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**Disarming Affirmative Action:
Why the Concept as We Know It, Cannot Solve the
Racial Issue**

A Capstone Project Submitted in Partial Fulfillment of the Requirements
of the Renée Crown University Honors Program at Syracuse University

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Honors Capstone Project in Philosophy

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Abstract

Disarming Affirmative Action: Why the Concept as We Know It, Cannot Solve the Racial Issue

The following is a study on the use of affirmative action in higher education, particularly with respect to race. Because admission into institutions of higher education has traditionally been perceived as a reflection on one's merit, the application of race-conscious affirmative action programs has undermined the meritorious prestige of a college education for graduates of all races alike. The use of an uncontrollable trait determined at birth as a factor in gaining admission to one of these institutions raised questions of fairness, legality, and purpose. The consequences of such a policy's application raised further questions regarding fairness, its success, and its side effects.

In evaluating these questions, this study recognized the necessity of defining its parameters and thus created an abstract philosophical ideal of equality upon which the rest of the study was based. The paper then summarized various affirmative action policies that actually have been implemented in the United States, based upon descriptions found in university literature and Supreme Court affidavits. The bulk of the paper was spent critiquing those policies on four main grounds. First, the policies were compared to United States law. Second, they were analyzed in terms of the fairness of using race as a determining factor. Third, in comparison with statistical data, various affirmative action programs' effectiveness relative to the absence of any program was considered. Finally and most importantly, the paper raised issues about the negative consequences of affirmative action upon the minorities the program seeks to benefit. The remainder of the paper was spent offering alternatives for the future.

The essential argument of the paper is that affirmative action is not the appropriate solution to the problem of equal opportunity. Not only does affirmative action contradict equality laws, it is unfair, it is disagreeable to Rawlsian political theory, and decades of its application have proven ineffective. Above all, the existence of race-conscious affirmative action casts a stigma on every successful individual of minority heritage, attributing their achievement solely to affirmative action rather than their own faculties.

In conclusion, this study found that affirmative action is in fact more harmful than beneficial to minorities, and alternative race-blind proposals may be more effective ways of increasing college admission among underprivileged students.

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1.

Introduction

Applying for admission to an institution of higher education is a process that millions of students undergo each year, and millions more will undertake in the years to come. Yet, despite the frequency with which Americans participate in this process, few actually take the time to analyze the complexity of the programs that may direct the rest of their lives. College admission is no longer a simple matter of academic success in high school. Today, gaining the oft-elusive acceptance letter to the college of one's choice requires more than an impressive transcript. Students are expected to present a well rounded package, complete with extracurricular activities, civic engagement, letters of recommendation from influential personas, and most importantly, a persuasive, well-crafted personal statement. The personal statement has gained notoriety among college students like myself as one of the most difficult, yet influential pieces of the admissions process.

“In what ways would your personal experiences contribute to the diversity of the community here at our University?” Some variation of this question faces each and every individual applying for admission to an institution of higher education. I was confronted with this four years ago in applying to undergraduate studies here at Syracuse University and will face it yet again as I seek admission into law school following my graduation this May. While innumerable young people are faced with this daunting question each year, the complexity of the issue

at the core of the diversity question is far less frequently understood. What is more, the affirmative action policies that utilize the information garnered by such diversity questions are in and of themselves perplexing.

A unique situation has arisen in America, the melting pot of cultures. A country once torn by vehement racial strife has, over the past half a century, renewed its desire for equality, and in doing so has realized the disparity that the racial conflict has left upon social stratification. As the Civil Rights Movement pushed the issue of racial equality to the forefront of American culture, institutions throughout the nation began to comply with the movement. This desire to escape the former racial bias and stimulate equal treatment regardless of race took its ultimate form in the affirmative action programs established by many institutions, but most prominently among colleges. Such programs were meant to facilitate the transition toward equality, providing underprivileged minority applicants a means of competing for admission alongside upper-middle class white students who had long enjoyed the fruits of higher education.

The study that follows is a predominantly philosophical look into the use of affirmative action programs in education along with the use of some historical and statistical data to that end. The paper's primary focus is a critique of the concept and application of affirmative action policies, but it also attempts to provide alternative policy options and in doing so considers their respective consequences.

By no means is the purpose of this study to attack racial equality or to promote racial injustice of any kind. In fact, the major argument the paper

proposes is the assertion that affirmative action programs themselves are responsible for such crimes, and thus are inadequate means for seeking the equality they were intended to provide. To that end, the study must first define the philosophical ideal of equality and compare the ideal to the actual world. Only after establishing the appropriate philosophical and linguistic groundwork can the analysis of actual affirmative action policies and their consequences be conducted.

2.**On the Ideal World**

Some 233 years ago, as they were struggling with the realities of standing against an oppressive government, the very forefathers of this nation found themselves reaching for the ideal philosophical grounds upon which to defend and articulate their justifications for breaching ties with Britain. In perhaps the most famous address ever to be delivered to all of humankind, a group of colonial rebels, drawing on the exalted theories of the likes of John Locke, proclaimed certain truths to be self-evident, specifically “that all men are created equal.”¹ This ideal of equality for all has long been a symbol of American society from the Statue of Liberty’s message welcoming strangers from all walks of life to the American dream that success and prosperity can come to anybody willing to work for it. Equality, in principle, lies at the heart of democratic governance and is central to modern political theory.

The essence of equality implies more than political rights like the right to vote. It points to the core of what it means to be part of a community. Equality requires that all individuals are given a fair opportunity. This opportunity may be to aspire to the same profession, to earn the same living, to enjoy the same entertainment, or even to access the same education. If equality in its truest sense were to exist, than any one profession, restaurant, ballpark, or school would be equally accessible by men, women, more and less youthful individuals, blacks whites, Christians, Muslims, and all other combinations of age, race, sex, religion,

¹ “Declaration of Independence.”

ethnicity and other distinguishing characteristics. However, that is not to say that these institutions must be comprised of equal proportions of individuals with each group of characteristics. In other words, fair opportunity in the ideal world need not imply diversity. While this may at first seem counterintuitive, upon a more thorough reflection, it becomes quite clear. Certain professions, forms of entertainment and recreational activities are closely associated with specific cultures. Therefore, individuals with a given cultural heritage are more likely to associate with the norms of that culture, and thus more likely to participate in the institutions reminiscent of that culture. Indeed, it would be expected for most of the employees in an Italian bakery to be Italian or for a gospel choir to be comprised mostly of Christians. As Laurence Thomas so aptly put it, “taking cultural diversity seriously entails acknowledging that interests may differ across ethnic and racial groups.”² In other words, because various cultures are more or less inclined to participate in different activities, a natural imbalance in racial or ethnic representation may occur in those activities, owing no fault to discrimination or oppression. All that fair opportunity in the ideal world requires is that these positions be equally available to and accessible by all regardless of whether they be Italian, African American or any other defining characteristic.

The ideal world, as the Declaration aspires to imply, is one based on equality. In that famous document upon which this nation was founded, equality was the very first of the self-evident truths to be articulated, implicit of the importance of protecting it.

² Thomas, p. 6

Rather than merely assert that equality is the ideal, it is more compelling to produce an argument from which one might be persuaded to accept this assertion. Deductive reasoning can provide a clear logical method for understanding why equality is so essential to the ideal world. Such an argument was crafted by the great twentieth century political philosopher John Rawls. He did so by producing a thought-experiment that leads the participant to conclude that equality is in his or her own best interests. If every participant inevitably arrives at the conclusion that equality is in their best interests than it would seem to be deductively rational that it would be ideal. The logic follows the subsequent format: If something is in the best interests of each individual, than it is ideal for the whole. Therefore, if equality is in the best interests of each participant, than it is ideal for the whole group.

In order to prove the first half of this statement, Rawls introduced a device he termed the “veil of ignorance.” Under this “veil,” the participant in his thought experiment was not given any details about his or her physical features, social status, natural abilities, wealth, education, disabling features, etc. All the participant knew was that they were a member of the community. From this blank, every-person perspective, the participant then views various social and political policies that affect various members of the community in various ways. A policy that discriminates against individuals with certain characteristics has the potential of discriminating against the thought-experiment’s participant since he or she is unaware what characteristics he/she might possess. Rawls further posited a concept of risk-aversion. He suggested that it must be assumed, for the

sake of the experiment that individuals would always act in their best interests and never choose an option with a greater risk of negatively affecting their best interests. With that clause in mind, participants would recognize that policies that discriminate against some are riskier than those which provide equal opportunity, since the latter choice provides the greatest guarantee of protection of their best interests.³

By putting ones self into a neutral role, it becomes obvious that in order to protect one's possible best interests, it is necessary to protect the equality of all, no matter what combination of characteristics they might possess. Since the participant may possibly possess an unfavorable set of characteristics, any policy discriminating against those would be contrary to the participant's own best interests, and thus disagreeable to his or her risk-averse nature. Instead, universally equal policies would not distinguish among various combinations of characteristics, and thus would be either acceptable or unacceptable to all, no matter their characteristic "portfolio."

Through the use of this thought-experiment, Rawls provided a simple, yet persuasive argument for the ideal of equality. When applied broadly and abstractly, rather than scrutinized and reduced to real-world specific circumstances, this argument provides a basis for the belief that equality is the ideal. From this it can be deduced, as explained above, that fair opportunity is a necessary outcome of the ideal world. Furthermore, as was also previously explained, this fair opportunity should permeate every facet of life, especially education.

³ Rawls.

Equality in education, like equality in all social realms would ideally involve a universally equal distribution of skills, attributes, abilities and talents, as well as an equal distribution of resources. However, even Rawls acknowledges that birth delivers individuals into arbitrarily different circumstances.⁴ Since a natural equality of distribution is impossible, the ideal must instead focus on opportunity. To provide equal opportunity to individuals with naturally unequal circumstances means that no matter what combination of circumstances one is given, they have the same right to pursue a goal and are held to the same criteria in consideration of that goal. Equal opportunity entails the absence of any law, standard or other criteria that discriminates against individuals with a particular set of circumstances, or even holds them to separate expectations. Equal opportunity means allowing everyone, no matter what their circumstances, to compete for the same goals under the same process.

