

Running Head: AFFIRMATIVE ACTION LEGALITY, FAIRNESS, AND ETHICAL  
USE IN COLLEGE ADMISSIONS

Affirmative Action Legality, Fairness, and Ethical Use in College Admissions  
at Both the Graduate and Undergraduate Levels of Federally Funded Programs

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### Abstract

Affirmative action has been a strong subject of debate for the past 25 years. Its use in decisions pertaining to college admissions has even been ruled on by the U.S. Supreme Court. Its history has been littered with attempts to rectify social injustices for minorities. Questions have been raised as to its fairness, ethical use, and legality. Many large, state universities across the country have been implementing some type of affirmative system to make quantifications in admitting new students. Has a measure of social importance been justified in its use? Closer analysis will reveal the true implications of such a policy, not only on the institution itself, but on the students who it tries to assist.

### Professional Issue

Affirmative action is the practice, usually by institutions, of giving preference to racial minorities or women when hiring employees, giving awards, or deciding whom to admit (So You Wanna, 2003). It was designed to allow for any disadvantages in an individual's background to be compensated for, when their merits for entrance to an academic institution were being considered. If a person came from a minority household, it was pre-assumed that the likelihood of an unfair hardship would be present. To give those, who might otherwise be well-qualified an equal chance of admittance, a system was designed to give additional weight to an applicant's file based on their race/ethnicity.

Initially, affirmative action involved setting racial quotas, but now it usually involves using racial, gender, socioeconomic background, and/or sexual orientation status as a positive factor in hiring or admissions (So You Wanna, 2003). Most people only consider it to be concerned with an individual's color, even when other considerations are made by an admissions committee. The states of California and Texas have been leaders in the areas of implementing systems of affirmative action to use in education. However, both states have reversed their original positions, but the decisions were not made on a national level. In the year of 2003, the topic did go all the way to the Supreme Court.

The arguments for and against using such a program each have valid points. Some will argue that it is unfair on a face value, while others will debate the likelihood of negative stereotypes being perpetuated against those who benefit from such loopholes, if you will. Others will claim that racial diversity does not necessarily lead to diversity of opinion (So You Wanna, 2003), which is considered to be paramount at higher levels of learning. There are no clear-cut measures as to which is more beneficial to the students.

### Background of Professional Issue

While affirmative action may have a much wider context within which it may be considered and evaluated, its history within only academic and educational settings is rather well-documented. In 1961, President Kennedy signed Executive Order No. 10925, putting the term “affirmative action” into its first use in relation to civil rights (Cable News Network [CNN], 2003). This initial reference was made toward employing practices dealing with contractors, but the premise was set to move forward. In 1964, President Johnson signed into law the Civil Rights Act of 1964. Included in the Act is Title VI, which prohibits race discrimination in education (CNN, 2003). Supporters of the bill did not believe that it would lead to preferential treatment of minorities.

In 1974, the Supreme Court agreed to hear *DeFunis v. Odegaard*, but they did not comment on racial preference, as the timing of the case made it moot. By the time the Court got around to hearing the case, the petitioner was about to graduate due to injunction orders that permitted him into the school. Later, in 1978, the Supreme Court did hand down a ruling in *Regents of the University of California v. Bakke* whereby they declared that minority candidates may not be separately judged among themselves. However, the ruling did allow for some consideration of race that might be appropriate to achieve “diversity” (CNN, 2003). Many schools renamed policies “diversity programs”.

California, which had been the first state to put into practice a policy of affirmative action, decided to reverse itself in the summer of 1995. Upon the urging of Governor Pete Wilson, who was trying to gain a presidential bid, the University of California regents voted to stop admissions officers from using race-based admissions practices at the UC system’s nine campuses (Booth, 1995). Wilson was quoted as saying,

“It is wrong for university officials to admit unqualified students on the basis of race alone, while denying opportunity to qualified applicants.”

