

**Is Diversity Racial Justice?**  
**Affirmative Action in Admissions and the Promises and Perils of Law**  
*For Challenging the Status Quo: Diversity, Democracy, and*  
*Equality in the 21st Century*, eds. Sharon Collins and David G. Embrick

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On April 1, 2003, a chilly gray day with cherry blossoms in bloom, thousands of people flooded the sidewalks of Washington, DC and the steps of the U.S. Supreme Court. The court was in the midst of hearing oral arguments in two historic cases, *Gratz v. Bollinger* and *Grutter v. Bollinger*, which challenged the University of Michigan's use of affirmative action in admissions. The crowd was energetic. People had come from across the country to make their positions heard, almost all of them in support of affirmative action. A sea of African-American, Latino, White, and Asian marchers with a national organization called BAMN held up red and White posters, "DEFEND Affirmative Action and Integration. FIGHT for Equality." Those with Students Supporting Affirmative action, a multi-racial collective of Michigan college students, wore blue and maize t-shirts with the slogan, "Race is a factor because racism is a factor." A Black college student had on a button, "40 acres or 20 points," referring to the land that many believed was owed to formerly enslaved African American farmers and the number of additional points that the Michigan undergraduate admissions office gave to applicants of color.

Others chanted about diversity. "Unity! Diversity! A better university!" repeated a group of marchers, one with a sign "Diversity is educational." Activists with the National Association for the Advancement of Colored People carried professionally made posters, "NAACP recognizes UNITY & STRENGTH in DIVERSITY."

Small groups of counterprotesters, nearly all of them White men, made their way through the crowd with handwritten signs, too. "Affirmative Action is Racist," read one. Another referenced a line from the famous I Have a Dream speech by Dr. Martin Luther King, Jr.: "Content of Character, Not Color of Skin."

The various slogans at the DC march reflected political activists' passionate views about the controversial practice of considering race in college admissions. These same slogans also reflect the three major legal frameworks that have, since the 1970s, guided the actions of colleges that opt to do affirmative action:

*Remedial racial justice:* An argument *for* affirmative action. According to this position, considering race in admissions is a means of rectifying past and ongoing barriers that have cut off opportunity for people of color because of their race. Example: "Fight for equality."

*Diversity:* An argument *for* affirmative action. According to this position, considering race in admissions is a means of achieving diversity, which is socially beneficial because students learn best and become more capable citizens when

they attend college with students of different racial backgrounds. Example: “Diversity is educational.”

*Colorblindness*: An argument *against* affirmative action. According to this position, any consideration of race in decision-making, even if the objective is to further opportunity for people of color, is discriminatory, denies individual liberties, and violates the U.S. Constitution. Example: “Affirmative Action is Racist.”

To understand the pursuit of racial equality in the United States, we need to understand what, exactly, law permits us to do regarding race and what it prohibits. This includes where these legal frameworks come from and how they are applied. We also need to understand how colleges and universities actually do affirmative action. College admissions policies can determine who has access to opportunity and who does not. Overall, college admissions favor affluent, predominantly White students, but when admissions officers do affirmative action—when they account for race as a positive factor—they can improve the life circumstances of people of color.

Since the 1970s, the U.S. Supreme Court, in response to challenges by conservative activists, has made it increasingly difficult for admissions officers to make decisions based on an applicant’s race. The court has narrowed the justification that colleges can use for voluntary race-conscious admissions, so that the goal of diversity is *the* acceptable rationale. How has law cut off an argument for remedial intervention and advanced arguments for diversity and colorblindness? What are the promises and perils of diversity under law? How do higher education leaders interpret the mandate for diversity? Ultimately, is diversity racial justice?

This chapter draws on legal doctrine, my ethnographic-historical study of affirmative action and the *Gratz* and *Grutter* litigation at the University of Michigan, my analysis of diversity discourse at other universities, and insights from socio-legal theories of law. It explains two key themes. First, law has established the official terms of debate over race-conscious college admissions policies. Legal contests have helped to make such policies culturally significant and politically controversial. Further, they have limited—but not (yet) altogether ended—colleges’ ability to give some favor to students of color in the admissions decision. Second, administrators at many selective colleges and universities have adopted diversity discourse, but not simply as a justification for affirmative action. They have made diversity an identity for their institutions. That identity symbolizes their values and, at least superficially, defines their actions. As this chapter shows, diversity, both as legal doctrine and as an organizational identity, affirms the cause of racial minority inclusion, but the actions taken in its name usually fail to recognize or adequately address the structural foundations of racial inequality.

### **Affirmative Action and Its History**

Affirmative action is a form of decision making that intentionally considers an individual’s race, ethnicity, or sex for the purposes of expanding opportunities for racial

minorities and women. It can happen in many domains of social life, but it is most prevalent in the workplace and in college admissions (When companies practice affirmative action, they take additional steps to ensure that they are recruiting, hiring, and promoting racial minorities and women to the same extent that they treat White people and men. Companies typically do affirmative action because they are large government contractors and thus are required by the federal government to do so.).