It is important to note that there is some debate over whether equal opportunity must mean a “leveling-of-the-playing-field” or proactive effort to aid those with less desirable circumstances such that their pursuit of a given goal is no more difficult than any other person. While the essence of this debate penetrates to the core of some questions concerning affirmative action itself, for the time being I am speaking about equal opportunity in the abstract, as a means of achieving the ideal of equality. Again, I will borrow from Rawls, who recognizes that different backgrounds may lead to different paths of resistance in the pursuit of the same goal. He argues that equality does not require identical levels of

⁴ *Ibid.*

resistance, but that the opportunity to compete and a uniform way of judgment will suffice.⁵

That being said, the arbitrary distribution of circumstances that occurs at birth makes the pursuit of various goals easier or harder for different individuals, at no fault of their own. In the past, as in Medieval Europe, social stratification and limitations due to birth were accepted as the norm. In a democracy today, and especially in America where social movement has become our trademark, it is expected and desired that individuals better their situation over the course of their lifetime. Thus, in a society that encourages upward social movement, and by no means desires a lower class, a passive acceptance of the inequalities of birth seems counterintuitive. Indeed, our society desires the higher ideal of universally equal distribution at birth or at least, the ideal of easing the resistance encountered by the not so well off.

It is this desire that has led America, and many other modern nations to stray from the extreme libertarian hands-off governments of theory, in favor of social welfare initiatives and other positive liberties led by the government in an attempt to pursue our ideal desires. Laws such as the Civil Rights Acts and EEOA have brought this nation to the primary ideal of equality of opportunity as I have described it. Other programs including the redistribution of wealth or affirmative action initiatives seek to move closer to the higher ideal identified above. It is the pursuit of that higher ideal that has brought America to enact the various affirmative action policies that it has in recent years, and that pursuit that has led to this very debate. Later chapters will elaborate upon this issue,

⁵ *Ibid.*

addressing both the flaws of current policies and proposing alternative methods for providing opportunities for the disadvantaged.

3.

On the Real World

The previous chapter sought to theorize about the ideal of equality, and in doing so, described a hypothetical world, barren of injustice, devoid of historical practices and ways of thinking, completely abstract in time and space. For equality to exist in that world, only fair opportunity was necessary since the world itself was absent any outside factors that might inhibit the pursuit of equality through fair opportunity. As the chapter's conclusion noted, however, reality is not so clear cut.

In addition to the "accident of birth" described in the last chapter, the real world is filled with numerous external factors hindering the process of fair opportunity and the pursuit of equality. This includes both historic and contemporary problems, and issues both political and individual in nature. Let us begin by examining issues of a historical nature here in America.

While injustice and persecution based on religion, sex, and age have all persisted throughout this nation's history, the issue of racial injustice was by and large the most dominant and pervasive problem with respect to equality facing the United States, historically. From the colonization of the Atlantic coast until the Emancipation Proclamation in 1863, the actual enslavement of minorities, particularly of African descent was a common and legal practice. The social construction of slavery created a hierarchy of human classification, fostering a sense of superiority for free persons over their slaves. Over time, this sense of

superiority led to an ingrained discrimination of minorities as second class or even sub-human people. As late as 1857, in the case of *Dred Scott v. Sanford*, the U.S. Supreme Court, even ruled that slaves were so inferior that they were incapable of receiving the protections of citizenship.⁶

Even after the abolition of slavery, institutional and social measures cultivating this racial discrimination remained in place. In southern states, poll taxes and so-called Jim Crow laws made it difficult for African Americans to participate in political life and even segregated public facilities, reinforcing notions of racial superiority among whites. Again, the Supreme Court itself upheld these discriminatory practices in the case of *Plessy v. Ferguson* in 1896, essentially holding that segregation was constitutionally permissible.⁷

Shifting focus to a more contemporary time period, the Civil Rights Movement of the 1950s and 1960s more or less led to the end of legally sanctioned segregation and sought to end institutional discrimination. However, throughout the twentieth century, minorities continued to find themselves proportionately more disadvantaged financially, in quality of education and in the job field.⁸

Over time, these factors become interdependent. Less wealth necessitates poorer living conditions. Because public schooling is funded largely by district property taxes, poor living conditions lead to poorly funded, lower quality educations.⁹ Lower quality educations make traditional forms of academic

⁶ Taney.

⁷ Brown.

⁸ Blank, pp. 56-68.

⁹ Hochschild, pp. 61.

achievement such as high SAT scores and Advanced Placement credits less likely to be obtained by students in those circumstances, which in turn leads to a lower likelihood of acceptance into institutions of higher education. Finally, individuals lacking a college degree are less likely to find elite jobs, thus resulting in financial disadvantage and renewing the vicious cycle.¹⁰

To make matters worse, the current disparities in finances, housing, education, employment and other aspects of well-being between races are - at least in part – artifacts of the injustices of the past. Decades of discrimination and segregation led to accumulated disparities in inherited wealth and thus opportunity. Furthermore, past acceptance of discrimination has led to an engrained discriminatory mentality in some Americans.

Because of these issues, the pursuit of various objectives, and in particular higher education, have become significantly more difficult for some individuals of minority heritage. They have thus, become the primary catalysts for the cause of affirmative action policies.

Providing reparations for past injustice is both impossibly difficult to implement and vulnerable to subjectivity in determining a state of adequacy. The notion of compensating a descendent for an injustice committed against his or her ancestor is a debatable issue in and of itself. Even if it were to be accepted, the task of proving whether a specific individual was in fact the descendent of a victim of the injustice would be extremely difficult since few records were kept with regards to slaves, and families were often separated from each other. Furthermore, it would be incredibly inhumane to equate an individual person's

¹⁰ Blank, *ibid.*

suffering to a given form of recompense. In addition to these difficulties, various individuals could claim to have suffered greater extents of injustice than others, and thus, in theory could legitimately request greater compensation. While compensation for injustice is a commonplace result of modern civil court cases, the antiquated nature of the injustice at hand makes that sort of remedy far more difficult to facilitate.

Instead, a focus on present inequality and disadvantage often fuels the advocacy of affirmative action. Indeed statistics, like those presented by Rebecca M. Blank in her article *An Overview of Trends in Social and Economic Well-Being, By Race*, illustrate that minorities in general and especially African Americans are currently less wealthy and lower educated than their Caucasian counterparts.¹¹ This evidence suggests that minorities are proportionately more disadvantaged than Caucasian Americans.

The fact that financial, educational and residential disparities exist in present day America inevitably implies that the difficulty of one's path to success differs among various individuals. The legal abolition of segregation and discriminatory practices has allowed for the development of fair opportunity like that of the ideal world since all individuals can now compete for the same positions under the same criteria. However, the fact that discrepancies in resources such as education and income continue to exist means that some individuals will continue to have far more difficult paths to success. The continued presence of these accidents of birth prompt the movement to provide official assistance policies to compensate for these misfortunes. The correlation

¹¹ *Ibid.*

between race and well-being noted by scholars such as Blank, inevitably led to the creation of race-conscious affirmative action programs, especially in education.

4.**Recent Affirmative Action Policies**

In a 2008 proposal submitted by the Office of the Assistant to the President of Harvard University, the University issued the following statement reflecting its educational goals. “Diversity within the University community advances the academic purposes of the University...But simply adopting a policy of equal...opportunity alone is insufficient.” It goes further to state that “an affirmative action policy is essential to achieving such diversity.”¹² This mentality, among even the most competitive institutions of higher learning, reflects the common movement, discussed in the previous chapter, that Americans seek more than a passive renunciation of impediments to the ideal of fair opportunity, but go further to demand proactive measures to promote the pursuit of those opportunities by individuals whose backgrounds may have made their pursuit of success more difficult.

For decades, this methodology has existed in institutions of higher education, and has led to a variety of programs established for the promotion of those objectives, especially the assistance of the disadvantaged and the promotion of diversity within the academic community. What follows is a review of some such programs, the analysis of which will provide insight into the relationship between the intentions of said programs and the actual means by which they are applied.

¹² “Affirmative Action Plan 2008.” p. 4

The Supreme Court decision in the case of the Regents of the University of California v. Bakke (1978) was arguably the single greatest catalyst of the debate over race-conscious affirmative action policies, which has emerged in the decades since. It is logical, therefore to begin with an examination of that controversial policy. That program, utilized by the Medical School of the University of California at Davis, accepted one hundred applicants annually. In evaluating these applicants, the School applied its regular admissions program, as well as a special admissions program. The regular admissions program automatically rejected any applicant whose undergraduate grade point average fell below 2.5 on the 4.0 scale, while offering an interview to approximately sixteen percent of applicants who passed the GPA requirement. After the interview, each member of a panel consisting of 5-6 evaluators would rate the applicant on a one hundred point scale, one hundred representing the strongest likelihood of admission. The criteria for this rating included undergraduate GPA, GPA in courses relevant to the study of medicine (the natural sciences), MCAT scores – the medical school equivalent of the SAT, the results of the interview, strength of letters of recommendation, the applicant’s extracurricular activities, and other biographical data. Once the ratings for each panel member were averaged, applicants with the highest scores would be offered admission on a first come first serve basis.¹³

A separate evaluative process was conducted for individuals who listed one of the approved minority groups on their applications, as well as those who were considered to be otherwise economically or educationally disadvantaged.

¹³Powell, “University of California Regents v. Bakke.”

These applicants were evaluated in a similar manner to those subject to the regular admissions process. However, they were not subject to the strict GPA cutoff, and about twenty percent were offered interviews, compared with only sixteen percent in the regular process. The special admissions applicants with the highest rating were then evaluated by the regular admissions panel, with the stipulation that they would not be automatically rejected due to a GPA below 2.5. The process of referring special admissions applicants to the regular admissions panel continued until a strict quota of 16 of the 100 available spaces was filled with special admissions applicants.¹⁴

The UC-Davis affirmative action policy, thus, had several defining characteristics. First, it took race into account as a factor effecting an applicant's consideration for admission. Second, it provided separate processes for applicants of different races. Third, it designated a specific number of spaces to be filled by minorities and other "special admissions" applicants. Finally, it held minority applicants (and those who were economically or educationally disadvantaged) to lower standards with respect to the GPA requirement. This policy was ultimately found unconstitutional, a matter that will be discussed in the chapter that follows.

Nearly twenty years after the UC-Davis policy was overruled by the Court, the University of Michigan's affirmative action program for undergraduate admissions employed similar discriminatory criteria. Michigan's committee, like that at UC-Davis utilized "a number of factors in making admissions decisions, including high school grades, standardized test scores, high school quality,

¹⁴ *Ibid.*

curriculum strength, geography, alumni relationships, leadership, and race.”¹⁵ To equate undergraduate criteria to graduate-level criteria one might consider high school grades as similar to the GPA referred to by UC-Davis, while standardized test scores are the equivalent of the MCAT. High school quality and curriculum strength are compatible with criteria such as difficulty of course-load or relevant courses, as UC-Davis utilized. Leadership might reflect the equivalent of qualities expressed in personal statements, interviews and letters of recommendation. In making these analogies, I do not purport to suggest that they are necessarily equivalents in all cases, only that they are roughly comparable in evaluating various strengths and weaknesses of applicants at different levels of the education process.