The *Bakke* ruling carried over the country for the next twenty years. In 1996, the 5<sup>th</sup> Circuit Court of Appeals rendered a decision in *Hopwood v. Texas*, in which it was held that race could not be used as a factor in admissions at the University of Texas Law School (CNN, 2003). The Supreme Court declined to review this case. As a result, the Texas Attorney General ruled that this basic ban on affirmative action also had to include financial aid, recruiting, and the undergraduate program (Pressley, 1997). The following year the freshman class only had 150 African-American students, half the number from the previous year. And only four African-Americans entered the law school that Fall.

In the year 2000, the state of Florida banned racial preferences in state college admissions, opting for a percentage plan to the university system for top high school performers (CNN, 2003). However, it has been shown that these types of programs do not provide the intended results. From a Harvard University study, research shows that it is incorrect to attribute any significant increase in campus diversity to a percent plan alone. Institutions have not been successful in maintaining racially/ethnically diverse campuses through percent plans (Horn & Flores, 2002). The idea being that those who were able to achieve a GPA in the top 20% would've been accepted to a college anyway.

In 2003, two major cases regarding affirmative action practices in college admission procedures were heard by the U.S. Supreme Court. The first, dealing with undergraduate admissions at the University of Michigan, was *Gratz v. Bollinger*. The second, dealing with graduate admissions at the University of Michigan's Law School, was *Grutter v. Bollinger* (CNN, 2003). In the first case, the Court ruled that the

affirmative actions policies were unconstitutional and had to be discontinued. In the second case, the Court ruled that law school may continue its practice of giving preferential consideration to minority candidates.

Q: Is Affirmative Action a legal, fair, and ethical rule to employ in admissions?

#### Key Legal Issues

There are many key legal issues that are the basis for the debates of the courts. Going back to the *Bakke* case (*University of California Regents v. Bakke, 1978*), the Supreme Court ruled that the UC Davis Medical School admission policy violated both the Federal and State Constitutions and Title VI. They found that the program operated as a racial quota, as minority candidates were not compared with/to non-minority applicants. Justice Powell concluded, “petitioner’s special admissions program, which forecloses consideration to persons like respondent, is unnecessary....and therefore invalid under the Equal Protection Clause.”

McCutchen and McAcAuliffe (2003) explain that “The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution provides that ‘[n]o state shall...deny to any person within its jurisdiction the equal protection of the laws.’” Originally designed to protect the freedoms of newly released slaves, the Clause has served as the legal foundation for desegregating public schools. Courts analyze Equal Protection cases by applying different levels of scrutiny. For classifications based on race or national origin, courts apply strict scrutiny. Using this analysis, “racial classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.”

Title VI provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance” (McCutchen & McAuliffe, 2003). Title VI is relevant to the consideration of race because most universities receive federal financial assistance. Section 1981, of 42 U.S.C. subsection 1981, provides that “[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts...as is enjoyed by white citizens....” This is particularly relevant to the situations of college admissions because the Supreme Court has ruled that the provision of educational services constitutes a “contract” for the purposes of this section.

In the case of *Gratz v. Bollinger (2003)*, the claimants filed that there were violations made under the same categories as Bakke did. In this situation, the undergraduate school automatically added 20 points to an applicant’s file score simply if they were a minority. The University said that they needed to have a system in place to weed down the excessively high numbers of applications that they receive. The Court found that the school’s admission policies operated as the functional equivalent of a quota, running afoul of Justice Powell’s opinion, and thus struck down the practice.

A different precedent was set with the Supreme Court’s decision in the case of *Grutter v. Bollinger (2003)*. Here, the university was not assigning a set value of points to an applicant’s file. Instead, they were using race as something like an unofficial tie-breaker to choose between students of equal standing and credentials. The policy of the law school does not use race as a “predominant” factor, and its use of race was “narrowly tailored” because race was merely a “potential ‘plus’ factor”. The Court held that “The

Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal Protection Clause, Title VI, or subsection 1981".

