

Running Head: AFFIRMATIVE ACTION

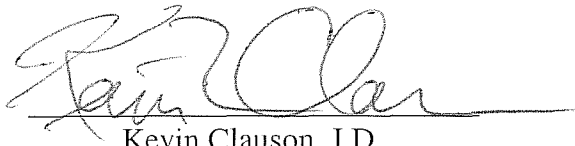
Affirmative Action: Equality or Reverse Discrimination?

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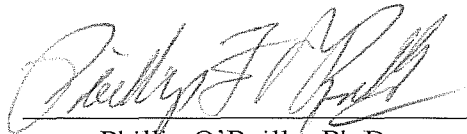
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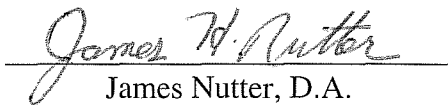
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Abstract

The practice of affirmative action has recently been at the vanguard of intense debate more than any other time in its forty-year history. A growing number of programs including quotas, preferential hiring, minority scholarships, diversity, and reverse discrimination have all been linked to affirmative action, which aims to break down the wall of segregation that excluded racial minorities and women from the workplace and in education.

Two class-action lawsuits, *Gratz v. Bollinger* [02-516] and *Grutter v. Bollinger* [02-241], filed in response to white students being denied admission to the University of Michigan's undergraduate and law school program, provided the United States Supreme Court with its best opportunity in recent years to focus on the constitutionality of adopting such admissions policies. Affirmative action policies are inconsistent with the principle of merit (the idea of attaining what you earn) and they penalize an innocent person for the alleged crimes of his or her ancestors, effectively known as reverse discrimination. Furthermore, affirmative action unfairly rewards minorities on the erroneous notion that a minority status automatically equates "disadvantage." In conclusion, an additional perspective for the case against implementing affirmative action policy within the workplace and in higher education will be presented.

Affirmative Action: Equality or Reverse Discrimination?

Affirmative action is a program that serves to rectify the effects of purportedly past societal discrimination by allocating jobs and opportunities to minorities and women. Affirmative action programs were an outgrowth of the 1950s and 1960s civil rights movements and the Civil Rights and Equal Opportunity legislation of the 1960s. Close to fifty years later, the practice of affirmative action has been at the vanguard of intense debate more than any other time in its history. Hardly a week goes by that the subject of affirmative action does not come up in some context (e.g., in both the private and public employment sectors as well as in the educational sphere). A growing number of programs including quotas, preferential hiring, minority scholarship, and reverse discrimination have all been categorized under this controversial policy; and all ostensibly seek to break down the wall of segregation that excluded racial minorities and women from occupational and educational placement throughout much of American history.

The analysis of affirmative action in this thesis will first consider the changing face of affirmative action from all perspectives: race and gender-based as it has been applied in private employment, public employment, and higher education. Following a glimpse into the definition of affirmative action, the analysis presents a history and general overview of affirmative action, including a discussion of the various forms of affirmative action (e.g., quotas, goals, and preferences); the courts' interpretation of affirmative action; the arguments for and against affirmative action; and recent developments pertaining to affirmative action. A separate section will include a close analysis on the issue of affirmative action in higher education. A concluding section will

consider the future of affirmative action and what, if any, other measures could be utilized in achieving the goals of affirmative action.

The Historical Context of Affirmative Action

The term “affirmative action” was first used in its current civil rights context in President Kennedy’s 1961 Executive Order (EO) 10925, which created the Equal Employment Opportunity Commission (EEOC). The EEOC established guidelines for contractors working on federally financed projects to employ affirmative action in order to end discrimination in the workplace (Machan, 1988). John Skrentny, author of *The Ironies of Affirmative Action: Politics, Culture and Justice in America*, contends that the basic concept underlying affirmative action comes from the English legal concept of equity or “the administration of justice according to what was fair in a particular situation, as opposed to rigidly following legal rules, which may have a harsh result” (1996, p. 6). The first iteration of the term “affirmative action” in United States law or policy appeared in the 1935 National Labor Relations Act where it “meant that an employer who was found to be discriminating against union members or union organizers would have to stop discrimination, and also take affirmative action to place those victims where they would have been without the discrimination” (Skrentny, 1996, p. 6).

The onset of World War II renewed racial, ethnic, and gender tensions (Lynch, 1997). In 1941, President Franklin D. Roosevelt signed into legislation EO 8802, which outlawed discriminatory hiring policies by defense-related industries that held federally funded contracts. In its current usage, affirmative action was born out of the struggle for civil rights. In his essay, “The Evolution of Affirmative Action,” R.A. Lee (1999) asserts that affirmative action is generally conceptualized as being one step beyond the concepts

of non-discrimination and equal opportunity, moving towards a more pro-active stance of “anti-discrimination” (p. 393). Citing economist Barbara Bergmann in his book, *We Want Jobs: A History of Affirmative Action*, Robert Weiss (1997) asserts that affirmative action has three main objectives: “1) to overcome discrimination; 2) to increase diversity within the labor force; and 3) to reduce poverty among groups historically victimized by discrimination” (p. x). Lee (1999) presents the following definition of what has become an increasingly confusing term:

It is the ‘proactive policy of making special efforts in employment decisions, college entrance, and other areas of public behavior as a way of compensating for past discrimination. It is based on the thought that certain groups of people, even in the absence of current discrimination against any individual member of that group, are at a disadvantage in the workplace and on campuses because of the effects of past discrimination against some members of the group. Affirmative action is an attempt to ‘level the playing field’ for whole categories of citizens, and the emphasis is on ‘disadvantaged groups’ rather than injured individuals. (p. 394)

Although affirmative action as it developed in the 1960s and 1970s eventually came to include anti-discrimination measures intended at a broad spectrum of “protected” minorities (including women), the history and the birth of affirmative action policy is firmly rooted in black-white race relations and the struggle for black civil rights. In his essay, “A Brief History of the Commitment to Inclusion as a Facet of Equal Educational Opportunity,” Robert D. Bickel (1998) traces the roots of affirmative action debate in education to the late nineteenth century and the rise of black colleges, and

correspondingly, the writings and speeches of educated African-Americans (e.g., W.E.B. DuBois and Booker T. Washington) (p. 3). Bickel (1998) cites in particular DuBois' rejection of Washington's proposal for the "industrial education of the Negro" on the grounds that such a program would constitute the creation of civil inferiority (p. 3). Bickel (1998) remarks, "by 1942 blacks constituted substantially less than 1 percent of graduates receiving Ph.D. degrees, and most of these recipients were trained in black undergraduate colleges" (p. 4). The impetus towards affirmation action in education suffered through most of the first half of the twentieth century, even as white universities gradually felt compelled to admit larger numbers of black students.