While all qualified applicants would be given consideration for admission to the University, the University of Michigan was among the elite educational institutions in the United States, and thus, decisions among many qualified applicants were required. The University employed a points system to facilitate the decision process. Those applicants who scored over 100 points were judged to display extraordinary potential in comparison with their peers and were automatically admitted. However, because the institution’s reputation attracted many reasonably qualified individuals, further criteria for admissions among the majority of applicants who scored somewhere below the 100 point mark was required. Rather, than employ even stricter scrutiny to the academic achievements of its applicants, the University of Michigan utilized the other factors listed above, such as geography, alumni relationships, and race as plus

¹⁵ Rehnquist.

factors in distinguishing amongst similarly qualified applicants. With respect to race, the “guidelines use a selection method under which every applicant from an underrepresented racial or ethnic minority group is automatically awarded 20 points of the 100 needed to guarantee admission.”¹⁶

By recognizing race as a relevant factor in determining admissions, the University of Michigan’s admissions program clearly utilized an affirmative action policy with respect to race. By affixing a specific numerical value to minority racial identity, Michigan’s policy of the 1990s was similar to that of UC-Davis in the 1970s in that, by quantifying race, both employed race as a predominant factor in the admissions process.

A plethora of other institutions of higher learning also employ race-conscious affirmative action programs. However, many of those institutions differ from UC-Davis and the University of Michigan, granting race lesser significance in the evaluative process. Harvard, for example, approached affirmative action quite differently than UC-Davis, though its policy in the 1970s nevertheless confirmed its interest in promoting diversity. Even more so than the University of Michigan, Harvard has been able to claim the prestige of being one of the most elite schools in the country. Because of this distinguished status, Harvard has faced the same problem as Michigan in that it receives applications from numerous qualified candidates. While there are always a select few that transcend the lot, the majority have excelled academically and possess impressive resumes. Consequently, some further criteria had to be used to distinguish amongst these highly qualified individuals. To do so, the Committee on

¹⁶ *Ibid.*

Admissions at Harvard sought to promote diversity in granting admission. The policy itself states:

“The effectiveness of our students' educational experience has seemed to the Committee to be affected as importantly by a wide variety of interests, talents, backgrounds and career goals as it is by a fine faculty and our libraries, laboratories and housing arrangement.”¹⁷

Wielding this interpretation of the importance of diversity, Harvard recognized “variety of backgrounds” to include the geographic location of an applicant’s hometown, the career aspirations of the applicant, and the applicant’s race or ethnicity, among other factors. Individuals whose backgrounds were deemed to contribute to the diversity of the academic community were viewed in a slightly more favorable light when compared with similarly qualified peers. The result was the possibility of favorable consideration for qualified minority applicants, but not to the extent that it automatically granted points in an admissions formula – as the University of Michigan’s program had.

Similarly, Harvard’s policy clearly stated that it did not establish a numerical quota for the amount of minority applicants it intended to accept in a given year. It did, however, recognize that excessively small proportions of minority students compared with the total class size would not achieve the desired effects of diversity, and may in fact, lead to “a sense of isolation among [minority] students themselves and thus make it more difficult for them to develop and achieve their potential.”¹⁸ Therefore, the institution essentially recognized that a minimally adequate proportion of minority students was

¹⁷ “Excerpts from the Harvard College Admissions Program.”

¹⁸ *Ibid.*

necessary to achieve its academic goals, though it refused to specify a concrete number for any given year.

By refusing to quantify the importance of race, Harvard's affirmative action policy differed significantly from those of UC-Davis and Michigan. Nevertheless, Harvard's policy contained its own distinguishing characteristics. First, it recognized race as a relevant factor in granting admission to an academic institution. Second, it recognized the varied implications of diversity and resolved that a given characteristic did not always contribute to the institution's goals – that is, a given characteristic did not constitute a fixed-value benefit towards admission. Third, it recognized the absurdity of quantifying the proportion of various individuals that would result in the desired diversity.

Unlike its undergraduate program, the University of Michigan's Law School utilized an affirmative action policy in the 1990s similar to that of Harvard's policy from the 1970's. Like most other institutions of higher education, the University of Michigan Law School took into consideration GPA and test scores (the LSAT), as well as letters of recommendation, the applicant's personal statement and extracurricular activities. The school acknowledged that while GPAs and LSATs are traditional indicators of success in law school, they are imperfect, and thus cannot single-handedly guarantee or deny admission.¹⁹ Like Harvard, Michigan's Law School sought to promote diversity in addition to sheer academic brilliance, though its understanding of diversity was even more broad than was Harvard's. Its admissions policy was focused on admitting students likely to make significant “contributions to the intellectual and social life

¹⁹ O'Connor.

of the institution.”²⁰ To pursue that goal, the Law School took into consideration the quality of the applicant’s personal statement and letters of recommendation, the quality of previous academic institutions attended, and the difficulty and variety of undergraduate course work, in addition to numerical figures like GPA and LSAT scores.

The policy further considered any ways in which an applicant’s portfolio might suggest a non-academic contribution to diversity. Unlike other institutions, the University of Michigan’s Law School did not list particular criteria that counted towards diversity, instead recognizing that diversity can manifest itself in numerous ways. It did, however, officially recognize the importance of promoting and ensuring racial diversity particularly with respect to “groups which have been historically discriminated against...who without this commitment might not be represented in our student body in meaningful numbers.”²¹ Despite its identification of race as a factor contributing to diversity, and thus a positive note for an applicant’s consideration for admission, the Law School neither quantified the significance of this factor, nor speculated a quota of admissions for maintaining diversity.

What is more, the Law School’s focus was on promoting diversity as a means of fostering more wholesome intellectual and social life. It did not specify that racial or ethnic diversity was the only way to achieve this. By diverting its focus away from race and towards diversity more generally, the Law School created a policy in which all applicants had the potential to contribute to diversity.

²⁰ *Ibid.*

²¹ *Ibid.*

The expressed recognition of race as one of many possible contributing factors did not afford it the same predominant weight granted by the likes of Michigan's undergraduate program.

Each of the above institutions provided some explanation for its inclusion of race as a relevant factor in the admissions process at educational establishments. Harvard recognized the importance of promoting a diversity of backgrounds. The University of Michigan Law School sought to ensure the representation of historically underprivileged minority groups. Considerations such as these have been used to justify the inclusion of race in admissions traditionally as a benefit for minority groups such as African Americans, Hispanics, and Native Americans. However, the use of race as a tool for the promotion of intellectual and social diversity can also lead to other outcomes.

In order to promote a similar goal of diversity in its academic community, some colleges in Alabama adopted an affirmative action policy that benefits Caucasian applicants, since those schools have historically been dominated by African American students. Created in 1995, the policy effects Alabama State and Alabama A&M universities and was designed to encourage white students to apply in order to foster a greater sense of diversity.²² Though this program was the result of a court order rather than a voluntary assertion of those schools' desire for diversity, similar reasoning applies. When viewed as a compelling interest of educational institutions, the promotion of diversity has led many to adopt affirmative action policies that target race, among other factors, in order to ensure that goal is met.

²² "Alabama State University."

Since the issue came to bear with the *Bakke* case in 1978, institutions of higher education have taken different measures with regards to race and affirmative action. Some have specifically and meticulously targeted race as a crucial factor in accepting a pool of applicants. Others have utilized a more general approach, acknowledging race as one of many factors that has the potential to contribute in a positive manner to the institution's community. Regardless of the methods used, it is undeniable that race has become a relevant factor in the evaluative processes of many college admissions offices.

5.**Affirmative Action and the Law**

Americans have tirelessly aspired to provide a means of bettering our disadvantaged, for providing all people with that treasured opportunity to share in the pursuit of happiness. In the more than forty years since the monumental Civil Rights Movement of the 1960s, that ideal has embraced the betterment of minorities, long hindered by discrimination in their pursuit of this most essential American virtue. Whether it be the result of this movement towards equality, a desire to procure the putative profits of a diverse academic community, or some other combination of objectives, it is undeniable that American universities have come to regard race and ethnicity as relevant factors in the evaluation of applicants seeking admission to these hallowed institutions. An analysis of the admissions policies at any cross-section of such institutions of academia reveals precisely that reality, as evidence in the affirmative action policies of the University of Michigan, Harvard College, the Medical School at UC-Davis, and Alabama State University described in the preceding chapter.

Any policy as extensively intertwined within the American educational system as race-conscious affirmative action is, inevitably lies under the jurisdiction of state governments. Owing to the Constitution's delegation of all non-expressed powers to state governments rather than the national government, education has historically fallen under the individual control of each state within

its own boarders.²³ However, due to the racial component of their affirmative action programs, university admissions policies also fall under the superior authority of the federal government. For better or worse, race-conscious affirmative action, in both form and theory, finds itself governed by ambiguous federal law and as such, the continued focus of judicial review and intervention.

It is with this subject, the relationship between affirmative action and the law, that I begin my critique. Though it is just one of the many reasons I find fault with the concept of affirmative action, the legal justification for such programs, or lack thereof, is questionable at best and utterly invalid at worst. Moreover, the conflict between affirmative action and the law is arises at multiple levels of authority, from state statutes and constitutions, to federal legislation, judicial precedent, and even the Constitution itself.

The United States Constitution, premier governor of the United States as a nation, and the very document by which our current government was created, was designed with the intention that it could be altered to reflect the evolution of public opinion and address the ever-increasing array of concerns affecting American society. This capacity for change has been wielded 27 times throughout the course of American history, in the creation of 27 Amendments to the Constitution. A number of these have reflected the issue of race and its dubious history in this country. The assertion that affirmative action comes into conflict with one of these most emblematic proclamations of America's commitment to equality is a striking allegation. Yet this is precisely the reality of affirmative action's position with respect to the Fourteenth Amendment.

²³ "United States Constitution." *Ibid.*

Found within that amendment is a provision known as the equal protection clause that reads as follows: “No state shall...deny to any person within its jurisdiction the equal protection of the laws.”²⁴ The remainder of the amendment explains that all individuals naturalized in the United States are, in virtue of their birth, citizens of both the state in which they reside and the United States as a nation. Furthermore, as national citizens, such persons are protected against any action of a state which violates federal law. Since the amendment itself is federal law, the right of all persons to equal protection cannot be violated by any state. Though this may seem intuitive to some, well versed in American history and government, it is necessary to elaborate the intricacies of the law’s language in order to fully appreciate the impact it should have on affirmative action.