### Key Ethical Issues

One has to consider whether there is enough of a benefit gained by the use of affirmative action to justify its use in college admissions proceedings. There are valid arguments to be made for both sides of the controversy. The U.S. Supreme Court has recognized two interests that are sufficiently compelling to justify the use of race in higher education admissions: (1) promoting student body diversity; and (2) remedying the present effect of an institution's past discrimination (McCutchen & McAuliffe, 2003).

The major academic institutions of the U.S. are proud to boast of the diverse student populations that inhabit their campuses. Some would argue that "...affirmative action was producing a diverse student population and that the universities, far from suffering, were world-class" (Booth, 1995). California led the nation on affirmative action and produced some of the most diverse student populations in the world. Micheal Sharlot, dean of the University of Texas School of Law, said "We're a school that over the past decades has produced more African American and Hispanic lawyers than any other law school in the United States. We've played a major role in diversifying the legal profession" (Pressley, 1997). The University of Texas had practiced affirmative action.

In writing the opinion for the Court on *Bakke*, Justice Powell concluded in his paper that achieving a diverse student body was a sufficiently compelling reason to justify the use of affirmative action. In deciding on *Grutter*, the Court resolved that universities are places for the "robust exchange of ideas", and because of this,

educational institutions have a protected First Amendment interest in the selection of students and faculty (McCutchen & McAuliffe, 2003). The major question then, becomes how can these universities meet their expectations of educational diversity of the student population, and at the same time be fair and ethical toward the students?

As for the second compelling interest of rectifying past discrimination of the institution, that was never an issue in any of the cases presented. However, the current situation requires an ethical approach to student selection that will not treat prospective students with an undue level of unfairness. How do you tell an otherwise qualified student that they are not going to be admitted, simply on the basis of their ethnicity? This is not a characteristic over which they had any control or input. How do you let down a student who has worked so hard their entire life to gain admittance to a specific program, only to be rejected on the basis of his or her skin?

It gets to a point here where one has to consider the past consequences of similar actions. If it was not right to exclude someone in the past, because they were a minority, how is it correct to do so from the opposite end of the spectrum? This is where an institution gets itself into a situation of reverse discrimination. To exclude someone because of the color of their skin hurts just as much for the non-minority applicant as it did for the originally discriminated class. What may be seen as a benefit for one, may be a major hindrance for others. Equality in numbers is not rightly a justification for bias.

Many professors believe that the quality of one's education is in direct correlation with one's exposure to culture and diversity. As one law professor states, "...a diversity of student opinions makes for better classes," and additionally, "...we cannot but agree that members of different races see things differently and have different views about how

history has unfolded....” (Finkelman, 1998). So why would students also not understand and agree that the value of their educational experience is enhanced by a more varied student population? Should not students accept the propaganda of affirmative action and demand, themselves, that it always be in place, regardless of one’s race?

### Analysis and Application

In deciding the value of affirmative action and the fairness in using it, it will be important for one to consider it in relation to the six foundation principles. These are: non-maleficence, autonomy, beneficence, justice, fidelity, and veracity. From these applications, one will be better able to decide how they feel about affirmative action.

Non-maleficence is defined as the value of desiring to prevent harm (Sperry, 2003). No academic institution would desire to harm any student, but decisions need to be made as to who will, and will not, be enrolled. One has to wonder about the sincerity of the admissions committees. By admitting students with lower criteria, they set the student up for ridicule and judgment. It becomes easy for the student to become stereotyped by their inclusion based on race. Others will tend to believe that the placement was not earned, and hence, the student is not a rightful equal. Both the criticism and the unfair classification will label him or her as being unintelligent. Continuing this train of thought, if a student is admitted who otherwise would not have been, how is it beneficial to them if they are not able to successfully complete the work?

Autonomy is defined as the value of desiring to promote the freedom of others to make personal choices (Sperry, 2003). Affirmative action has a way of doing both, promoting autonomy and not. If a minority student is admitted under the policy, then the program is furthering that student’s choice to become a student at that institution. This

would be considered good. However, if another prospective pupil applies and is denied, under the same policy, then it would have to be said that it was not promoting that individual's choice to make the decision of becoming a student at that school.