Toward the end of the nineteenth century, several southern states passed "Jim Crow" laws, which were laws that injected racial segregation into virtually every area of public life. In the 1896 case, *Plessy v. Ferguson* [163 U.S. 537], the United States Supreme Court (Supreme Court) upheld the constitutionality of such laws on the basis of the "Separate but Equal" doctrine. The *Plessy* decision established the precedent that "separate" facilities for blacks and whites were constitutional providing they were "equal." Dissenting from the majority's opinion, Justice John M. Harlan (the elder) fervently opposed the Supreme Court's ruling and instead emphasized that "our Constitution is color-blind, and neither knows nor tolerates classes among citizens" (Stephens and Scheb, 2003, p. 726). The 1954 Supreme Court decision in *Brown v. Board of Education of Topeka* [347 U.S. 483] ultimately repudiated the "Separate but Equal" doctrine, regarding the premise that separate schools were unequal and thus, an unconstitutional practice.

Weiss (1997) maintains, in his research into the history of affirmative action, that

government measures directed at ensuring civil rights and nondiscrimination towards blacks in the workplace during the first three decades of the twentieth century were “largely symbolic” and mainly motivated by demographic pressures created by the large migrations of blacks—a factor which put pressure for greater opportunity, if not equality, on both industry and education (pp. 31-33). Historians generally consider that the first federally mandated affirmative action program was developed in response to the creation of the Public Works Administration (PWA) in 1933. The PWA Housing Division, which was designed to create low-income housing for urban blacks, also saw an opportunity to take advantage of the huge supply of unemployed black construction labor. In response to pressure from civil rights proponents in the Roosevelt Administration, the PWA Housing Division promulgated the first race-preferential hiring quota. The quotas were based on the percentage of blacks in the local labor force, as determined by examination of the 1930 United States Department of Commerce Census. Consequently, employers who failed to hire the required percentage of black workers would be considered guilty of practicing discrimination. Weiss (1997) mentions that the “first PWA project, in Atlanta, included a clause affirming that ‘the failure of the Contractor to pay Negro skilled labor (irrespective of individual trades) shall be considered prima facie evidence of discrimination by the Contractor’” (p. 35).

The outbreak of World War II and the conclusion of the New Deal program encouraged blacks to focus on the booming defense industry as a key job target. Nonetheless, neither the industry nor the unions that controlled its workers (notably the AFL-CIO) felt any compulsion to provide equal or even unequal opportunity jobs for blacks. The frustration over the employment situation served as a leading catalyst for the

Urban League and the National Association for the Advancement of Colored Persons (NAACP), which began to coordinate major civil rights protests. Faced with the ensuing prospect of a 100,000-strong “March on Washington” by blacks demanding job rights, President Roosevelt issued EO 8802, establishing the Fair Employment Practices Committee (FEPC) (Skrentny, 1996, p. 29). EO 8802, issued just one week before the scheduled July 1, 1941 “March on Washington” rally, obliged the FEPC to enforce new federal rules that all training and vocational programs for jobs in defense industries be “administered without discrimination because of race, creed, color, or national origin” (Weiss, 1997, p. 37).

The two-track (education and employment) movement for black civil rights converged in the early 1950s over the issue of school segregation. A formative moment for the civil rights movement was the *Brown v. Board of Education* decision wherein the Supreme Court reasoned “the segregation of public schools as a form of racial isolation had a damaging effect on black children” (Bickel, 1998, p. 4). The *Brown* decision permeated the civil rights movement with a sense of legitimacy and gave the civil rights organizations a renewed sense of optimism.

The civil rights and black protest movement steadily grew throughout the rest of the 1950s. By 1960, a new radicalism had emerged, as symbolized with the formation of the Student Nonviolent Coordinating Committee (or SNCC, pronounced “snick”) (Weiss, 1997, p. 51). SNCC was a nonviolent civil rights movement mainly devoted to supporting their leaders and publicizing their activities in attempting to combat white oppression. Moreover the Congress for Racial Equality (CORE) also began to strengthen its position during this period. Weiss (1997) contends:

The 1960s witnessed a transformation of the goals as well as the strategies of the civil rights movement. Just as mass protest became as critical to the movement as legal actions, demands for specific remedial procedures-often involving the use of numbers-supplanted acceptance of vaguely defined ledges of nondiscrimination within the movement. (p. 51)

President Kennedy proved to be a bitter disappointment to most black leaders during his first year in office, as civil rights leaders had been led to expect that Kennedy would push for a new Civil Rights Act. Kennedy, however, soon made it obvious he that he would not be advocating such a bill in the immediate future. Notwithstanding, the movement did gain something of a victory through some of the Kennedy Administration's policies during the early 1960s. Issued March 6, 1961, Kennedy's EO 10925 proved most significant because it prohibited discrimination by employers holding federally funded contracts and empowered government agencies to cancel contracts with unions and businesses that violated "equal employment opportunities" provisions (Weiss, 1997, p. 55). Most significantly, EO 10925 was the first civil rights initiative to use the phrase "affirmative action." In addition to prohibiting discrimination, EO 10925 stated that "affirmative action [would be implemented] to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color or national origin" (Skrentny, 1996, p. 7).