As previously mentioned, education is governed by individually by the states. However, under the Fourteenth Amendment, education practices at the state level are still subject to the provisions of the equal protection clause, and as such subject to the rulings of federal courts. This power of judicial evaluation came to bear in the case of *Brown v. Board of Education* (1954). In an unprecedented decision, the Supreme Court ruled that the practice of school segregation was unconstitutional. The practice of providing “separate but equal” facilities for students of different races was invalidated after decades of accepted application. The Court opined that segregation denied individuals the right to equal protection required by the Fourteenth Amendment. In delivering this opinion, Chief Justice Warren stated that the Court found the equal protection clause to mean that all individuals regardless of race are to be subject to uniform

²⁴ *Ibid.*

and inclusive public institutions and systems of regulation. The Court further asserted that the provision of separate opportunities based on race, regardless of their comparability in quality, were inherently unequal.²⁵

Taken in this time-tested context, the equal protection clause of the Fourteenth Amendment necessarily prohibits any separate consideration or treatment of individuals based upon race. It would seem to follow, therefore, that any program or facility that provides certain benefits to individuals of a given race but not to individuals of another race, solely on the basis of racial identification, violates the Fourteenth Amendment. In providing separate opportunities based on race, such programs are essentially establishing separate “institutions,” which – as the Court noted in *Brown* – are inherently unequal, and thus, violate the equal protection clause. Affirmative action programs, as I have proven via numerous examples, epitomize the type of “institution” outlawed by this law. By providing separate or additional consideration for different individuals because of their race, affirmative action policies are akin to segregation in the manner of the Court’s interpretation in *Brown*, and likewise, provide inherently unequal treatment.

While unconstitutionality, in and of itself, is a considerable enough claim to prove affirmative action is illegal, the Fourteenth Amendment is not the only instance of affirmative action’s conflict with federal law. Another and arguably even more iconic decree of this nation’s pursuit of racial equality is the Civil Rights Act of 1964. After years of struggle in the fight for equal treatment and an end to discrimination, the Civil Rights movement culminated in the passage of this piece of legislation, officially prohibiting the use of race to discriminate

²⁵ Warren.

between various persons. This document is the cornerstone of America's preservation of equality and its passage is widely celebrated as the event that ultimately liberated minorities from years of oppression, providing a legal foundation for the belief that all are created equal and should be treated as such, without regard for their skin color. If affirmative action programs designed to warrant aid to individuals of minority heritage were found to violate this iconic piece of legislation, irony would be an understatement to say the least. Yet a careful review of the language of that Act reveals that this contradiction is indeed present.

The language of Title VI of the Civil Rights Act, concerning federally assisted programs states that: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance."²⁶ Further subsections of the legislation go on to outline the programs affected by this act, including "a college, university, or other postsecondary institution...any part of which is extended Federal financial assistance."²⁷ This stipulation brings the vast majority of such institutions under the scope of the law, since most colleges receive federal funding of some sort via an enormous variety of grants, loan programs and other financial aid.²⁸

Where the issue arises with respect to affirmative action is in the language of the clause. It specifically forbids discrimination based on race. While affirmative action programs certainly do not use the terminology of discrimination

²⁶ "Title VI of the 1964 Civil Rights Act."

²⁷ *Ibid.*

²⁸ "Federal On-Budget Funds for Education."

in their doctrines, they clearly provide preference based on race. It is precisely this issue wherein lies the problem. To prefer one entity in relation to another is to hold the preferred entity in higher esteem than the other entity. To hold in higher esteem or elevate the status of one entity in relation to another necessarily lowers the relative status of the entity that is not the subject of the preference. (see attached footnote)²⁹ To hold one entity in lower esteem or debase its status relative to that of another entity is essentially to discriminate against the “lower” entity. When the grounds for this discrimination are race, color, or national origin, Title VI of the Civil Rights Act of 1964 forbids such treatment.

Though its use of racial preference varies in degree and is often of minor significance, relatively speaking, the simple fact that race is ever a basis for providing distinction between individuals in the pursuit of a specific opportunity, namely education, clearly brings affirmative action into contradiction with the language of the Civil Rights Act. It is conceivable that critics of this point of view might allege that the language of the act only expressly prohibits discriminatory action, and in the absence of any stated prohibition on preferential treatment, the use of race to determine preference is allowed. A further critique of my argument might allege that the intent of the act was to stop discrimination against minorities and, because of the ambiguity in its language, the act can be

²⁹ To make this point clearer, it might help to visualize two entities on the X-axis of a Cartesian plane with a corresponding Y-axis value of zero for each entity in light of their identical starting positions. Assume entity A is raised vertically in the slightest degree and a new line is drawn at that elevation but parallel to the X-axis, while entity B remains at its original starting position on the X-axis. Entity A now rests on a line with a larger Y-axis value than entity B. The resulting relative relationship between entity A and entity B is such that the value of A is greater than that of B. The inverse, the value of B is less than that of A, is also true. If one was to replace the variables A and B with minority and non-minority races, and replace arbitrary Y-axis values with preference in admissions consideration, the relationship would resemble the effect of affirmative action.

interpreted to promote active measures to prevent or counteract such discrimination, including the use of affirmative action to ensure that minorities have access to higher education that discrimination, either past or present, might otherwise prevent.

Though this interpretation may seem intuitive and even noble to some, I reject this claim, and posit that such an interpretation is a perversion of the law's true intentions to bring about total equality and remove the notion of race from evaluative process in all aspects of American public life. I do not hold this concern unaccompanied. It was recognized and advocated by the citizens of the State of California, who voted to amend similar language in their own state constitution rather than allow the continued manipulation of the abstract proclamation of universal equality.³⁰

The amendment of California's constitution, known as Proposition 209, represents another level of authority in which affirmative action policies violate the law. Since the proposition was passed, the language of California's constitution was amended so that the prohibition against discriminating on the grounds of race, described in the Civil Rights Act, is supplemented to include prohibitions against both discrimination and preferential treatment on the grounds of race, as well as sex.³¹ With the addition of this concrete language, race-conscious affirmative action clearly violates the law at the state level. California is not the only state in which affirmative action programs find themselves in violation of recently enacted law. Texas was also subject to a prohibition of the

³⁰ Hadley, pp. 107.

³¹ *Ibid.*

preferential use of race in admissions as a result of a federal court ruling in *Hopwood v. State of Texas (1996)*.³² This prohibition was eventually reversed by the Supreme Court's decision in *Grutter v. Bollinger*, but for a time affirmative action was illegal at the state level here as well. Similarly, in Florida, Governor Jed Bush enacted an initiative called "One Florida," to end race-conscious admissions policies in the state, replacing them with race-neutral means of encouraging the pursuit of higher education by the state's youth.³³ Although this initiative also occurred prior to the Supreme Court's ruling in *Grutter*, it represents yet another state-level instance of affirmative action in violation of the law.

State laws, federal Acts of Congress, and the U.S. Constitution aside, the dispute over affirmative action's controversial legal status is littered across numerous court cases, many of which were contentious enough to reach the U.S. Supreme Court before finally being decided. The most famous of these is the *University of California Regents v. Bakke (1978)*. In one of the first cases to address the constitutionality of race-conscious affirmative action policies, the court ruled that the use of race as a predominant factor in admissions, such as the use of quotas that completely restrict the access of non-minorities to a number of spaces, violates individual rights under the Fourteenth Amendment. It did however, determine that the pursuit of diversity, when narrowly tailored, was a

³² Bucks, pp. 1.

³³ Peltz.

compelling interest that could be promoted through racial preference when used as a secondary, less significant factor.³⁴

Another case that resulted in the termination of an institution's existing affirmative action policy was *Gratz v. Bollinger* (2003). The Court's ruling in this case was similar to that of *Bakke*, finding, here, that the University of Michigan's placement of a quantified value on race, and use of that value to account for a significant portion of the requirement for admission, violated the requirement laid out in *Bakke* that affirmative action for the promotion of diversity be narrowly tailored. The granting of a significant preference to every minority applicant solely on the basis of race violated that requirement according to the Court.³⁵

In a similar case, *Grutter v. Bollinger* (2003), the Court upheld the University of Michigan's Law School admissions policy, claiming that the use of race as one possible way in which an applicant might contribute to diversity, and thus tip the scales of admission in his/her favor was narrowly tailored because it did not quantify race and made determinations on an individual basis. It again relied on the opinion from *Bakke*, asserting that the explicit and predominant use of race was unconstitutional, but its inclusion as part of a narrowly tailored attempt to achieve diversity was permissible.³⁶

Despite the Court's consistent assertion that race can be used under certain circumstances, I maintain that, in light of the constitutional and legislative issues laid forth above, a correct reading of federal law would indicate that any use of

³⁴ Powell, "University of California Regents v. Bakke."

³⁵ Rehnquist, *ibid.*

³⁶ O'Connor, *ibid.*

racial preference violates the very laws that were established to abolish racial discrimination. This view finds support in the ongoing judicial dispute over Alabama's unconventional policy, which targets Caucasian applicants. In *Tompkins v. Alabama State University* (1998), Jesse Tompkins, a graduate student, brought suit against ASU, claiming that the school's use of "other-race" scholarships in the interest of diversity violated his Fourteenth Amendment rights. The difference between his and other similar claims was that he was a minority student, and the affirmative action policy in question aided Caucasian students. Mr. Tompkins' allegations were similar to those of Plaintiffs in the more famous cases like *Bakke*, *Gratz*, and *Grutter*, in asserting that any use of race is unconstitutional.³⁷ Though the case was dismissed on technical issues over whether Plaintiff had standing to bring suit, the issue at hand was left undecided and open for appeal within the scope of a previous case.

The fact that minority students as well as Caucasian students recognize the constitutional conflicts brought by affirmative action policies, and the willingness of public interest organizations to bring suit on behalf of these individuals' rights, is telling of the controversy surrounding affirmative action's legal status. Furthermore, the demand for race-neutral admissions policies by students of all backgrounds is indicative of the true meaning of the law – equality, completely absent any racial implications.

³⁷ "Tompkins v. ASU."

6.**Affirmative Action and the Fairness of Evaluating Uncontrollable Events**

In the scholastic setting, especially at the college level, affirmative action programs in association with admissions policies have recently come under tremendous scrutiny for alleged preferential treatment. Concerns over the legal status of such policies are not the only issues surrounding affirmative action. Stemming, perhaps, from what the law attempts to promote – a fair and just society – affirmative action programs utilize race-conscious evaluation processes that lead to questions regarding the sheer fairness of the concept, itself. In some instances, affirmative action programs not only lend unwarranted advantages to minority applicants, but they do so at the precious expense of other honorable individuals.