Unfortunately, there are limited numbers of openings at each university. For one person to be admitted, means several others have to be denied.

Beneficence is defined as the value desiring to do good (Sperry, 2003). All schools would like to do what is right for each applicant. Many feel they are doing right by a student when rejecting him or her, fearing that they would not succeed in that particular environment. When affirmative action is used to allow a student to gain entrance, the admissions committee would certainly believe that they were doing what was good for the student, as they wanted to attend that particular institution. However, doing good for one, may not be doing good for another. When one applicant is rejected, with equal credentials, it can't be said that the policy was good for that individual.

Justice is defined as the value desiring to promote the fair treatment of people (Sperry, 2003). This would have to be the one consideration that would come under the most fire in regard to affirmative action. How can a policy promote justice when it uses race as a tie-breaker among equally qualified candidates? The treatment is not fair no matter how you view the practice. Equal means equal and using weighed point systems does not treat people on an even basis. Yes, some people come from a disadvantaged background. However, the people competing with them had nothing to do with that. For a policy to promote justice, the same criteria must be used for all who apply.

Fidelity is defined as the value desiring to be true to one's commitments (Sperry, 2003). As far as a university is concerned, they would have to be committed to providing

a quality education to all who apply for admission. Many arguments have been made that a better education is achieved through a more diverse student body. If this is correct, then affirmative action would have the positive effect of allowing schools to promote fidelity. However, if a state system is also committed to providing a quality education to all of its citizens, the practice of excluding many of them based on their race would not allow this.

Veracity is defined as the value desiring to tell the truth (Sperry, 2003). This will certainly provide major obstacles for the practice of affirmative action, for there is nothing true about it. Schools are telling applicants that they may be admitted even when they don't meet the minimum qualifications. Likewise, they are telling qualified applicants that they may not be admitted. There is nothing truthful about penalizing those people from today who had nothing to do with the past. Affirmative action puts false hopes into some students' heads, while crushing the dreams in the minds of others.

### Conclusion

I find myself to be in a very unique situation in relation to the topic of this paper. The person writing this was himself, the "victim" of affirmative action. I spent a year of college attending classes in Los Angeles while participating in an exchange program. I found that I enjoyed the city so much, that I decided to apply to the University of California at Los Angeles School of Law. This was back in the Spring of 1995, before California voted to abolish the practice in educational admissions. My application was returned to me and no decision had been made on it. It was simply stamped, "Not accepting applications from Whites for two years". I could not believe it. Due to the practice of affirmative action, all the time and effort and work that I had put in was for naught, as the school would not even read my application. I was in complete disbelief.

I will not say that there are not some valid points made as to the defense of using affirmative action. If an institution has done wrong, then yes, they should correct the injustice that was perpetuated. And, yes, I do believe that many of us were fortunate to grow up in the households, neighborhoods, and schools that we did. Many of us were blessed with caring families and quality school districts that prepared us well for the future. However, I do have a major contention with simply admitting a student based on the color of their skin. There has got to be a better way to equal the playing field.

The strongest argument I have read for the use of affirmative action, is its promotion of diversity among the student body to enhance the quality of the educational experience. This, I will concede, is a very strong argument. In a recent research study, conducted by Harvard University, of a large high school in a city of over 100,000 people that has only one high school, it was noted:

“Results from the survey suggest positive educational impacts of diversity for students in the district. Overall, substantial majorities of students report a strong level of comfort with members of other racial and ethnic groups. Students indicate that their school experiences have increased their level of understanding of diverse points of view, and enhanced their desire to interact with people of different backgrounds in the future.” (Kurlaender & Yun, 2002)

Having said this, I would have to say that my final opinion is that affirmative action, the way that it has been practiced, is not an appropriate means of equalizing the educational playing field. It is simply not right, fair, or ethical to exclude those who are the most qualified. For when you do, in essence, you are punishing them instead of rewarding them, for all of their hard work and dedication. That is the wrong message.

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