Despite the historical importance of EO 10925, the landmark 1964 Civil Rights Act (CRA) paved the way for affirmative action, as it is understood in the twenty-first century. President Johnson signed the CRA into law in a climate of intensifying national racial tension. Title VI of the CRA was directed at enforcing the *Brown* decision and

mandated desegregation of public elementary, secondary, and post-secondary institutions and prohibited discrimination in education on the basis of race, color, religion, sex, or national origin. Similarly, Title VII provided for equal employment opportunities by prohibiting discrimination in employment on the basis of race, color, religion, sex, or national origin (Bickel, 1998).

Notwithstanding, nothing in the 1964 CRA proscribed the development of affirmative action programs. Certainly, the CRA was purportedly “color-blind” legislation that was aimed specifically and singularly at non-discrimination, and particularly at non-discrimination against blacks (Lee, 1999, pp. 393). Although the agenda of many of the more radical black civil rights groups had already shifted away from purely “color-blind” legislation towards more pro-active anti-discrimination policies, the liberal supporters of the CRA who directed its passage emphasized its stringent focus on non-discrimination. Senator Hubert H. Humphrey (D-Minnesota) made the following statement shortly before the Act was passed in 1964:

Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the [Equal Employment Opportunity] Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial ‘quota’ or to achieve a certain racial balance. In fact, the very opposite is true. Title VII prohibits discrimination. In effect, it says that race, religion, and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion. (Lee, 1999, p. 393)

Despite Humphrey’s pronouncements and the ostensibly “color-blind” purpose of the

CRA, the civil rights movement had shifted away from non-discrimination and towards anti-discrimination by the time of the legislation's passage. In a June 1965 commencement address at Howard College (a prestigious historically black college), President Johnson seemingly signaled a shift in favor of affirmative action: "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him to the standing line of race, and then say you are free to compete with all the others, and still believe that you have been completely fair" (Weiss, 1997, p. 81).

Three months later, in September 1965, President Johnson issued EO 11246, generally considered as the federal action that inaugurated affirmative action (Lee, 1999, pp. 393-407). Similar to Kennedy's EO 10925, EO 11246 reaffirmed the nondiscrimination affirmative action requirements related to federal contractors. Additionally, EO 11246 stipulated that contractors had to submit periodic "Compliance Reports" and it established the Office of Federal Contract Compliance (OFCC), a division within the United States Department of Labor, to supervise compliance with the regulations. One of the first regulations that emerged from the OFCC required that "goals" and "timetables" be set for the employment of minority group members (i.e. Blacks, Spanish-surnamed Americans, American Indians, and Asians) in job categories where they were currently "under-utilized" (Bacchi, 1996, pp. 32-33). Women were assigned "minority status" under affirmative action rules in October of 1967 when President Johnson issued EO 11375 (Weiss, 1997, p. 104).

The practice of affirmative action was rarely defined clearly in the first few years of its operation. The rule making, administration, and enforcement that were divided among several different federal agencies were chaotic and often contradictory. Initial

confusion and debate arose over the use of the phrase “goals and timetables.”

Nevertheless, a concern among employers, politicians, and affirmative action opponents was that “goals and timetables” was just a clever way of identifying “quotas.” The United States Civil Service Commission (CSC) tried to dispel these fears with its definition and clarification (issued in 1969) which seemingly opposed the use of quotas:

A ‘goal’ is a realistic objective which an agency endeavors to achieve on a timely basis within the context of the merit system of employment. A ‘quota’ on the other hand, would restrict employment or development opportunities to members of particular groups by establishing a required number or proportionate representation which agency managers are obliged to attain without regard to merit system requirements. ‘Quotas’ are incompatible with merit principles. (Lee, 1999, p. 397)

While the use of direct, fixed quotas thus seemed to be prohibited in employment-based affirmative action, admissions officers in public universities had already begun to put into the place “minority quotas” for their annual undergraduate admissions by the late 1960s and it would not be until 1978 that a clear decision concerning the use of quotas in education would be made.

Judicial Interpretation of Affirmative Action Policies

In addition to a series of Executive Orders and the proliferation of agency guidelines, affirmative action policy in the United States has primarily evolved through the executive and judicial branches of government, rather than through the legislative branch (i.e., Congress). A comprehensive review of the court cases that shaped the face of affirmative action in the 1970s, 1980s, and 1990s is perhaps beyond the scope of this

thesis. Notwithstanding, a brief discussion of a few important Supreme Court decisions is crucial in gaining an understanding of affirmative action policies.

Despite inconsistent and dissent-driven cases, the Supreme Court has played an instrumental role in defining and interpreting specific affirmative action policies and practices. The doctrine of disparate impact addresses the issues of when employment practices are or are not permissible under EEO and affirmative action guidelines. Disparate impact was first spelled out through the 1971 Supreme Court decision in *Griggs v. Duke Power* [401 U.S. 424]. In *Griggs*, black employees at a power company's station brought a class-action lawsuit against the company, asserting that it discriminated against blacks by implementing a "test" policy. Specifically, this "test" policy consisted of requiring a high school diploma or reasonable performance on two standardized test in order for employees to qualify for a transfer from the coal-handling department. Prior to the enactment of Title VII, Duke Power openly discriminated against black employees by hiring them only to work in the coal handling facility; the "test" policy had been implemented in the aftermath of Title VII, presumably as a way to keep blacks in the coal-handling department and out of the management and administration ranks (Dansicker, 1991, p. 14).

Supreme Court Chief Justice Warren Burger, who wrote the decision in the *Griggs* case, ruled in favor of the plaintiffs (workers). Burger opined, "[p]rocedures or tests neutral on their face...cannot be maintained if they operate to freeze the status quo of prior discriminatory practices" (Dansicker, 1991, p. 14). Justice Burger further established the standard to be used in determining whether or not such a test was permissible "[i]f an employment which operates to exclude Negroes cannot be shown to

be related to job performance, the practice is prohibited” (Dansicker, 1991, p. 15). The Court concluded that the purpose of these requirements (i.e., high school gradation and two aptitude tests) was to protect Duke's long-standing policy of providing job preferences to its white employees.