In theory, affirmative action does serve a compelling moral interest in our society, providing aid to the underprivileged and disadvantaged so that they too might participate in the American dream of social mobility. However, as the remainder of the essay elucidates, its academic application ultimately does not accomplish that interest. What is more, it fails to promote the primary goal of any scholarly institution – the further development of knowledge and its applications, through the studies of its most talented pupils. In utilizing an uncontrollable factor such as race, affirmative action policies inevitably arrive at two consequences: the unfair denial of admission to some qualified individuals, and a negligent disregard for the primary objective of the academic institution.

First let us begin with a review of the case of *Barbara Grutter v. Lee Bollinger*, a U.S. Supreme Court case regarding the University of Michigan's Law School admissions policy with respect to race. In 1996, Ms. Grutter applied for admission to the law school, boasting an undergraduate GPA of 3.8 and an LSAT score of 161.³⁸ She was denied admission, whereas 6 minority applicants were admitted with GPAs below 2.99, a quite significant decrease from Ms. Grutter's, and LSAT scores between 161 and 163, just two points higher than Ms. Grutter's.³⁹ While some critics might be quick to point to the slight elevation in LSAT scores as a factor in the admission of the minority applicants, the deficit in GPA is far more significant and reflects a far more extensive cross-section of the individuals' academic careers – four years versus four hours.

In cases such as this, absent some other compelling talent or ability illustrated by those minority applicants, the university's decision to accept them over a more academically qualified candidate raises striking questions about the use of race in determining admission. For the sake of the argument, let us assume that the decision to accept the minority applicants was based in part upon their racial status and that there were no other striking talents displayed on their applications to justify admission, the question of fairness arises. How is it justifiable to grant more significance to an uncontrollable factor such as race, than an earned, entirely controllable factor such as academic ability, when the position for which the candidates are being considered professes to focus on is academics. It seems intuitive that for any given position, traits that reflect upon that position's

³⁸ O'Connor, *ibid.*

³⁹ Thomas, p. 7.

primary objective should be granted far more importance in the admissions process, considering their strong relativity to the objective at hand. In other words, factors that should be considered must not only be controllable by the applicant, but must also, in and of themselves, bear some relevance to the position sought. Thus, since the primary goal of academic institutions is to foster discovery, brilliance, and academic growth, it would seem that in affirmative action cases similar to Ms. Grutter's, the use of race as a predominant factor is plainly unfair.

In the aftermath of the *Bollinger* Supreme Court cases concerning the affirmative action policies of the University of Michigan's undergraduate and law schools, a generally accepted consensus among institutions employing such policies might be articulated such that the Court's ruling had allowed for such policies that used race as an abstract consideration only among similarly qualified candidates. Policies employing racial quotas, quantified bonuses, or otherwise predominant consideration for race would be, like Michigan's undergraduate policy, illegal. Despite the legal implications of this interpretation of the Court's opinion, the use of race as a factor in gaining admission to an academic institution continues to raise questions of fairness.

As a tiebreaker between equally qualified applicants, acceptance of the individual with minority status does so, however, at the expense of the other individual through something that cannot be controlled. Even this minor preferential treatment is a violation of fair opportunity. In taking into consideration a factor determined prior to birth, one that the applicant is

completely incapable of altering and that, in itself does not demonstrate a relevant aptitude, affirmative action policies cease to provide the universal path of opportunity and criteria for consideration that fair opportunity necessitates, as laid forth earlier in this work. To recall what was elaborated on in that initial chapter on the ideal world, I hypothesized that fair opportunity was in and of itself a natural ideal, but that ideal did not necessitate the pursuit of diversity.

As the *Bollinger* cases note, universities such as Michigan seek in part to promote diversity as a compelling interest of their institutions, in part because of the academic benefits presumed to be attributed to it. However, since fair opportunity is the ideal, while diversity is inessential, promotion of fair opportunity should also supersede the promotion of diversity. Therefore, ties should only be broken by inclusion of some other earned quality of the individual.

This hierarchical view of admissions criteria can be applied to specific examples. Take, for instance, a university that is contemplating two admissions policies. While both policies look primarily toward academic qualifications including grade point average, standardized test scores, letters of recommendation, research, and experience, the difference lies in how each deals with tiebreaker scenarios. Policy A suggests using athletic prowess, artistic creativity, or the inclusion of some other cultivated talent as the determining factor between two equally qualified applicants from a scholastic perspective. Policy B suggests using racial status (such as members of historically underprivileged minority groups, for example), sex, or religious affiliation as the tiebreaker. According to the above argument, Policy A should be considered

better than Policy B from the perspective of fairness, since it leaves the determination to be the result of some earned status or trait. Abilities such as athletic prowess or artistic creativity are skills that must be labored toward; they involve hard work, training and dedication, and are something that can be reasonably achieved by all humans. Because they are earned traits, faculties like athletic prowess and artistic creativity would be plus factors that either applicant could have worked to achieve, and therefore would pass the standards of fair opportunity for admission. With regards to the above example, policy A is the more just choice than Policy B, since it allows the decision to be at least partially, if unequally, placed in the applicants' own hands, rather than be left up to an uncontrollable, birth-given trait.

Taken in a separate context, the contrast between athletic prowess and racial status as credentials becomes even more apparent. "If no one is choosing sports players on the basis of skin color and ethnicity, but on the basis of raw talent, instead, then nothing could be more ludicrous, disingenuous, and utterly incongruous than insisting that color and ethnicity are relevant [in] an admissions policy at institutions of higher learning."⁴⁰ In order to fully appreciate this comparison, one must recognize the striking similarities in the objectives of sports teams and academic institutions. At any competitive level beyond a Saturday morning recreational league, the primary goal of sports teams is to be a successful organization and win games. In order to do so, teams choose players based on ability, taking those athletes with the best abilities at various skills the team needs to succeed. If the player has no ability that will help the team win, chances are

⁴⁰ Thomas, p. 4-5.

they team is not going to draft that player. Likewise, the primary goal of an academic institution, particularly at the collegiate level, is to build a program that fosters discovery, brilliance, and academic growth. This not only gains renown for the institution but enriches the educational environment for its students. However, in order to foster such an atmosphere, colleges need to choose the students that display the greatest abilities and potential for brilliance. Thus, academic institutions, like sports teams should choose prospective members based on abilities or skills, rather than some other trait that in and of itself does nothing to facilitate the organization's pursuit of its primary goal.

It is important to note the degree of difficulty to which one must work to achieve the trait is insignificant; it is only the fact that the trait is controllable at all that matters. Though I previously acknowledged the American desire to aid the disadvantaged as a contributory factor to the initiation of programs such as affirmative action, a leveling-of-the-playing-field for a specific trait or ability is not necessary. By simply including alternative forms of achievement in the consideration process, admissions policies would provide the desired aid by widening the opportunity for all. This shall be elaborated on in a later chapter.

The point alluded to in the above quotation from Laurence Thomas's essay on diversity addresses the second consequence of affirmative action policies mentioned at the beginning of this chapter. In focusing on race as a factor for consideration in gaining admission, the academic institutions that utilize such policies do themselves an injustice in failing to promote their primary objective – the cultivation of talent and ability. In cases like Barbara Grutter's, the university

not only neglected this objective, but in fact impeded it. By accepting applicants who had, to that point, indicated inferior talent or ability, while simultaneously rejecting applicants that presented significantly greater potential, the university acted in plain disregard for the objective of cultivating the best talent, whether that talent be academic, athletic, artistic or other. As Thomas suggested, race in and of itself is not a talent, and thus its use as a factor in admissions processes at universities neglects their primary objective of cultivating talent.

7.

Affirmative Action and Effectiveness

Thus far, I have provided critiques of affirmative action addressing its legal status and constitutionality, as well as a philosophical concern over the fairness of using racial preference. As the chapter on legality explained, the official ruling on affirmative action permits its use under certain conditions, despite suggesting that the language of the law should forbid it. This chapter shall address the conditions under which affirmative action has been judged permissible by our court system. To recap the Court's position, racial preference is permissible as one of the factors considered to contribute to the promotion of diversity as a compelling interest. In other words, a diverse community – which includes a variety of racial backgrounds – is considered an acceptable goal of universities. In order to promote that goal of including a variety of races in the community, institutions are allowed to acknowledge a minority race as a beneficial characteristic of an applicant, and allow that applicant preference over other similarly qualified applicant lacking in that characteristic.

If affirmative action programs are necessary to achieve or promote this goal, then it would follow that institutions would contain of a significantly greater contingent of minority students with affirmative action, than they would without the program. In order to determine whether such programs are necessary, one must review a statistical analysis of various institutions both utilizing and not utilizing affirmative action policies. Such studies have been conducted, and the

data shows little, if any change in minority enrollment at a variety of institutions of higher education. In light of that data, it is clear not only that affirmative action is ineffective, but furthermore, that in virtue of its ineffectiveness, the program is not necessary for the pursuit of that compelling interest of diversity, since similar levels of diversity occur in the program's absence.

Since the *Bakke* decision incited debate over the use of race-conscious affirmative action policies in college admissions, a number of states have attempted the replacement of these policies with race-neutral admission plans. Among these, California's Proposition 209, Texas' Top Ten Percent Plan, and Florida's One Florida Initiative were the most highly publicized. While each was controversial and hotly contested, all resulted in similar, and surprising outcomes.

California's Proposition 209, as previously mentioned, amended the state constitution to prohibit preference based on race in addition to the former language prohibiting discrimination. In association with that prohibition proactive efforts were conducted to encourage the pursuit of postsecondary education by all the state's youth, regardless of race. An emphasis was placed on college preparation by focusing on primary and secondary education.⁴¹ As a result, a study conducted five years after the prohibition concluded that minority admissions had only decreased by one percent overall, across the combined average of all University of California campuses.⁴² A statewide decrease of only one percent is a far cry from the end of diversity on UC campuses. In fact, it

⁴¹ Hadley, pp. 128.

⁴² *Ibid.*

implies that the affirmative action programs previously in place did little at all to boost minority enrollment.

The study did analyze the effects on a campus by campus basis, as well. The effects of Proposition 209 on some of the more prestigious branches of the University, UC-Berkeley and UCLA, showed significantly larger declines in minority admissions. However, these drops were offset by even larger increases in minority admissions at some of the less competitive campuses, of which, the University of California at Riverside reported an increase of 82 percent.⁴³ While these results do imply that fewer minorities were accepted at the more competitive schools and instead, matriculated at less prestigious campuses, that result is not as detrimental to minority students as it first appears.