In higher education, the goal of affirmative action is to improve racial minorities' chances of being admitted to, attending, and graduating from universities and colleges—without requiring universities and colleges to radically change their standard admissions process. The targets are African Americans, Latinos, and Native Americans. Admissions officers take many different kinds of actions to reach and enroll these students, from outreach and recruitment activities (“soft” affirmative action) to admissions and financial aid decisions (“hard” affirmative action). Those “hard” forms of affirmative action are the most contentious. They are when universities distribute valuable, zero-sum resources to applicants, so, to critics, administrators appear to be picking winners (underrepresented minorities) and losers (White students and, for some, Asian American students).

Affirmative action is a surprising departure from the history and ongoing dynamics of institutional discrimination, which has long kept students of color off college campuses. Through most of U.S. history, simply being a racial minority almost always barred a person from becoming a college student. There have been, since the 1830s, historically Black colleges and universities, first created to educate freed slaves, and since the late 1960s, Tribal Colleges and Universities on Indian reservations. But the vast majority of the country's institutions of higher education were exclusively for White people up until the 1960s. The most elite schools were exclusively for White, rich males from the eastern seaboard, nearly all of them Protestant. This exclusion has had cumulative racial effects into the present. The benefits of higher education are passed down through families, generation by generation. One specific way this plays out today is through legacy preferences, which give favoritism to the children of alumni. Legacy admissions are commonplace at selective institutions. That is a huge strike against students of color, especially for those who are first generation college students.

In the period after World War II, in the face of changing demographics and growing social pressures, the ways that admissions was done changed. Elite universities moved away from admissions based on family lineage. They adopted standardized testing with the pretense of making colleges more open and meritocratic, particularly for Jewish students, whose enrollment was prohibited or limited by admissions quotas (Lemann 1999). Consequently, a relatively wider range of types of students were admitted.

A few elite universities and colleges first began to do affirmative action in admissions in the mid-1960s. Top university officials were inspired by the Southern civil rights movement, which was fighting against discriminatory Jim Crow laws and for full citizenship rights for Black people (Stulberg and Chen 2014). These leaders believed their institutions had some responsibility to support those civil rights aims. Later that decade, other elite universities adopted race-conscious admissions in response to

campus-based student protest (ibid). By the early 1970s, the practice was quite widespread throughout higher education (Grotsky 2007). At this point, such interventions targeted African Americans, as the Black-White divide was not only the most pronounced racial division in American life but also the focus of the 1960s civil rights reforms. Major new civil rights laws banned discrimination in public education, employment, and housing. At this time, there was relatively more social, political, and legal support for race-based interventions intended to remedy racial injustice and enable people of color to fully participate in American life.

Affirmative action is most common at competitive colleges and universities, which are not “open access” and only admit a portion of applicants. Since the 1980s, with a ballooning number of college applicants and increasingly stricter criteria for gaining admission, admissions to selective schools has become a high-stakes competition (or at least it feels that way to applicants).<sup>1</sup> The cost of college has also skyrocketed. Adjusting for inflation, the cost of attending a public four-year university in 2014 was 3.25 more expensive than in 1984 and the cost of attending a private one was 2.46 more expensive (College Board 2015).

There is good reason for the push to go to college. Simply attending and graduating matters. According to the Pew Research Center, young college-educated workers now earn on average \$45,500 year, compared to \$28,000 for high school graduates, and they are more satisfied with their careers (Pew Research Center 2014b). Those who go to selective institutions are even better off when it comes to earning an advanced degree, getting a desirable job, career promotion, and future income (Espenshade and Radford 2009).

Since its early implementation, affirmative action has been effective. It has increased the odds that African American, Latino, and Native American students are admitted to and graduate from college. In a 2007 study, Eric Grotsky compared African American and Latino students to White students with similar academic records and socioeconomic status, to see who was admitted to college with what credentials. He found that, between the early 1970s and early 1990s, BA-granting universities and colleges across the spectrum—from the most competitive to least—gave an edge to African American applicants over White ones. In 1972, that edge was the equivalent of a 281-point boost in SAT scores. At the more competitive institutions, this advantage was upwards of 343 points or more. Between the early 1980s and early 1990s, Latino applicants received a boost of somewhere between 108 and 118 SAT points. According to another study of the top 146 institutions, the policy tripled the enrollment of African Americans and Latinos (Carnevale and Rose 2003).

The benefits of affirmative action extend beyond the college campus. In a major study, William Bowen and Derrick Bok (1998) demonstrate that the policy improves African Americans’ career prospects and Black communities’ leadership capacity. Those affirmative action beneficiaries who come out of elite universities, they show, have

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<sup>1</sup> Some research indicates that, contrary to popular perception, 80% of top students are accepted to at least one elite school Carey (2014). According to this study, what actually has changed is the number of less qualified students applying to elite schools.

formed what they call the backbone of the Black middle class.

### **Affirmative Action at Selective College Admissions Today**

The exact number of the colleges and universities that make admissions and financial aid decisions based on race is difficult to pin down. The simplest way to measure this (although not necessarily the most reliable) is based on institutions' self reports. In the 1990s and early 2000s, it was used by an estimated 20% of selective institutions (Bowen and Bok 1998) and about half of comprehensive institutions (Grotsky and Kalogrides 2008).