In 1978, the major federal agencies involved in the EEO and affirmative action practices issued the “Uniform Guidelines on Employee Selection Procedures” which aimed at providing a framework for the acceptable use of tests and other employment procedures. The “Guidelines” established a formula for the “presumption of discrimination” and adverse impact:

The Guidelines presume that discrimination exists whenever the percentage of minorities in a company's work force is less than 80% of their share of the surrounding population. A selection rate for any race, sex or ethnic group which is less than four-fifth (80%) of the rate for the group with the highest rate will generally be regarded by the federal government enforcement agencies as evidence of adverse impact. (Lee, 1999, p. 400)

Few issues have generated as much controversy in the entire affirmative action debate as the use of quotas and “set-asides” (which reserve “slots” for individuals in protected categories). Public opinion surveys conducted in the 1960s through the 1990s consistently demonstrated that the overwhelming majority (80%-90%) of Americans (of all races and both genders) favored “equal opportunity legislation” (Steeh and Kraysan, 1996, p. 132). These surveys also indicated an overwhelming majority (80%-90%) of white Americans (of both genders) opposed the use of quotas and deliberate programs of racial preferences in employment settings (Zelnick, 1996, p. 351). Only a minority

(25%-40%) of Americans (of all races) favored the use of quotas in college admissions (Steeh and Krysan, 1996).

The Supreme Court has addressed the use of quotas and set-asides in a number of cases. One of the primary cases to challenge the public sector use of affirmative action policy came in the 1978 Supreme Court case, *Regents of the University of California v. Bakke* [438 U.S. 265]. Allan Bakke, a thirty-seven-year-old white male engineer, had twice applied for admission to the University of California Medical School at Davis (Cal-Davis) and twice was rejected. As part of government mandated set-aside policy, Cal-Davis reserved sixteen places in each entering class of one hundred for “qualified” minorities, as part of the university’s affirmative action program. Bakke’s qualifications (Medical College Admission Test score and grade point average) exceeded those of any of the minority students admitted for the two years that Bakke was rejected. Consequently, Bakke challenged the affirmative action policy of the medical school at Cal-Davis on the basis of reverse discrimination (Machan, 1998). The looming issue for the Supreme Court to decide was if Cal-Davis violated the Fourteenth Amendment’s “Equal Protection Clause” and Title VI of the 1964 CRA (which prohibits discrimination based on race) by incorporating affirmative action policy into its admissions policy. The Supreme Court ruled in a 5-to-4 decision that Cal-Davis’ quota system was unconstitutional and Bakke was entitled to enrollment. The Supreme Court did find, however, in a contrasting 5-to-4 decision, that it was constitutionally permissible for universities to employ race as a criterion in admission policies (Stephens and Scheb, 2003). As Skrentny (1996) observed, “In a remarkable compromise, Bakke was to be admitted, Davis had to move away from a fixed quota, but treating applicants with regard

to race was acceptable” (p. 226).

Just a year later, the Court began to apply this “compromise view” towards the use of quotas in occupational affirmative action programs. The 1979 case of *United Steelworkers of America v. Weber* [443 U.S. 193] involved a contractor who had implemented a racial quota for admission to a training program as part of an attempt to increase the number of minorities. The Supreme Court ruled that such quota programs were acceptable as long as “they mirrored the purpose of Title VII, did not trammel the interest of white employees or create an absolute bar to advancement, and were used as a temporary measure to eliminate a manifest racial imbalance” (Lee, 1999, p. 400).

Beginning in the late 1980s with the Supreme Court ruling in *Wards Cove Packing Co. v. Antonio* [490 U.S. 642] and throughout the early 1990s, the Supreme Court began to take a less favorable view of affirmative action, consistently striking down the use of quotas and other fixed preference schemes and increasingly supporting charges of reverse discrimination against non-minority applicants. An exception to the trend was the passage of the 1991 CRA which:

[s]trengthened certain remedies for intentional discrimination, modified the burden of proof in adverse impact cases, and extended certain protection to employees of the Congress...one of the most significant revision was to change Title VII from a merely remedial or ‘make whole’ statute to one that provides for compensatory and punitive damages. (Lee, 1999, p. 401)

During the 1990s, a strong anti-affirmative action movement began to take root in Texas, Washington, and California. In 1995, the Board of Regents of the University of California made a decision to end racial preferences in admissions policies. The most

dramatic move against affirmative action in the 1990s occurred in California. In November of 1996, California voters approved Proposition 209 by a margin of 54% to 46% (Weiss, 1997). The measure, which had attracted the support of California Republicans and the National Republican Committee, prohibited the state from discriminating against or granting preferential treatment to any individual or group based on sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting (Chavez, 1998).

On June 23, 2003, the Supreme Court delivered what are likely the most important decisions to date dealing with affirmative action. Two class action lawsuits, *Gratz v. Bollinger* [02-516] and *Grutter v. Bollinger* [02-241], were simultaneously reviewed and decided on by the Supreme Court in relation to allegations of white students being denied admission to the University of Michigan's (Michigan) undergraduate and law school programs. These two cases provided the Supreme Court with its best opportunity to focus on the legality of the issue in the recent past. Prior to the 2003 decisions, the undergraduate program at Michigan evaluated applicants on a 150-point scale. Whereas black, Hispanic, and Native-American applicants received twenty points solely for their race, a perfect SAT score of 1600 rendered only twelve points.