Under the widespread use of affirmative action, a serious concern developed with regards to the post-graduate success of individuals who were recipients of affirmative action benefits during the admissions process. Findings suggest that minority students admitted to elite institutions under affirmative action may not have been adequately prepared, since their credentials alone would not have gained them admission without affirmative action. Professor Richard Sander, of the UCLA Law School, found that African Americans, on average, perform significantly lower than their Caucasian counterparts when enrolled in elite law schools. His study concluded that African Americans tend to perform two full standard deviations below Caucasian students at the same schools, and more than half of the African American students received first year GPAs at the bottom of their class compared with approximately five percent of Caucasian

⁴³ *Ibid.* pp. 129.

students.⁴⁴ Alternatively, when minority and Caucasian students at a given law school had comparable credentials prior to admission, they tended to perform at the same level, according to Sanders' study. When these African American and Caucasian students who achieved similar grades in law school took the bar exam both groups of students passed the bar exam at similar rates. Yet, when considered on a whole, African Americans tended to pass the bar exam far less consistently than the Caucasian students with similar credentials.⁴⁵

This data, Sanders concludes, suggests that affirmative action is having a negative effect on the career prospects of minorities by ushering them into competitive institutions for which they are not as prepared as other students. Meanwhile, Caucasian students with similar qualifications are not benefiting from affirmative action and instead attend less competitive schools, learning more basic skills and grasping a stronger understanding of the material than their comparable minority peers that are attending the more prestigious institutions, where the information is taught at a faster pace and focuses on more complex issues.⁴⁶ Though they are equally qualified, affirmative action places minorities in situations less conducive to their proven abilities than their Caucasian peers.

This study implies that affirmative action is ultimately having a negative impact on its beneficiaries in the long run. Statistics like those following California's Proposition 209 may prove welcome in light of studies such as Sanders'. The decrease in minority admissions at top tier campuses and consequent increase in admissions at less competitive campuses means that

⁴⁴ Heriot.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

minorities were being accepted purely on their credentials and, therefore, were attending the same tier schools as their equally qualified Caucasian peers. If that indeed is the case, then Sanders' worry will eventually be corrected in California, as all students with similar qualifications will attend similarly difficult schools and, if his data holds true in a broader scope, will find similar levels of professional success after graduation. California's statistics certainly appear to back this hypothesis. After only two years under Proposition 209, the University of California's most elite branch, Berkeley, reported increased graduation rates of 6.5 and 4.9 percent for African American and Hispanic students, respectively. Likewise, at UC-San Diego, in the first year following the proposition minority GPA rose to nearly equal that of Caucasian students.⁴⁷ Berkeley's results suggest that its minority enrollment reflects a more qualified group of students, better capable of handling the competitive classes, while UC-SD's results suggest an increase in highly capable minority students, possibly due to the fact that affirmative action no longer pushes them into more competitive institutions. Bearing that in mind, the University of California statistics turn out to be quite promising for the prospects of minority students.

The California State University system of campuses reported similar findings after ten years of race-neutral admissions. While overall minority enrollment decreased by less than one percent, admissions among Hispanic applicants increased in the absence of affirmative action by nearly five percent.⁴⁸

⁴⁷ *Ibid.* pp. 130.

⁴⁸ *Ibid.* pp. 130.

Texas also experimented with a mandatory race-neutral admissions policy, which resulted in conclusions similar to those in California. After the passage of its “Top Ten Percent Plan,” Texas colleges experienced insubstantial decreases in overall minority enrollment, but reported that overall, the qualifications of enrolled minorities had increased in comparison with levels under affirmative action.⁴⁹

Florida also found promising results when it converted to a race-neutral policy for the year 2000. Under the replacement plan, the One Florida Initiative, minorities maintained a virtually identical percentage of enrollment in public universities as had existed under affirmative action, hovering around 36 percent. Moreover, the actual number of minority students admitted in the second year under the new policy had increased by twenty percent from the last year under affirmative action. This increase mirrored the total increase in student enrollment, suggesting that minorities are being admitted with equal frequency as Caucasian applicants under the new plan.⁵⁰

The results of race-neutral admissions policies in California, Texas and Florida all suggest that the prospects for success for minority students are quite possibly better without affirmative action than they were with its use. Furthermore, the results in all three states show that the absence of affirmative action did not result in drastic fall-offs in minority representation at the institutions studied. In fact, the changes were trivial and in some cases, actually portrayed increased representation. Changes on less than one percent have

⁴⁹ Bucks, pp. 9. Citing *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin. Report 5 (Part 2)*

⁵⁰ Peltz.

virtually no impact on composition of a student body, and certainly do not result in the absence of diversity. Therefore, I would argue that affirmative action has proven itself ineffective in facilitating a greater proportion of minorities to attend institutions of higher education than would in the absence of affirmative action. This ineffectiveness in turn implies that affirmative action is not necessary for academic institutions to achieve their desired diversity. Regardless of whether diversity is deemed a compelling interest in and of itself by the law, the implementation of affirmative action policies in college admissions contributes little to this interest. When a controversial concept offers little in terms of benefits, it is only logical to discontinue its use. Such should be the case with affirmative action.

8.

Affirmative Action, Discrimination, and Stigma

America boasts of a democracy based on the ideals of liberty, equality, and opportunity. However, discrimination has long been one of the tragic, unfortunate themes blemishing the history of the United States. For a nation that prides itself on opportunity, or as Thomas Jefferson once so eloquently put it, “the pursuit of Happiness”⁵¹, the problem of discrimination represents an obvious flaw in the furtherance of that reputation. This is undeniable. A problem has arisen, however, in the way that this nation’s leadership has gone about reconciling that fault. An onlooker would be hard-pressed to find an American citizen today who frowns upon the desire to remedy the problem of discrimination. But it is precisely here, wherein lies the problem. Programs like affirmative action policies, when viewed carefully and scrupulously, have a sort of divergence somewhere between the motives behind them and their actual application. While the motives behind affirmative action policies in all probability were indeed honorable and commendable, their application has proven largely the opposite.

I will elaborate upon what exactly I believe the motives behind affirmative action were momentarily. First I would like to recap the criticisms laid out in the paper to this point. Most immediately, based upon the language of the Civil Rights Act and other legal literature, race-conscious affirmative action programs violate our nation’s laws by using race in a discriminatory manner. Next, I have found affirmative action programs to fail the goal of moving the real world into

⁵¹ “Declaration of Independence,” *Ibid.*

closer alignment with the ideal, since affirmative action negates the fairness of competition between competent individuals otherwise equally capable of applying their own faculties to showcase talent and compete for acceptance. Finally, a review of statistics produced by various institutions of higher learning suggests that affirmative action is not very effective. The criticisms laid out to this point have addressed issues that might concern everyone except those targeted by the policies themselves. Shortly, I will suggest a somewhat more compelling flaw of the programs, an assertion that these programs are in fact doing more harm than good to those individuals they seek to aid.

Before delving into that piercing concern, I would like to return to my previous comment regarding the motives behind those who would seek to institute affirmative action policies in institutions of higher education. While I clearly cannot speak with certainty as to their actual thoughts and mental processes, I shall speculate upon what I believe is a logical deduction in light of the facts and circumstances. It is quite undisputed that the rise of affirmative action programs in academic institutions coincided with the aftermath of the Civil Rights Movement, which concerned itself largely with issues of race (and to the extent that it coincided with the Women's Rights Movement, sex as well). The proximity of the two events is a very tempting indicator of the Movement's relevance to the rise of affirmative action.

Much has been said lately of diversity as a goal of affirmative action programs, that they seek to promote diversity through making college admission more widely available to otherwise underrepresented groups of individuals. The

notoriety gained by the *Bollinger* court cases again finds itself applicable here. According to the University of Michigan Law School, whose affirmative action policy was protected by the Court, the school seeks to admit students who show a “strong likelihood of succeeding in the practice of law, and contributing in diverse ways to the well-being of others.” It furthermore seeks “a mix of students with varying backgrounds and experiences who will respect and learn from each other.”⁵² The notion that the school seeks to promote a mix of backgrounds in the hopes that it will lead to shared learning is implicit of the promotion of diversity, more generally, as a major goal of the institution.

However, the idea that this desired mixture of backgrounds would not occur naturally implies one of two possible causes. Either those groups that are otherwise underrepresented simply do not desire to pursue the path toward higher education, or for one reason or another, they have encountered less success in their pursuit of it. While the first suggestion is entirely compatible with the hypothesis that diversity in every facet of life is not a necessary outcome of the ideal world, surely we do not want to suggest that certain groups have a cultural tendency to reject higher education in present day America. Assuming that is not the case, then there must be a question of what causes the lack of success referred to in the alternative explanation. Taking what is obvious about traditional college admissions, an emphasis on performance in high school, the standardized SAT test, and the breadth of one’s additional extracurricular activities seem to be the major requirements. A lack of success in these areas is, then, the most likely cause of the lack of success in gaining college admission. Poor results

⁵² O’Connor, *ibid.*

academically suggest either inferior mental capacity or inferior educational environment. Again, it is quite obvious that no one is suggesting certain individuals to be of inferior mental capacities. Therefore, it must be the latter concern.

I use the term educational environment because it is broad enough to encompass a variety of factors that I believe should be included under its umbrella. These may include an inferior quality of education, which may be coupled with or caused by a lack of resources, as well as a lack of encouragement or motivation to succeed. Families and the community play an important role in fostering a proper learning environment for children, without which, a tendency to underachieve is quite possible. What is undeniable is that both a lack of resources and a lack of proper environment are more likely in areas of lower socioeconomic capital. The same can be said about extracurricular activities. Deficiency here can be attributed to a lack of resources or motivation. The point is that given the proper environment, the students won't choose not to achieve and excel, but rather would be inclined to. An immediate assertion could be made that poor socioeconomic conditions may have stemmed from discrimination or racial injustice among other things. However, the issue at hand is that a lack of success in these resume-building areas is likely attributable to a poor educational environment and the presence of a poor educational environment is more likely in poor socioeconomic areas.

The concern then should be a policy geared towards increasing representation among those who suffered poor educational environments. This is

not the case though. Many academic institutions that utilize affirmative action focus on race and sex rather than specifically victims of detrimental educational environments. This identification of race and sex leaves out some of the underrepresented due to the lack of success previously mentioned, while including others who may have enjoyed academic success and would not have required aid in attaining their individual representation among the academic community. Because the institutions choose to focus on things such as race and sex in spite of this fact, I am inclined to believe that there is something about those characteristics the universities seek to promote.