More recently, a 2012 national survey found that approximately 45% of colleges and universities give some consideration to race in undergraduate admissions decisions (National Association of College Admissions Counseling 2014). Almost 25% of those institutions rated it as of considerable or moderate importance—which is more weight than they gave to personal characteristics such as applicants' ability to pay or alumni status. Racial and ethnic minority status continues to be one of the attributes valued by administrators at the country's top institutions.

In higher education, where affirmative action is directed at students, the policy is an addendum to the larger system of admissions. Understanding this is crucial to understanding institutional discrimination and the counterweight that affirmative action provides. Contrary to popular myths that White students are hurt by affirmative action, bias against students of color pervades that larger admissions system. By and large, colleges and universities give unacknowledged favoritism to applicants from wealthy, White families. Admissions decisions are by and large based on what administrators refer to as merit-based criteria, which include an applicant's grade point average, standardized test scores, the high school they attended, and the rigor of the classes they took. Affluent, White students are far more likely to excel on the merit-based criteria for reasons unrelated to their actual intellectual ability. Test scores are highly correlated with family income, such that the richest students do best (College Board 2014; Fischer, Hout, Jankowski, Lucas, Swidler, and Voss 1996). Advantaged youth more often attend private and college-preparatory high schools, which provide test preparation, rigorous curricula, and better teachers.

In contrast, Black and Hispanic students are more likely to attend underfunded high schools that lack advanced classes. Furthermore, they consistently score lower on standardized test compared to their White and Asian American counterparts (but not on performance-based measures such as grades and class rank which, in fact, are better predictors of academic success down the road) (Alon and Tienda 2007). Stereotype threat is a major obstacle for Black test-takers (Steele and Aronson 1995). Because of widespread negative, inaccurate stereotypes about African Americans' inferior intellectual ability, these students experience anxiety about being judged and treated in a stereotypical manner or about fulfilling those negative stereotypes. That anxiety, in turn, undermines their performance.

Even with affirmative action, Black, Latino, and Native American students are underrepresented in selective institutions compared to their representation in the U.S. population and to the enrollment numbers for White and Asian American students (Alon

and Tienda 2007). However, the policy has been the focus of political and legal disputes for decades, seen by critics as reverse discrimination biased against White students.

### **Affirmative Action Politics and the Mobilization of Law**

Public opinion on affirmative action depends on the wording of the question, but a 2014 poll found that 63% of Americans say that affirmative action programs designed to increase the number of Black and Latino students on campus are a “good thing.” Pew found similar support in 2003 (Pew Research Center 2014a). Even with this support, affirmative action has been, arguably, the most politically contentious racial policy in the United States—more so than troubled city schools, mass incarceration, immigration law, or other problems that affect far more people of color. It became what legal scholar Christopher Edley, Jr. describes as “the highest pole in the storm” (Holmes 1997 in Hochschild 2002).

It is useful to understand affirmative action through the lens of critical race theory, which understands the U.S. legal system as a source of racial meanings and power relations (Crenshaw, Gotanda, and Peller 1996). Critical race theory foregrounds how law socially constructs race in ways that primarily, but not invariably, support racial domination and perpetuate injustice. This analytic approach casts doubts on the supposed neutrality of legal concepts such as principles, rights, and state protection.

Although not a critical race theorist, political scientist Jennifer Hochschild provides insight into the culture and discriminatory dynamics of affirmative action controversies. She observes that the policy is a weapon in the culture wars, more so than a strategy to aid African Americans and women or a real threat to White people (2002). It has served as a petri dish for contention over the American dream. It touches on deeply held, contrary sentiments about the meaning of success and the role of ability, effort, opportunity, and unfair obstacles therein. By arguing against affirmative action, she explains, White people unapologetically claim White privilege and favoritism in their pursuit of the good life.

Disputes over affirmative action have taken place from panels on college campuses to the editorial pages of major newspapers. But nowhere have these disputes been more important than in the U.S. Supreme Court. Law is central to affirmative action politics. It defines the acceptable treatment of race in admissions decisions. Likewise, conflicts over affirmative action have been channeled into the courts. Thus, the dynamics of litigation have organized the terms of debate. Litigation institutionalizes affirmative action politics as an oppositional contest between polarized sides, with opponents arguing for color blindness and defenders arguing for diversity, remedial justice, or some other position. Law also defines much of the popular discourse on affirmative action.

The involvement of the Supreme Court in affirmative action politics also is significant. As the highest court in the country, the Supreme Court is the foremost authority on the Constitution. Its decisions formalize what is lawful or not. It makes laws more precise and creates precedents that others must follow.

Since the mid-1970s, a series of important legal cases have established the acceptable use of affirmative action in admissions and the officially-sanctioned

discursive frameworks for affirmative action, as outlined at the opening of this chapter. *Bakke v. Regents of the University of California* (1978) was the first of these and the most complicated one (see Table 1). In this case, Allan Bakke and his attorneys made a colorblind argument against affirmative action. They claimed that the University of California-Davis medical school used an unconstitutional racial quota (meaning, a fixed numerical admissions goal based on race). The university defended its admissions policies on many grounds. It made an argument for remedial racial justice. At this time, many college administrators across the country justified their race-conscious policies along these lines: as a means of countering Black disadvantage (Berrey 2011; Stulberg and Chen 2014). UC-Davis also argued for the benefits of diversity; this was a rationale that some of the country's most elite universities had developed in the late 1960s. The university made an argument for the importance of racial minority role models in the medical profession, as well, but this role model position has never gained the prominence that arguments for remedial justice or diversity have gained. In a complicated, divided opinion, the Supreme Court found that universities could engage in race-conscious admissions but could not use racial quotas. There was no consensus on the proper rationale.