The Supreme Court ruled 6-to-3 in *Gratz v. Bollinger* [02-241] that Michigan's race-conscious point system for undergraduate acceptance denied other applicants (non-minorities) equal protection under the law. Jennifer Gratz, who was denied admission to Michigan's undergraduate program, had sued the school on the basis that Michigan's implementation of race and ethnicity in admissions violated the Equal Protection Clause

of the Fourteenth Amendment and Title VI of the 1964 CRA. In addition to the undergraduate decision, the Supreme Court reversed itself with the 5-to-4 *Grutter v. Bollinger* [02-516] decision in favor of Michigan's law school admissions policy of using race as a factor in admissions policy, providing race was not the only factor used. Barbara Grutter, who was denied admission to the law school, sued Michigan on the same grounds as Gratz. Unlike the undergraduate system, the Supreme Court reasoned that using race as a determining factor in admissions provides "a meaningful individualized review of applicants" (Will, 2003, A21). In his dissent of the law school ruling, Justice Thomas (who was joined with Justice Scalia) quoted a message that Frederick Douglass had delivered on January 26, 1865 in Boston, Massachusetts:

[I]n regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the Negro is not benevolence, not pity, not sympathy, but simply *justice*. The American people have always been anxious to know what they shall do with us. I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! And if the Negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! Your interference is doing him positive injury. (Thomas, 2003, para. 122)

Justice Thomas continued in his dissent:

Like Douglas, I believe blacks can achieve in every avenue of American life

without the meddling of university administrators. Because I wish to see all students succeed whatever their color, I share, in some retrospect, the sympathies of those who sponsor the type of discrimination advanced by the University of Michigan Law School (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.” Racial discrimination is not a permissible solution to the self-inflicted wounds of this elitist admissions policy. (Thomas, 2003, para. 123)

The Supreme Court’s split decision of the Michigan cases had the effect of amending the Constitution. The newly created legal precedent of “the compelling interest of diversity” has superseded the Fourteenth Amendment’s “Equal Protection Clause.” According to Rush Limbaugh, a nationally syndicated radio talk-show host, “University of Michigan’s law school can now say that people of certain colors can be discriminated against. They can now say to certain students, ‘You’re too genetically and mentally inferior to compete on a level playing field, so we’re going to give you special preferences.’ It’s a massive insult” (2003, par. 1). The contradictory rulings of the Supreme Court in these two cases did not completely resolve whether diversity is a governmental interest that can guide publicly funded schools’ admissions. The Supreme Court reasoned that the undergraduate system resembled too much of a racial quota system, and was therefore unconstitutional. Conversely, the Supreme Court upheld the law school’s use of race in admissions because it employed the term “critical mass” as opposed to “quota.”

Notwithstanding, it remains unclear why the Supreme Court handed down two conflicting decisions without providing a clear rationale, but essentially, these decisions have entrenched a racist system of legal preferences. The serendipitous decisions have promoted the need for racial diversity at the expense of violating and ultimately suspending the constitutional rights of individuals. The Supreme Court has manufactured a way for racial preferences to exist. According to Justice Scalia, the rulings are a “split doubleheader [that] seems perversely designed to prolong the controversy and the litigation” (Maddox, 2003, para. 13).

Affirmative Action in Higher Education

With the exception of the recent Michigan cases, the seminal affirmative action case in higher education was the *Bakke* decision. In his separate decision, Justice Powell made the case for the value of diversity in education, while simultaneously striking down the use of fixed quotas. Bickel (1998) argues that another Justice in the case, Justice Blackmun, took the bold step of challenging the “Court to recognize the moral argument for affirmative action” (p. 10). Furthermore, Justice Blackmun opined: “[I]n order to get beyond racism we must first take account of race. There is no other way. And in order to treat some person equally, we must first treat them differently” (Bickel, 1998, p. 10).

Despite sharing many of the same features, the affirmative action debate in the context of education is fundamentally different from the context in employment.

Whereas employers are not expected to consider the “moral argument” for affirmative action, institutions of higher education are expected to consider such an argument. As Justice Powell (*Bakke* decision) suggested, diversity is regarded as extremely valuable in institutions of higher learning. Most public universities and a majority of private

universities made a commitment to diversity in their admission policies shortly after the passage of the 1964 CRA. While formal quota systems were theoretically abandoned in the wake of the *Bakke* decision, the majority of universities continued to implement some type of racial-preferential treatment throughout the 1980s and into the 1990s. According to a statement made by a Stanford University admissions officer in 1995, “[t]he characteristic of race and ethnicity have become paramount” in the selection of prospective students (Bunzel, 1996, p. 53). Universities not only have a vested interest in ensuring the ethnic diversity of their student body, they are also often swayed by the argument that they have a moral obligation to ensure that the marketplace of education be inclusive of all ideas which by implication means that it must be inclusive of all people.

Affirmative action in higher education is perhaps even more controversial than affirmative action in employment. The central argument against affirmative action in education is that attaining diversity requires an assault on merit (Steele, 1999). Race-preferential admissions most likely means that candidates with better academic credentials (e.g., test scores) will be “passed over” in favor of those candidates with lesser qualifications but who have “membership” in the target protected group. Evidence has shown a persistent pattern of significantly lower scores for African Americans and Hispanics (as compared to Caucasians) and even slightly higher scores for Asian Americans over Caucasians. In his article entitled “Race and College Admissions,” John Bunzel (1996) cites the 1988 figures from the University of California-Berkeley that revealed the mean SAT scores for Berkeley freshmen: Asian 1269, Caucasian 1267, Latino 1053, and African American 979. Bunzel observes, “they [the scores] do not suggest that students of all racial or ethnic groups are held to the same standard” (p. 54).

Critics of ending race-preference admissions in higher education suggest that it would dramatically reverse the “gains” of the past three decades. According to Bunzel (1996), “if admissions were race-neutral, the best estimate is that perhaps only one-third of the minority students (excluding Asian Americans) would still get it” (p. 54). From the perspective of affirmative action opponents, this would be an impartial outcome and consistent with academia’s purported focus on merit. Even affirmative action opponents such as Harvard University professor Nathan Glazer (1999) acknowledge that college admissions have never been run as a pure meritocracy:

Even before the age of racial preferences, it [admissions policies at the most selective universities] took into account not only academic qualifications but also such factors as leadership qualities, ability to contribute to athletic teams, alumni connections, and special talents. The children of persons of distinction, and in state universities perhaps legislators’ children, might receive preference.