This brings me back to my initial observation on the proximity of the rise of affirmative action and the Civil Rights Movement. An entirely plausible explanation for the universities' continued focus on race and sex is the desire to end or counter discrimination based on those characteristics. While that in and of itself is an undoubtedly admirable motive for instituting such policies, it raises two further issues. First, it runs counter to the proclaimed concerns of diversity and under representation. Second, and more importantly, the continued existence of a proactive policy providing aid to perceived victims of discrimination, has inevitably led to the perpetuation of the very discrimination it sought to combat.

Even if the universities were to assert the argument that it is in fact discrimination that leads to poor socioeconomic conditions, and in turn a low rate of success in education, and ultimately under representation of those groups discriminated against, the use of affirmative action policies to counter the effects of that discrimination nonetheless perpetuates it. With regards to race, there are

specific ethnic groups often designated the favored minority status. Usually, these include African, Mexican, Puerto Rican, and Native American.⁵³ By targeting specific racial groups to receive a benefit under affirmative action as a means of increasing their representation, an institution essentially interprets a statistical generalization to suggest that the given group is underrepresented through the traditional admissions process. In identifying a given racial group as eligible to receive affirmative action, that institution has (maybe inadvertently) labeled that racial group. Before elaborating on the implications of that label, it is necessary to examine the nature of generalizations.

Statistical generalizations are assertions about a broad subject group based on patterns exhibited with regularity in one's observation of that group. In order for a statistical generalization to hold, it must be true for the majority of the subject group, though there will always be exceptions. An example of a statistical generalization might be that "doctors are wealthy." While statistical generalizations can often be useful since they are based on observation and data, and can thus often be well-founded rather than subjective, a problem arises when their assertions begin to take on a negative connotation. Few would find issue with statistical generalizations about a group that implied lavish praise of an ability exemplified by a number of the groups constituents. However, in cases where such a generalization implies an insult, lack of ability, or any general debasing characteristic, that generalization becomes a stigma. Suppose observation has led to the discovery that a number of members of a certain subject group displayed an inability to do some task. The statistical generalization that

⁵³ Thomas, p. 9.

has formed labels the entire group in generality as incapable of performing that task. Even if it is true for the majority, the implication that even the truly capable members of that group cannot perform the task is an insult to their abilities. Over time, the acceptance, continuation and furtherance of such a generalization would lead others to assume all members of that group incapable, discounting the genuine abilities of some.

This stigma phenomenon is precisely what has happened with minorities as a result of affirmative action. Because the policies labeled certain ethnic groups as underrepresented by traditional admissions processes, they implied that those groups were not achieving admission on their own and thus needed further help in order to gain admission. That generalization is one implying a negative, in this case the lacking of traditional academic abilities. Any negatively framed generalization that becomes accepted becomes a stigma for the entire subject group. The case at hand is no different. Because minorities have been labeled by affirmative action as needing assistance in gaining admission to college, a stigma developed that any minority in college got where they were because of that assistance. The stigma discounts the abilities and talents of many individuals because the institution has labeled the racial group in general as in need of assistance to gain adequate representation on campus.

The fact that the stigma is not true makes little difference. Because the generalization exists and is accepted, the stigma casts its shadow over the entire group. Whether an individual with minority heritage benefited from affirmative action or not makes little difference. They are stigmatized by the program with

the assertion that if they were successful in college it was a result of affirmative action and not their own hard work and talent.

The shadow of this stigma will haunt any minority individual to the extent that it, in effect, perpetuated the discrimination that may have obstructed their pasts. However, beyond even the stigma's implication that all college-bound minorities must have benefited from affirmative action, lies an even more horrid accusation. The stigma cast by affirmative action also implies a modern adaptation of Bernard Boxill's critique of the Caucasian observations about slaves. "[B]ecause the race idea supposes that a racial essence accounts for the behavior of the members of a race, it gives those who are impressed by it an excuse to take the slavish behaviour of slaves to be evidence of an essence that determines how they behave."⁵⁴ That is, in the modern context, the inferior performance of minorities is taken as evidence that they are naturally inferior. This implication of the stigma is far more harmful, derogatory, and damaging than the first, yet both are equally powerful critiques of the negative effects of affirmative action policies on those they seek to aid.

⁵⁴ Boxill, p. 22.

9.**Proposals, Alternative Solutions, and Their Consequences**

Throughout this discourse, I have endeavored to illustrate just how flawed affirmative action is in concept and form. My critiques vary in discipline, and condemn the concept on multiple levels. The greatest failure of affirmative action, however, is referred to in the very title of this project. It was meant to solve a racial problem. Whether its advocates focus on discrimination or diversity, affirmative action inherently acknowledges and attempts to address the achievement gap that exists between minorities and Caucasian Americans in the United States. While this gap goes beyond education, encompassing socioeconomic status, occupational availability and ascent, and other facets of life, each of those other concerns is related to education. Without education, prestigious jobs are out of reach. Without elite jobs, socioeconomic success and the accumulation of wealth are unobtainable. A lack of wealth relegates families to areas with few resources, lower quality of education, and a far greater degree of external pressures to detract a student's focus away from education. From there the circumstances repeat themselves forming a cycle of inadequacy that perpetuates the disparities in achievement at all levels of life.

Affirmative action cannot resolve this achievement gap that plagues minorities in America. Its legal and ethical consequences lead many individuals, of all backgrounds, to detest its use and likely fuel the stigma its existence casts upon all minorities. That stigma is the equivalent of discrimination and can

perceivably harm the career opportunities of all minorities, if employers believe the stereotype it casts, and dismiss achievement, merit, and qualification as the result of affirmative action rather than desert. Its persistent facilitation of minority students into more competitive schools than the Caucasian peers with the same abilities, will continue to result in lower performance for minorities relative to comparably skilled Caucasian students after graduation. This concern may even increase the achievement gap as Caucasian students continue to excel at less competitive schools, while minorities fall behind at the more challenging institutions and ultimately fail to acquire the necessary skills to gain elite professional jobs after graduation.

If affirmative action is not the solution, the inevitable question arises: What is? One explanation is simply the termination of affirmative action all together. By doing away with the race-conscious policy, all of the above mentioned problems associated with it would eventually disappear. It would not exist to garner the hostility of the public, the stigma would eventually dissipate as minority students continue to succeed in the program's absence. Yes, this will happen. The statistics from California, Texas, and Florida prove it. Finally, without affirmative action ushering minority students into super competitive institutions to their frequent detriment, the future prospects for minorities relative to the Caucasian peers would begin to level off.

This prospective success is only possible, however, if other programs are initiated to supplement the current educational opportunities available to most minority students. Critics would point out that the results achieved in California,

Texas, and Florida were only possible because of the race-neutral educational initiatives instituted to replace affirmative action. While this may be true, the fact that the alternatives are race-neutral suggests that they apply to all individuals and grant opportunities for which all can compete, unlike race-based affirmative action. Race-neutral initiatives would not carry with them the stigma, legal, and ethical issues that affirmative action does.

I would propose that this type of initiative take the form of efforts within school systems, communities, and families of our nation's youth to foster a spirit of encouragement and the expectation to excel and pursue post-secondary education. Such a communal sense of unity can propel individuals to strive for success and yearn to accomplish tasks they otherwise might not aspire to complete. The Civil Rights Movement from which the concept of affirmative action arose epitomized this idea. Without any aid from the government and despite the active oppression of a great deal of the public, African Americans bonded together during that era, forming an unyielding sense of community. The community expected each of its individuals to do what was necessary to achieve their goals, and these lofty expectations encouraged individuals not to let the community down. Much of that sense of unity and encouragement was facilitated by the institution of religion, with which many of the Movement's participants were involved. The presence of a major public institution to preach the belief in high expectations further strengthened this desire.

Like the African American community did during the Civil Rights Movement, parents, teachers and other authority figures influencing today's youth

could bond together under a united goal of preaching higher expectations and the desire for our youth to succeed through education. The school systems could replace churches as the institutional catalysts in fostering this movement. Eventually, the expectations would become ingrained in young students, while parents and teachers would remain involved in guiding their students towards success. If the African American community could achieve the tremendous success it did in the 1960s with all the odds against them, then our nation's youth of all backgrounds can aspire to educational excellence with the support of their families, communities, and governments.

In focusing on community involvement and the instillation of a mental desire to excel, progress will likely be slow, as critics of this proposal will likely point out. However, coupled with the benefits of removing affirmative action, it provides a legitimate if protracted solution to the issue of racial achievement disparity.

Another suggestion that might provide for more immediate results focuses on the incorporation of more forms of achievement in college admissions policies, besides the traditional academic indicators. These alternative forms of achievement might focus on the arts, athletics, leadership, language, or other skills that can be learned, honed, and worked toward by virtually all students. Furthermore, these areas of achievement of skill are manifestations of excellence in one form or another, in that they required devotion and aspiration on the part of those who possess them, and often indicative of greater ability than an individual's peers, in the given field. These manifestations of excellence need not

be secondary indicators reserved for deciding between applicants with equal academic qualifications. The whole concept of expanding the fields of achievement beyond grades and test scores is to accommodate capable individuals who have lacked academic success either due to an educational disadvantage or simply did not excel academically for other reasons. While a minimum capacity for traditional academic achievement would be necessary to ensure their likelihood of success in college, a policy in which a tremendous gift for comic book design could be viewed favorably in comparison with a high SAT score would open opportunities to students whose circumstances could not facilitate the skills necessary to excel on standardized tests. Furthermore, if students knew that they could pursue what they were good at and use that to gain admission into college even without exceptional grades, the desire to pursue postsecondary education would likely increase among traditionally underrepresented groups.

Critics might claim that such a policy would encourage students to give up on traditional education and focus instead on some other skill. By maintaining a baseline of traditional achievement necessary to be considered for admission, this worry would cease to be an issue, because students would know that they had to maintain a certain degree of traditional academic knowledge and skill.

The ideal, of course, would be the abolition of affirmative action, coupled with the immediate implementation of the new, broader admissions evaluation policy, and the incremental and deliberate long term implementation of the community outreach/encouragement program for the fostering of higher expectations. Applied together, these proposals would provide immediate,

intermediate, and long term methods of promoting greater equality in achievement and closing the gap between Caucasians and minorities. Though the provisions would apply broadly to all students across all racial and ethnic backgrounds, the effects of the policies would presumably aid minority students to a greater degree.