What has received most attention out of the *Bakke* case is not the court's final decision but, rather, a solo-authored opinion by Justice Lewis Powell. Powell's opinion offered a nonremedial defense of affirmative action. Pulling from a brief submitted by Harvard, Columbia, and a few other prestigious universities, he wrote about the value of diversity. According to Powell, students have a variety of characteristics that contribute to the mix on a college campus, and race is one of many "pertinent elements of diversity." He viewed race-conscious admissions as acceptable so long as the admissions counselors treated a student's ethno-racial identity as a "plus factor" and with the intention of achieving the social benefits of diversity. This was the first legal justification for the policy based on the instrumental pay-offs of diversity.

Over the years, Powell's opinion became the touchstone for admissions offices that did affirmative action, as his was the safest opinion to follow. College administrators alit on the rhetoric of diversity as a description of their values and their student bodies (Berrey 2011, 2015). That said, we do not know the extent to which schools actually eliminated any racial quotas they may have been using.

Meanwhile, those who opposed affirmative action—or, in their words, racial preferences—were becoming more politically influential. Their cause gained momentum with the growing conservative movement, which fueled White hostility against Black people (Edsall 1992). This movement buoyed, and was buoyed by, the election of President Ronald Reagan in 1980, and it helped to put into place many more conservative judges. *Bakke* was the first of a number of court cases that restricted affirmative action. In the face of this movement, those who wished to argue that corporate and government policy should rectify systemic inequalities found the legal climate even more inhospitable in the 1980s and 1990s. Significantly, the *City of Richmond v. Croson* case, which concerned affirmative action in employment, found that "remediating past societal discrimination" was not an acceptable defense for race-conscious policies. By the mid-1990s, the movement against racial preferences was

winning victories in court and in state referenda. Proposition 209, passed in 1996, ended affirmative admissions in California. That same year, the Fifth Circuit Court's decision in *Hopwood v. State of Texas* ended voluntary, race-conscious admissions based in the diversity rationale in Texas, Mississippi, and Louisiana.

Through court cases and political actions such as these, and also through public opinion, the conservative movement has successfully made colorblindness a legal argument against affirmative action (Haney-López 2006; Siegel 2011). According to the colorblind position, race-conscious, equality-seeking policies are discriminatory. The reasoning is that such policies grant opportunities to people of color based solely on their racial group membership, and this violates the U.S. Constitution's protections for individuals. Political supporters of colorblindness have framed their positions in terms of protecting individual rights and preventing government overreach. Their actions have the effect of furthering entrenching White privilege while leaving it unacknowledged. When successful, colorblind advocates have redirected government away from progressive, collective objectives—specifically, away from earmarking resources specifically for the upward mobility of disadvantaged groups—and toward individual or private interests (Duam and Ishiwata 2010).

In contrast to the firm legal grounding for colorblindness, a diversity-based argument for affirmative action was not elaborated fully until the early 2000s.

### **The Law of Affirmative Admissions in the Early Twenty-First Century**

In the late 1990s, the Center for Individual Rights, a libertarian public interest law firm, and three plaintiffs brought *Gratz* and *Grutter* against the University of Michigan. Arguing for colorblindness, *Gratz* challenged the university's main policy for undergraduate admissions, which awarded extra points to African American, Latino, and Native American. *Grutter* challenged the law school's policy, which took race into account in a holistic review of each application. These turned out to be the most important affirmative action cases since 1978.

The University of Michigan administration mounted a remarkable legal and political campaign to defend its policies (Berrey 2015; Stohr 2004). Given the legal record, diversity was the most viable argument. Drawing on Powell's opinion in *Bakke*, the university administration argued what became known as the diversity rationale: that student learning improves and other benefits accrue when students interact with peers of different backgrounds, which include but are not limited to race and ethnicity. The reasoning is that cross-racial interaction exposes students to unfamiliar experiences and perspectives. Political support for Michigan came from all corners, including former U.S. president Gerald Ford, retired military officers, corporate executives, and the activists who organized the April 1 March on Washington.

The university had a high legal bar to pass. It needed to prove that its policies passed strict scrutiny—a difficult-to-achieve legal standard that, since *Bakke*, the conservative movement had successfully extended to race-conscious decision-making. If an institution wants to use racial classifications lawfully and still receive federal funding, it must demonstrate that its policies pass a two-prong test: that they serve a compelling governmental interest and that they are narrowly designed to achieve that interest.



Although the *Gratz* and *Grutter* litigation was framed in terms of a colorblind critique and a diversity defense, arguments for remedial justice could sometimes still be heard in popular debates and the news media, as they had been for decades (Gamson and Mondigliani 1989). What's more, BAMN (or, the Coalition to Defend Affirmative Action and Fight for Equality by Any Means Necessary) intervened in *Grutter* in the lower court to argue that affirmative action was both corrective of social inequities and transformative in that it furthered integration. The activists claimed that the policy offset discrimination in the university's admissions criteria, particularly standardized testing (Berrey forthcoming). However, while their claims resonated with many affirmative action supporters, the activists ultimately had little impact on the court's final decisions, either at the Sixth Circuit or the Supreme Court.