‘Diversity’ considerations also existed, but up until probably the 1950s, this was mostly a matter of keeping down the number of Jews. (p. 52)

Despite the gender-focused character of recent revisions of the CRA (e.g. the sexual harassment provisions of the 1991 CRA), gender is rarely viewed as anything but an afterthought in the affirmative action debate. Skrentny (1996) contends that his book gives no consideration to women and various racial or ethnic groups beyond African-Americans:

Though much of the law applies equally to women, the arguments in the scholarly articles and mass media almost always center on (black) racial preferences, not on gender preferences. More important, women, other groups, and affirmative action

are not explored here because, as we will see, affirmative action developed as a model of justice for African-Americans, in response to a struggle for racial equality and a racial crisis. (p. 15)

In her book, *The Politics of Affirmative Action: 'Women,' Equality and Category Politics*, Carol Bacchi (1996) suggested the following after observing affirmative action programs and their impact on women in the United States, the Netherlands, Sweden, Norway, Canada, and Australia:

A quick perusal of the major theoretical analyses of affirmative action in the United States illustrates how often 'women' is relegated to a footnote. The common explanation is that the arguments concerning affirmative action are most clearly developed using the example of race and that gender raises somewhat different, less 'pressing' issues. (p. 42)

Not only is the history of affirmative action inherently a black history, but it also draws from a female historical point of view. Despite the fact that the "equal pay for equal work" campaign had already been launched, few people gave any serious consideration to sex discrimination at the time (Bacchi, 1996, p. 41). The passage of the Equal Pay Act of 1963, (29 U.S.C. Section 206), which required equal pay for men and women engaged in comparable work, may have been presumed by many analysts to have "taken care of" working women's more immediate needs (Sass and Troyer, 1999, p. 571). Lee notes that it was little more than a bad joke that women were even included in the original non-discrimination provisions of the 1964 CRA. Lee (1999) explains the fact that the original language of the CRA did not include any reference whatsoever to gender was in all likelihood inadvertently inserted by one its most ardent foes—Representative

Howard W. Smith (D-Virginia):

When he [Howard W. Smith] realized the tide was turning against him, he offered an amendment to add 'sex' as a prohibited form of discrimination. He may have intended this as a 'poison pill,' and he later said it was a joke, but to his dismay, the amendment passed. Thus, women became a protected group, covered by the same provisions in housing, education, and employment as 'disadvantaged minorities.' (p. 401)

Although the category of "women" was, by the mid-1970s, completely "folded into" the affirmative action guidelines and regulations, analysts (both inside and outside of government) continued to express doubts about the inclusion of women as a "minority." James Scanlon (1992), a former assistant general counsel with the EEOC, said the following:

Few would deny that but for the history of slavery and legally enforced segregation that followed, affirmative action would never have become a feature of American life. Yet, over the near quarter-century in which the controversy over preferential policies has raged in and out of the courts, one of the most neglected issues has been the wisdom or propriety of extending such preferences beyond the 12 percent of the population that is descended from slaves-not only to another tenth or so of the population that is descended from slaves-not only to another tenth or so of the population considered to be also disadvantaged minorities, but to women, just over one-half of the population. (p. 36)

Notwithstanding the opposition of Scanlan and others, there is evidence to indicate that women "qualify" as an economically oppressed group. In their article, "Diversity

Management: A New Organizational Paradigm,” Gilbert, Stead, and Ivancevich (1999) cite a broad range of empirical studies and surveys that document the persistent male-female “wage gap”; the under-representation of women in management positions and high-paying professional positions; and the concentration of women in low-paying occupations (p. 63).

The Arguments in Favor of and Against Affirmative Action

Before analyzing the arguments on both sides of the affirmative action debate, it would be remiss not to differentiate at the onset between two forms of affirmative action as identified by Louis J. Pojman (1998) in his essay “The Case Against Affirmative Action.” The first form, “weak affirmative action,” seeks to promote equal opportunity by employing race as a tie-breaker between two equally qualified applicants for employment, college admissions, or some other position in society. The goal for “weak affirmative action” is equal opportunity to compete, not equal results. The second form, “strong affirmative action,” applies preferential treatment solely based on race, while ignoring the possibility that the applicant might indeed be less qualified than a non-minority applicant (Pojman, 1998). Opponents contend that strong affirmative action is tantamount to reverse discrimination of individuals of non-minority status. Racism in the context of reverse discrimination is comparable to conventional racism. This policy is the form of affirmative action currently being advanced under the name “affirmative action.”

In spite of obstacles and despite its disadvantages, proponents of affirmative action insist that it must be defended because they assert racism and discrimination are still commonplace in education and employment. Proponents also insist that equality is

not achievable unless preferential treatment is applied to those that have endured discrimination and unwelcomed disadvantages (McKenna and Feingold, 1978).

Affirmative action is justified to counter past discrimination (both privately and publicly) against minorities and women in society.

The first argument in defense of affirmative action policy in the workplace and in education is the critical need for role models. Successful minority people will encourage and motivate other people of minority status to be confident in knowing that excellence can be achieved. Moreover, role models will strongly influence younger people to strive for excellence that others “of our kind” have already achieved.

The argument from compensation insists that victims of past discrimination are entitled to preferential treatment as reparation for the harms that have been previously committed against them. Charles J. Ogletree, Jr. (1996), professor at Harvard Law School, claims, “It [affirmative action] is a small but significant way to compensate victims of slavery, Jim Crow laws, discrimination and immigration restrictions” (para. 2). By implication, this argument is based on the “two wrongs make a right” assumption acknowledging that since some whites once enslaved some blacks, the descendants of those slaves are entitled to opportunities, qualification, and compensation for past grievances. Proponents are quick to defend the compensation argument by pointing out that blacks have not just been the victims of unfair treatment, but more importantly “subjected first to decades of slavery, and then to decades of second-class citizenship, widespread legalized discrimination, economic persecution, educational deprivation, and cultural stigmatization. They have been bought, sold, killed, beaten, raped, excluded, exploited, shamed, and scorned for a very long time ” (Fish, 1993, para. 5). Furthermore,

historian Roger Wilkins has noted that of the 375 years that blacks have inhabited the United States, 245 years entailed slavery; legalized segregation constituted 100 years, and only for about thirty years have blacks enjoyed first class citizenry (Plous, 1996).