Because of discrimination, a lack of resources, environments non-conducive to learning, the achievement gap, or any other issues, many minority students cannot currently compete for admission alongside their Caucasian counterparts. Whatever the reasons for that discrepancy, these solutions attempt to compensate for that by means of providing more opportunities that are open to all. More avenues to success should, in theory, equate to a more widespread pursuit of success. Since Caucasian students are, for the most part, already successful at traditional academic achievement, there is no reason to believe that they would abandon that success to pursue these new avenues and crowd out minorities. Instead, minority students would have substantial access to these alternative opportunities for achievement. These opportunities would likely lead to higher levels of minority enrollment in institutions of higher education, which in turn would eventually lead to greater success and the development of a greater likelihood for acquiring traditional academic achievement. While this is extremely speculative, it is not inconceivable that this process could eventually render the alternative achievement policy obsolete.

These are but a few of the possible alternatives to affirmative action as a means of closing the achievement gap. Critics of affirmative action should

welcome all proposed alternatives for consideration, since criticism without advice proves a futile activity. With that in mind, even without any proactive policy alternative in place, the very absence of affirmative action is the single most effective solution to the racial problem. The positive effects of this change will eventually lead to the desired outcome, though left to run its natural course, will undoubtedly taken far longer than with the aid of other proactive measures.

10.

Conclusions

Quotations such as, “All...are created equal;” “the pursuit of happiness;” and “justice for all” are three of the most recognizable phrases from two of the most famous symbols of American patriotism. The first two are excerpts from the Declaration of Independence, the very document that marked the conception of the country we know today. The third phrase is derived from the Pledge of Allegiance to the American flag, the international icon of this great democracy. Together, the three phrases represent the essence of the American spirit that lead to events that those symbols commemorate. Since the country’s founding, American have expected, even demanded the protection and preservation of their inalienable rights, including the right to pursue success in their lives, the freedom from oppression in along the way, and the right to be held to the same standards as each and every one of their fellow Americans. History has proven these simple requests far more complex than their authors would have anticipated. In response to these challenges, America has engaged in a variety of practices to facilitate our evolving understanding of these rights. The concept of affirmative action epitomizes this American desire to act in the name of promoting civil liberties.

It is undeniable that the concept of affirmative action arose out of the Civil Rights Movement and the push for racial equality during the mid-twentieth century. Owing its conception at least in part to the growing collective consciousness of the pervasive racial discrimination that plagued the country’s

history, affirmative action may incorporate broader topics, but a focus on race is prevalent throughout its manifestations, particularly with respect to education.

The provision of racial preference supplied by affirmative action is often justified either explicitly as a means of aiding historically disadvantaged minority groups in the pursuit of upward success, or implicitly within the professed interest in promoting diversity, which acknowledges achievement gap between minorities and Caucasians. Whatever the justification, race-conscious affirmative action is clearly an attempt to move American society closer to the ideal of universal fair opportunity and roughly paths of resistance in the pursuit of such opportunities.

The application of the concept of affirmative action has taken a variety of forms in the context of education. Some policies have granted racial identification more significance than others, some have quantified its importance, and some simply acknowledged its contribution to a diverse community. The differences between those policies have proven the determining factors in the official legal status of affirmative action policies by the Supreme Court. The Court has maintained its opinion that race can play a role in the narrowly tailored pursuit of diversity in academia. The language of the law, however, can be interpreted in such a manner as to suggest that race should never be used in these processes. Recent lawsuits brought by minorities indicate that the majority of Americans may be shifting towards this viewpoint that all race-conscious affirmative action is unconstitutional.

In a theoretical context, the very concept of affirmative action is flawed. Even a general philosophy on fairness necessarily concludes that the use of race

in evaluating applicants for skilled positions, such as academic study, is unjust since racial affiliation is completely beyond the scope of individual control, when other factors provide applicants a greater opportunity to compete with their peers, an ideal emphasized throughout American history.

In practice, affirmative action policies have proven to be of little benefit to any of the entities involved. Statistics from major institutions of higher education conclude that levels of minority admission in academic institutions is virtually the same with and without affirmative action, so long as race-neutral educational programs replace them. It can even be concluded from some studies, that the absence of affirmative action is actually more beneficial to the long term success of the minority students that would have received its preference.

The most striking flaw of affirmative action, however, is that regardless of its intent, its application has resulted in the very racial discrimination that it arose to counteract. The stigma of inferiority that affirmative action casts on all minorities, regardless of individual interaction with the concept, is far more damaging than the results of the policy's absence. Rather than combat discrimination, affirmative action reaffirms the misguided stereotype that minorities are inherently inferior and incapable of competing with Caucasians on their own merits.

Affirmative action cannot close the achievement gap between minorities and Caucasian Americans. It violates individual liberties and in recent cases has denied minority students access to education. It ushers minority students into elite institutions on the basis of traits that will not aid them in learning, while

simultaneously denying those same opportunities to equally qualified and talented students. Rather than increase the socioeconomic success of minorities by providing the educations necessary to gain more rewarding jobs, affirmative action may actually harm minority career prospects relative to their Caucasian counterparts, potentially furthering the achievement disparity. Finally, the discrimination produced by its stigma will haunt all minorities, and may lead to attitudes among potential employers that discount the merits of well qualified minorities, dismissing those skills as the work of affirmative action.

Though affirmative action is not the solution, a persistent achievement gap will remain unacceptable in the eyes of the American public. Simply removing the harmful side effects of affirmative action may lead to some equalization, but further actions could also be taken to catalyze this process. Programs to foster higher expectations in schools, communities, and families would likely encourage students of all backgrounds to strive for academic and professional success. Recognition of non-traditional forms of achievement as beneficial qualifications in college admissions evaluations would also enable and encourage a more widespread desire to pursue higher education among those individuals that have been educationally disadvantaged.

Whatever proposal ultimately becomes public policy is irrelevant so long as affirmative action continues to pervade the educational community and prevent minority students from attaining the success that they, as Americans, deserve to pursue, and have long been denied. Recognition of the concept's flaws is the essential first step. It is crucial to acknowledge that affirmative action is

incapable of solving the problem. Doing so will force individuals to rethink the issue at hand and realize the need for an alternative policy if we hope to solve the problem. Only then can the discussion over what sorts of alternatives might prove most successful in balancing achievement begin in earnest.

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Written Summary of Capstone Project

Disarming Affirmative Action: Why the Concept as We Know It, Cannot Solve the Racial Issue

“In what ways would your personal experiences contribute to the diversity of the community here at our University?” Some variation of this question faces each and every individual applying for admission to an institution of higher education. I was confronted with this four years ago in applying to undergraduate studies here at Syracuse University and will face it yet again as I seek admission into law school following my graduation this May. While millions of young people are faced with this daunting question every year, a question that may very well impact their future lives, the complexity of the issue at the core of the diversity question is far less frequently understood. What is more, the affirmative action policies that utilize the information garnered by such diversity questions are in and of themselves perplexing.

Debate in recent years, especially in the famous *Bollinger* cases, has pushed the discussion over the validity of affirmative action into the spotlight. Questions over what its purpose is, whether that purpose is being fulfilled, whether that purpose is even justified, whether it is fair, whether it is legal, and many other concerns have occupied scholars, educators and everyday citizens alike. It is these issues and their relevance to my own life at this juncture that inspired me to pursue a study on affirmative action. The project itself explores various concerns and questions regarding affirmative action in education and concludes that the program as an institution is inadequate. The paper addresses

the seeming contradiction between the goals of affirmative action and its apparent violation of the Civil Rights Act. It considers the issue of whether it is fair to use an uncontrollable factor such as race in determining which individuals are accepted at various academic institutions. Most importantly, it reveals the paradoxical outcome of affirmative action programs that ultimately renders them ineffective in the pursuit of equality. That is, because of their very nature as race conscious programs, they cast a damaging stigma on all minorities regardless of whether they even benefited from such programs. Finally, the project goes on to propose alternative solutions, namely the fostering of higher personal and community expectations of all our youth, as well as the implementation of more non-traditional criteria for consideration in the college admissions process.

Formatted in the style of a scholarly discourse, the project is an essay that provides its audience with analysis and evaluation of the affirmative action issue from every angle. It begins with a philosophical discussion of the ideal world and a definition of relative equality. Far from reality, the ideal world, as identified in this paper, is a hypothetical situation in which all people are free to pursue their passions, there is no discrimination, and thus no need for proactive measures to “level the playing field.” From there, the paper transitions into an analysis of equality and opportunity in the real world, contrasting it with the ideal, exploring how these differences developed, and ultimately proposing that it should be the goal of the society to bring the real world into closer alignment with the ideal world. The next section discusses current affirmative action programs and policies as attempts to bridge that gap between the real world and the ideal.

Following that analysis is a critique of these programs raising concerns over fairness, legality, stigmatization of its beneficiaries, and their failure to recognize non-traditional forms of excellence or intelligence. Subsequently, statistical data from various policies such as those in Texas and Florida will be drawn upon to question affirmative action's success. Finally, in recognizing that the ideal has still not been met, the project offers a possible solution focusing on the fostering of greater expectations of the nation's youth by parents and by communities. This solution both anticipates likely criticisms and rebuts them. In acknowledging that the implementation of a community-wide spirit must develop over time, the paper takes into consideration the generations that will be caught in transition by proposing a revision of the current criteria evaluated in college admissions processes.

In undertaking this project, I have relied mostly on traditional scholastic methodology for presenting the argument. First and foremost, I conducted a great deal of research into current scholarly writing on the subject. This included studying books, journals, internet blogs, and legal resources. Similarly, in searching for statistical data and program details, the project required extensive use of internet resources pertaining to government and university data, as well as that of interest groups. In developing and proposing a solution, it was necessary to imagine the implication, both positive and negative of each suggestion. Rather than promote an already popular existing solution, I opted to propose my own alternative, leaving some creative license, but requiring a great deal of consideration for possible criticisms, and a continuous, almost Socratic, evolution

of ideas in order to counter those perceived critiques. Finally, since the project itself took the form of an essay, and thus required the application of deductive reasoning, analytical comparisons, a mastery of rhetoric, and an overall command of the language in order to successfully convey the argument it proposes.

Equality has been synonymous with the idea of America since the nation's founding. Despite the historical importance of equality and justice, struggles for racial and ethnic equality, which are at the heart of affirmative action, have long scarred our nation's history. Equality concerns each and every American and its universal application is a cause that every engaged citizen should promote. Affirmative action policies not only fail to provide the equality they purport to promote, but often hinder it and even perpetuate the injustices that led its proponents to establish the programs in the first place. Consequently, a look into the truth about affirmative action is more than an exercise in engaged and responsible citizenship. It is also an attempt to shed light on a problem, propose a solution and advocate a fairer, more ideal world.