In its 2003 majority decision in *Grutter*, the Supreme Court found that university's policies were acceptable. The Law School's policy passed the test of strict scrutiny. The court made clear that the diversity rationale was *the* legally defensible justification for voluntary affirmative action. Its majority opinion emphasized diversity's instrumental benefits for learning, the economy, and national defense. In *Gratz*, which was a less important case, the court found unconstitutional Michigan's policy of awarding additional points to the applications of students of color.

The university declared victory, to much fanfare. After the Court's decisions, voices in support of diversity grew even louder. For instance, pro-affirmative action newspaper editorials overwhelmingly relied on an argument about diversity's productive benefits after the decisions were announced, in contrast to their more mixed opinions prior to the decisions (Richardson and Lancendorfer 2004).

*Grutter* overturned the *Hopwood* decision, thus making affirmative action lawful in public universities in Texas, Louisiana, and Mississippi. In the meantime, the use of race-based affirmative action was declining across the country. Most significantly, state-level bans were put into effect via ballot initiatives, executive action, and legislation. By 2013, the policy had been prohibited in eight states—California (1996), Washington (1998), Florida (1999), Michigan (2006), Nebraska (2008), Arizona (2010), New Hampshire (2011), and Oklahoma (2013)—and also by the University of Georgia (2000). Those eight states are home to 29% of U.S. high school students (Kahlenberg 2014).

In most of those states, the flagship universities adopted alternative admissions strategies designed to boost enrollment of students of color and low-income students without explicit attention to race. The best known of these strategies are the percent plans in place in California, Florida, and Texas. Such plans guarantee admission for top graduates from every high school. These policies are sure to bring in students from a range of geographic locations, and because American communities and high schools are racially and economically segregated, they also can bring in students from a range of backgrounds. At the most prominent universities in those 8 states, African American and Latino enrollment dropped. At many schools with alternative strategies, that enrolment recovered to pre-ban levels—although not at the most elite schools, UC-Berkeley, UCLA, and University of Michigan (Kahlenberg 2014).

Two relatively minor cases followed *Gratz* and *Grutter*. *Fisher v. University of Texas* (2013) charged that UT's admissions policy was not in line with *Grutter*. Again, a

colorblind argument against affirmative action was met with a diversity defense. The majority of the court upheld *Grutter*. But it also returned the case to the lower court, stressing that the university would need to demonstrate that using race in admissions decisions was “necessary.” In other words, in order to do affirmative action, universities would need to demonstrate that there was no other way to achieve a diverse student body but for considering race. Many observers read this as the court making it all the more difficult for universities to do race-conscious admissions.

*Schuette v. Coalition to Defend Affirmative Action* (2014) was an altogether different sort of case. Led by BAMN and another group, it challenged the constitutionality of the state of Michigan’s ban on affirmative action in public education and employment. This case was not specifically about college admissions and the legal standard was different than in *Gratz*, *Grutter*, and *Fisher*. It was not about strict scrutiny but, instead, political process doctrine, a thirty-year-old theory allowing people of color to advocate for public policies that support equality. According to the challengers, the ballot initiative created a racially unfair political process: people of color, but not any other group, would have to engage in an expensive, long-term campaign to amend the Michigan constitution if they wanted to contest a university’s admissions policies to ensure that those policies reflect their interests. The challengers’ argument was about structural inequality and civil rights. While they did not specifically argue for remedial racial justice, their claims made central problems of racial inequality. Ultimately, the majority of the Supreme Court justices decided against them. With that decision, the court gave the green light to state-based affirmative action bans.

With each of these cases, the debate over affirmative action—and the broader question of how racial discrimination can be addressed—has continued to narrow. *Fisher* and *Schuette* are exemplary of the eagerness of the majority of the court to undermine race-conscious, equality-seeking policies. They have been under the watch of Chief Justice John Roberts, who notoriously argued in an earlier case that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” None of the cases discussed in this chapter stop companies, universities, or government entities from using an argument about remedying historical discrimination. The organization just must argue that it is remedying its *own* history of discrimination—which no organization would willingly do, as it would mean admitting wrongdoing and, thus, opening the floodgates for lawsuits. At this point, the centrist, watered-down case for diversity is the only defense that remains, and it applies only to higher education, not even at the K-12 level.