Implementing preferential treatment is a method that can compensate for past and ongoing injustices against women and other minorities. Notwithstanding, the compensation argument is vulnerable because compensation is only limited to race and gender. Hypothetically, a male or female, born poor and white, could be extremely disadvantaged, yet under affirmative action would not collect any benefits. Bernard Goldberg (2003), author of *Bias: A CBS Insider Exposes How the Media Distort the News* remarks:

I'm against affirmative action when it means racial preferences, which in the real world is what affirmative action is usually about. Why should the children Jesse Jackson or Colin Powell or Diana Ross get some kind of racial preference when they apply to college or go out for a job, but no 'affirmative action' is given to the child of a white Anglo-Saxon Protestant coal miner from West Virginia? (pp. 56-57)

When society proposes to level the playing field for minorities and women, innocent white males, according to affirmative action supporters, are not warranted in complaint or protest because they have benefited from the unjust discrimination of blacks, other minorities, and women. Therefore, it is permissible to award benefits to a less qualified woman or minority person. In her essay, "Preferential Hiring," Judith Jarvis Thomson (1995) supports reverse discrimination by suggesting that preferential treatment "is something the community takes away from [white males] in order that it may make

amends” (p. 60). Thus, supporters of affirmative action advocate the elimination of discriminatory laws that favor white males at the expense of minorities and women (McKenna and Feingold, 1978).

Those individuals in favor of implementing affirmative action also indicate the inequality of results as compelling evidence for an inequality of opportunity (equal results argument). In his essay, “The Justice of Affirmative Action,” Sterling Harwood (1993) further develops this argument as he writes, “When will affirmative action stop compensating blacks? As soon as the unfair advantage is gone, affirmative action will stop. The elimination of the unfair advantage can be determined by showing that the percentage of blacks hired and admitted at least roughly equaled the percentage of blacks in the population” (p. 82). The objective of implementing affirmative action is “an attempt at redistribution, an attempt to achieve a limited but necessary reallocation of jobs and income within the existing legal structure. It is part of a long-term civil rights strategy to make the law operate as an instrument of social change” (McKenna and Feingold, 1978, p. 202).

The leading argument in support of affirmative action policy within society is the need for diversity. Those in support of attaining diversity maintain the importance of every person coming to appreciate other’s culture and outlook on life. Diversity, whether in the scope of the workplace or in education, better enables an individual to examine his or her principles and beliefs vis-à-vis other cultures. Barbara Bergmann (1996), author of *In Defense of Affirmative Action*, asserts, “[t]he major justification for affirmative action in the workplace is its use as a systematic method of breaking down the current discrimination against blacks and women. The desirability of diversity provides the

strongest justification for affirmative action in college admissions” (p. 118). Diversity is purportedly just another facet of a well-rounded education. A campus environment immersed in the diversity of people, ideas, and arguments fulfills one of the essential goals of education by developing the mind and the intellect.

Those individuals opposed to affirmative action policy in the workplace and in education claim discrimination is being proposed as the solution to resolving the effects of past discrimination. While seeking to help disadvantaged minorities and women, reverse discrimination has generally been consigned toward white males. Affirmative action was “Originally conceived as a means to redress discrimination, [and] racial preferences have [now] promoted it. And rather than fostering harmony and integration, preferences have divided the campus. In no other area of public life is there a greater disparity between the rhetoric of preferences and the reality” (Sacks and Thiel, 1996, para. 2). A significant argument directed against affirmative action is that it imparts discrimination on those individuals not covered under its precepts. Specifically, discrimination directed at innocent white people only creates another form of discrimination. In his essay, “What is Wrong with Reverse Discrimination,” Edwin C. Hettinger (1997) comments, “Reverse discrimination against white males is the same evil as traditional discrimination against women and blacks. The only difference is that in this case it is the white male that is being discriminated against. Thus if additional racism and sexism is wrong, so is reverse discrimination, and for the very same reasons” (pp. 305-306). Affirmative action then becomes discrimination-sanctioned law, and under the guises of quotas and statistics, reverse discrimination has plagued the productivity of businesses. Lisa Newton, in her essay “Reverse Discrimination is Unjustified,” contends

that if the point of reverse discrimination is to ensure equality for minorities, then which minority does one favor (Olen and Barry, 2001)? Newton further asserts that even if it is agreed upon that women and minorities are entitled to special treatment to undo the effects of past discrimination, the future practice of affirmative action will still remain unknown (Olen and Barry, 2001).

Another argument in opposition to affirmative action policy is a revision of the compensation argument proposed by supporters. Those individuals opposed to affirmative action recognize only that individual victims are eligible for reparations, not the entire class of individuals previously discriminated against. Economist Thomas Sowell (who happens to be black) remarked, “[t]hose initially in dire poverty have, over the generations, raised themselves to an above-average level of prosperity, by great effort and painful sacrifice. Now the deep thinkers come along and want to redistribute what they earn to others who were initially more fortunate but less hard working” (McElroy, 2001, p. 33). Members of a historically discriminated group are in effect not necessarily victims; consequently, compensation is not necessarily owed. A compensatory justice should not apply to the distant descendants of previously discriminated-against groups. Furthermore, white men as a class and taxpayers are the very ones made to directly and indirectly pay for the compensation, yet they are not the ones who committed the injustices. Opponents of affirmative action contend that no one should pay for the reparations because the perpetrators, like the victims, are dead. Glazer, in his essay, “Compensation for the Past is a Dangerous Principle,” articulates this argument, “Compensation for the past is a dangerous principle. It can be extended indefinitely and make for endless trouble. Who is to determine what is proper compensation for the

American Indian, the black, the Mexican American, the Chinese or Japanese American?" (McKenna and Feingold, 1978, p. 205). In their book, "America in Black and White," Stephan and Abigail Thernstrom (1997) have suggested that "affirmative action *retards* the progress of blacks: [...] the growth of the black middle class long predates the adoption of race-conscious social policies. In some ways, indeed, the black middle class was expanding more rapidly before 1970 than after. [...] Many of the advances black Americans have made since the Great Depression occurred before anything that can be termed 'affirmative action' existed [...] In the years since affirmative action, [the black middle class] has continued to grow, *but not at a more rapid pace* than in the preceding three decades, despite a common impression to the contrary" (Elder, 2003, para. 13).