**Table 1. Major Legal Cases on Affirmative Action in College Admissions, 1978-2014**

Case	Legal Frames	Majority Opinion	Also Significant
<i>Bakke v. Regents of the University of California</i> (1978, U.S. Supreme	Colorblindness vs. remedial justice/diversity/role models	Affirmative action allowed but not racial quotas	Powell’s opinion on the benefits of diversity

Court)			
<i>Hopwood v. State of Texas</i> (1996, Fifth Circuit)	Colorblindness v. diversity	Affirmative action banned in Texas, Louisiana, and Mississippi	Overtaken by <i>Grutter</i>
<i>Gratz v. Bollinger</i> and <i>Grutter v. Bollinger</i> (2003, U.S. Supreme Court)	Colorblindness v. diversity	Affirmative action is permissible if the goal is diversity and admissions decisions are individualized	In the lower courts, intervenors argued for remedial justice and integration
<i>Fisher v. University of Texas</i> (2013, U.S. Supreme Court)	Colorblindness v. diversity	<i>Grutter</i> holds, but universities have a greater burden to prove that they need to consider race	
<i>Coalition to Defend Affirmative Action v. Schuette</i> (2014, U.S. Supreme Court)	Colorblindness v. political process theory	State bans on affirmative action are lawful	Not governed by the standard of strict scrutiny

### The University of Michigan’s New Identity of Diversity

Law has defined how colleges and universities can do race-based admissions and the justifications they must provide. However, these institutions do not simply adopt what law dictates, point blank. Neo-institutional research on law and organizations is instructive here. A rich body of research has shown that colleges—like companies, non-profit agencies, and other organizations—look to each other to figure out how to comply with laws. A related insight is that, in a field such as higher education and within each individual organization, law is remade. Sociologist Lauren Edelman and collaborators (Edelman 1992; Edelman, Uggen, and Erlanger 1999) call this legal endogeneity. Law offers fairly vague mandates, so organizations create structures like offices and policies that signal (but do not necessarily ensure) their compliance. As they do this, they mediate law’s impact on society (ibid) and reframe it according to their interests such as effective management or profit making (Edelman, Fuller, and Mara-Drita 2001).

These findings prompt us to ask what universities and colleges have done with law on affirmative action, beyond eliminating race-conscious admissions or retooling the technicalities of their admissions policies. My own historical-ethnographic research on

the politics and policies of affirmative action at the University of Michigan, which I conducted between 2002 and 2005, shows how law can prompt organizations to redefine what they stand for (Berrey 2015).<sup>2</sup> Over the past thirty-five years, Michigan has made diversity part of its distinctive identity—one of its distilled, essential features (Albert and Whetten 1985). It has done so by connecting diversity to its status as a research powerhouse and its core objective of providing elite, public education. This is evident, for instance, on the university’s Diversity Matters website portal, which quotes the university president Mark Schlissel saying, “Diversity is at the core of the University’s excellence.”<sup>3</sup> The University of Michigan Vision Statement sets out its aspirations for the twenty-first century, including “To be a source of pride for all people of Michigan,” “To occupy a position of unique leadership among the nation’s universities in research and scholarly achievement,” and “To be recognized as a University that honors human diversity.” In addition, the university has developed an entire organizational infrastructure of diversity that includes organizational offices, positions, pedagogical programs, and funding dedicated to advancing diversity. It has directed some of its research resources towards studying how diversity works, and can best work at the university.

The university first made a commitment to diversity central to its identity in the years following the *Bakke* decision. This was most evident in the undergraduate admissions office, where administrators revised the rhetoric they used in promotional materials and public discussions (Berrey 2011). They alit on the idea of the benefits of diversity. But the Michigan administration did not simply make diversity their new description of affirmative action. In fact, they downplayed their affirmative action policy altogether. Rather, university leaders—along with faculty, staff, and even students—made the diversity rationale a description of the admissions process, the student body, and the university at large.

In the 1980s, officials at Michigan all but copied-and-pasted their new rhetoric text from Powell’s opinion in *Bakke*. Take, for example, Michigan’s 1987 undergraduate view book, which is that glossy booklet for applicants. In his opening letter, university president Harold Shapiro states:

The University of Michigan is committed to being a racially, ethnically, and religiously heterogeneous community. This commitment stems from many sources, including the conviction that such diversity is essential to creating an intellectual and social climate which promotes the freedom of thought, innovation, and creativity so fundamental to an academic community (University of Michigan, 1987:4).

At this time, much of Michigan’s discourse was reflective of the central tenets of the

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<sup>2</sup> For this study, I did field research on the political and public relations activities surrounding the *Gratz* and *Grutter* litigation prior to the court’s decisions and then, after the decisions, I did field research on changes in the undergraduate admissions office. This included participant observation on the public activities of a range of organizations, 30 formal interviews, and legal and document analysis. I also analyzed historical and archival documents to understand the development of affirmative action and the emergence of the push for diversity at Michigan since the 1960s. For details, see Berrey (2015).

<sup>3</sup> <http://diversity.umich.edu>. Accessed March 24, 2015.

diversity rationale. For example, the 1986-87 bulletin stated, “diversity fosters an exchange of ideas and a world-view that greatly expands the learning experience and prepares students to understand and interact with those from different cultural, religious, and philosophical backgrounds.”

For decades after, the diversity rationale was apparent in the university’s viewbook in the images of students and the text describing the student body. One ubiquitous example was the photograph or video scene of students of different racial backgrounds, sitting on lush green grass, perhaps around a professor, deeply immersed in conversation (see also Stevens 2007). The materials characterized students as coming from varied racial backgrounds, ethnic identities, geographic origins, religions, cultural traditions, philosophical leanings, and socio-economic circumstances. They reported statistics on the racial composition or the composition of international students. And students were repeatedly described as expressing unique cultural perspectives, open to others’ perspectives, and academically and socially enriched for being so. While these materials emphasized the many ways that students were diverse, they also stressed that students were alike in their academic excellence. In the 1980s viewbook, for example, the description of students ended with the sentence: “What all students have in common is an interest in learning and a high record of academic achievement.”

In the 1990s, the university engaged in an aggressive affirmative action policy, the Michigan Mandate. Meanwhile, the tone of its admissions and promotional materials became more focused on individual applicants and their personal experience, rather than generalized statements about the university and what it was up to. These materials also de-emphasized the theme of race. For example, the 1996-97 viewbook stressed that *everyone* contributes to diversity: “We want your perspectives to find a place at Michigan, because we want to benefit from it, just as we believe you will benefit from the perspectives of others.”

Following the *Gratz* and *Grutter* decisions, the university revamped the undergraduate admissions policy to comply with *Grutter*. The administration continued its public education and public relations campaign to inform the stakeholders about the cases. In their public discourse, administrators made Michigan’s victory in *Gratz* and *Grutter* part of its identity, as well, referencing the university’s defense as evidence of its diversity commitment. At the same time, administrators’ discourse played up the theme of diverse perspectives and downplayed race even more. For instance, the Office of the Vice Provost produced a full-color glossy brochure about the cases, called “The Educational Value of Diversity: A Landmark Decision,” which highlighted campus initiatives for gender, religious, and political diversity. No initiatives were identified as specifically about race. Near the end of the brochure, the two main programs serving students of color, Multi-Ethnic Student Affairs and the Office of Academic and Multicultural Initiatives, were described as “open to all students.” The notion of diversity was expansive enough that it needed not include special attention to race at all. This broadly inclusive definition of diversity served as the template for university initiatives such as the National Center for Institutional Diversity and the university’s strategic plan, Diversity Blueprints and the rhetoric for characterizing programs, grants, and other resources that had once specifically targeted students of color but became

open to all students.

### **Universities' Identities of Diversity: Beyond Michigan**

Do these insights hold true at other colleges and universities? Have other institutions made diversity central to their identity? Talk of diversity is pervasive throughout higher education. Putting diversity into a mission statement is a common practice. A national survey of 1,470 colleges and universities showed that 74% had mission statements that included a commitment to diversity (National Association of College Admissions Counseling 2003). The mission statements had fairly similar conceptions of diversity: 68% specified an ethnic and racial mix of students on campus, and 64% referenced other forms of diversity—most often geographic (77%) and socio-economic diversity (66%).

To understand the generalizability of what I observed at Michigan in my ethnographic-historical research, I did a separate analysis of the contemporary web sites of a random sample of 10% (20) of the nation's top 196 college and universities.<sup>4</sup> While Michigan is at the extreme in terms of its legal, political, and pedagogical campaign around diversity, and it is difficult to discern fact from fabrication on a university web site, there nonetheless are similar patterns in how Michigan construed its diversity and how other colleges and universities do so.

Of the 20 colleges and universities analyzed, every single one had indications on its website that it supported diversity, inclusion, or racial minority access. Half (10) mentioned diversity in their mission statement, had a diversity and inclusion statement, or did both. Twelve had web pages specifically featuring diversity in campus life and/or human resources (beyond undergraduate admissions), and 13 referenced diversity offices, positions, councils, and centers. All of the schools prominently posted at least one photograph or video with students of different racial backgrounds, including Black students, interacting in academic or social activities, although a handful of schools had very few of these images.

There was more variation in the extent to which the schools incorporated diversity into their identity, beyond these indicators. Six of the colleges and universities made little or no meaningful reference to diversity in the student body life (although one provided Spanish translation of some pages). Three gave limited attention to diversity by, say, simply spotlighting it in the student body with generic, boilerplate language. The College of Mount Saint Vincent, for example, a Catholic liberal arts college, described its student body as diverse and open to diverse viewpoints. One page of its viewbook was titled, "0% homogenous, 100% inclusive: Diversity at the Mount."<sup>5</sup>

The remaining 11 schools all, to varying degrees, emphasized diversity in their mission statements, characterizations of students and campus life, and/or

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<sup>4</sup> The pool of 196 colleges and universities was selected based on Barron's 2014 rankings of "highly competitive" and "most competitive" institutions. In March 2015, for each of the sampled schools, I reviewed the home page, the "about" pages, any mission/vision/inclusion statements, the admissions pages, and the main pages of any section devoted specifically to diversity or multiculturalism. Text, images, and videos were analyzed according to themes identified deductively, based on the secondary literature and my observations at Michigan, and inductively based on the materials themselves.

<sup>5</sup> [http://issuu.com/cmsvpubs/docs/final\\_cmsv\\_viewbook\\_high\\_quality/16](http://issuu.com/cmsvpubs/docs/final_cmsv_viewbook_high_quality/16). Accessed March 30, 2015.

organizational programming, planning, offices, and committees. Four had narratives that represented diversity as interwoven with the institutional identity, tailoring their value of diversity to the essential features of the institution. The website of Grinnell College, a small liberal arts college in Iowa with “an incredibly close-knit community,” describes one of the institution’s three core values as “A diverse community.” This includes “a wide diversity of people and perspectives” and “personal, egalitarian, and respectful interactions among all members of the college community.”<sup>6</sup> Six of the schools emphasized their administrations’ proactive institutional action around diversity.