According to the challengers of affirmative action policy, employing preferential treatment generates inefficiency as well as an undermining of black self-esteem. First, affirmative action policy results in loss of profits, decreased productivity, and reduced quality in the workplace. Those individuals who have advanced due to affirmative action will have contributed to overall inefficiency because they were the less qualified and less productive applicants who obtained the positions. According to author Tibor R. Machan (1988), the only norm for the economist is "economic efficiency-producing and distributing what is in demand at the lowest possible cost. The expanded idea of market failure accepts that what is demanded should be produced efficiently" (p. 165). In addition to producing inefficiency, affirmative action affects self-esteem. Racial preferences serve as a discouragement to minorities because they are labeled as inferior. In her essay, "Affirmative Action: The Price of Preference," Shelby Steel (1997) comments, "It [affirmative action] indirectly encourages blacks to exploit their own past

victimization as a source of power and privilege. Victimization is what justifies preference, so that to receive the benefits of preferential treatment one must become invested in the view of one's self as a victim" (p. 319). It does not seem too hard to imagine an employer quickly promoting women and minorities in an effort to fulfill quota standards. Surely when these individuals fail, their failure will be viewed as confirmation of their inadequacy. Then again, when some of these people do succeed on their own merit, it will be assumed they were the recipients of special treatment. Thus, undermining a person's self-esteem can understandably foster resentment.

The most effective safeguard against discrimination is the very device which affirmative action seeks to destroy. A free market system unconstrained by governmental control provides one of the best limits against discrimination because profits and losses are the ultimate determining factors. Discrimination costs money because it alienates customers by forcing away their potential business. The free-market system is blind toward color and women and it is for this very reason that it can be an effective deterrent toward discrimination. Affirmative action policies are allowing blacks and women whom have advanced on their own merit to be unfairly stigmatized. Consequently, accomplishments are going unnoticed in the marketplace.

The 2003 Supreme Court rulings in the two Michigan cases further entrenched a racist system of legal preferences and as a result have diverted the issue of racism from people of minority status and consigned it toward whites and Asians. Nonetheless, the United States Constitution, specifically the Fourteenth Amendment and the 1964 CRA, forbids extending an advantage to one group over another solely based on race or color. The Constitutional concept of equality of rights warrants that all people are created equal

and have a right to equal treatment under the law, regardless of their gender, race, or national origin. The Fourteenth Amendment of the Constitution states that no state may “deny any person within its jurisdiction equal protection of the laws.” Thus, an individual of non-minority status should expect equal treatment when applying for a job or applying for college admission. Yet on June 23, 2003, the Supreme Court in effect changed the Constitution and subsequently failed America and the principles that this nation was founded upon—that Americans are created equal and that they are entitled to the equal protection under the law.

Employing affirmative action policies in higher education has stigmatized minorities as second-rate. Imagine the insult if a black female were told that because of her “supposed inferiorities” (i.e., low test scores), she was going to be granted a special preference. Consequently, the principle of achieving excellence within higher education has been dealt a severe setback. Instead of implementing race-based admission policies, colleges and universities should utilize race-neutral means of attaining minority students instead of resorting to preferences and reverse discrimination. For example, Florida, Texas, and California have implemented a system in which a percentage of top performers at all public high schools, even those high schools that are mainly comprised of minority students, are assured admission into more prestigious state colleges and universities.

Affirmative action is replete with contradictions because it attempts to attain equality through inequality by practicing reverse discrimination on people of non-minority status. The practice of implementing affirmative action policy might well become a cure worse than the disease. Targeting supposedly historically disadvantaged

groups (i.e., women and minorities) will undoubtedly further intensify divisions and delay hope of a more classless society. What does affirmative action really affirm? Based on the flawed assertions coupled with the devastating economic and social costs, affirmative action proves to be little more than an agenda for political correctness. Affirmative action policies are untenable and an initiative that proves to be imprudent. The irony of the June 2003 Supreme Court decisions is that they came on the 40th anniversary of Dr. Martin Luther King Jr.'s "I Have a Dream" speech where he ardently proclaimed that his children were to "live in a nation where they will not be judged by the color of their skin but by the content of their character" (para. 15). Today's college applicants will have to hope that by the time their children are of college age, their skin color will not be used against them. Like King before me, I share in that dream too.

Using affirmative action to eliminate racism establishes a system of irreversible stereotypes. Making a decision on skin color is simply racial discrimination. Diversity of skin color is not tantamount to a diversity of viewpoint. People are all different—a black person is not automatically a democrat and vice-versa. Similarly, there is no Hispanic ideal. Assuming a linkage between diversity of skin color with a diversity of viewpoint destroys the fabric of society by erroneously assuming a linkage between culture and experience of the minority group. In his essay, "Affirmative Action and the American Creed," Martin Seymour Lipset (1995) quotes *Washington Post* political columnist William Raspberry (who happens to be black): "White Americans do not see themselves as racists, nor as opponents of equal opportunity and fundamental fairness. What they oppose are efforts to provide preferential benefits for minorities. How could we expect them to buy a product we [blacks] have spent four-hundred years trying to

have recalled: race-based advantages enshrined into law” (p. 154). Affirmative action propagates what it sets out to deny. Higher education is not out to attain diversity; but rather colleges and universities are out for the number game, which furthers racism.

Affirmative action promotes an erroneous view of group rights at the expense and exclusion of individual rights. American society has mistakenly looked at the “problems” of certain groups of people being historically disadvantaged, in addition to sexism and racism, and adopted an erroneous course of action. Affirmative action, though having seemingly better intentions earlier in its history, has outlived its purpose. Thus, affirmative action policies that are prevalent in the twenty-first century promote significant negative consequences with minimal benefits.

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