On their websites, the 20 colleges and universities noted various institutional objectives that involve diversity: fostering inclusiveness and heterogeneity (11), teaching appreciation of difference (11), exposing students to difference (9), and opening access to underrepresented groups (9 stated doing so for on racial minorities). Just 3 schools cited an objective of understanding inequality and challenging discrimination. Kalamazoo College’s student life page on multiculturalism stated, “Addressing issues of diversity with students and issues of institutional racism within the College is a very important part of a liberal arts education and the work of Kalamazoo College.”<sup>7</sup> Fourteen of the school web sites mentioned race specifically as a part of diversity, and fifteen mentioned other forms of diversity—most consistently geography, but also group-based differences such as sexual orientation and gender as well as cultural qualities such as backgrounds and perspectives. Many described diversity as a self-evident attribute of an institution of higher education. Other rationales for diversity fell into two general categories: students’ self-expression and personal growth (6) or else instrumental purposes (13). Those instrumental purposes included better learning (11); preparation for a diverse world (7); excellence, innovation, and creativity (7); and career and leadership preparation (5).

This analysis indicates how colleges and universities have incorporated the principle of diversity into their institutional activity—into their public relations at the very least, and sometimes as something more. The push for diversity throughout higher education should be understood in context, in addition to the legal factors discussed earlier. Admissions offices’ slick promotional materials are part of the neoliberalization of higher education. Colleges and universities now compete for top applicants in the market of competitive admissions. For many, diversity is part of the sales pitch to prospective students (Urciuoli 2003). Meanwhile, the popularity of “diversity” also has been connected to the growing multiculturalism on college campuses (Berrey 2011). It is a catchall word that characterizes students of many different backgrounds, including those who are gay and lesbian, low-income, of different faith traditions, or—increasingly important for financially strapped institutions—from outside the U.S., as those students are more likely to afford full tuition. The concept of diversity is so flexible that it can expand to include a broad range of student attributes and institutional objectives that are considered relevant and desirable within the field of higher education, with no

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<sup>6</sup> <http://www.grinnell.edu/about/si/mission>. Accessed March 30, 2015.

<sup>7</sup> <http://www.kzoo.edu/studentlife/?p=multi>. Accessed March 30, 2015.

inherent connection to race.

So, how does the push for diversity actually matter for problems of inequality and exclusion on college campuses? The experience of the University of Michigan is instructive.

### **Overcoming Inequality at the University of Michigan**

That Michigan saved affirmative action nationwide and identifies as a diversity champion does not necessarily mean that it has been successful at improving problems of racial inequality on campus. The results are very mixed, the data are limited, and the line between window dressing and organizational efficacy can be difficult to discern. The university's implementation of the Michigan Mandate coincided with higher enrollment and graduation rates of students of color. Between 1988 and 1998, the percentage of undergraduate and graduate students who were African American, Latino, Native American, and Asian increased from 15% to 25% (University of Michigan 1988; University of Michigan 2013b). The university's longitudinal Michigan Student Study examined the student experience of diversity. In 2004, the vast majority of Michigan college seniors—from 68% of white seniors to 79% of African American ones—reported that diversity had “quite a bit” or “a great deal” of an impact on their college experience. For most of those individuals, the impact was positive (Office of Academic and Multicultural Affairs nd). The 2004 seniors and alumni of the university, reflecting on their years on campus, felt their exposure to different types of people and perspectives had enhanced their intellectual development and cross-cultural awareness.

Yet problems for students of color on Michigan's campus have persisted and the promise of diversity, as formulated by the university, has not been realized. Some of this was due to factors outside the university's control: the state-level ban on affirmative action caused a major drop in the enrollment of students of color. In fall 2013, Black, Latino, and Native American student made up 10% of the first-year undergraduate class, which was the first admitted solely under the university's race-blind admissions policies (University of Michigan 2013a). This was a decrease from 15% in fall 2003, the last class admitted under the point system. The percentage of African American students declined even more dramatically (University of Michigan 2003; 2013b). In fall 2013, African American students made up 4.6% of the undergraduate student body—down from a peak of 9% in 1997 and below their 5% representation in the early 1980s (University of Michigan 1999).

Many issues of exclusion remain under the university's control, however. A study of the law school showed that opportunities for diversity discussions in the classroom were repeatedly missed (Deo 2011; see also Moore and Bell 2009). Some faculty members and students lacked interest in race or other issues of identity and the topic of exclusion in the classroom, or they were uncomfortable with such conversations. More recently, as their numbers have dwindled, students of color at Michigan have found themselves isolated in what for many is a hostile campus environment. Students launched a Twitter campaign, Being Black at University of Michigan (#BBUM) in fall 2013, after a Michigan fraternity threw a “Hood Ratchet Thursday” party for “bad bitches” and “ratchet pussy.” The purpose of BBUM was to voice “unique experiences of



being Black at Michigan.” Students tweeted comments such as “When every room you stand in on campus 9x out of 10 your the only one that is Black.” The group organized protests, calling for greater representation of Black students on campus, and the hashtag quickly trended on Twitter and captured the media spotlight. Similar campaigns at University of California–Los Angeles, Harvard University, and other predominantly White campuses raised similar issues.

### **Is Diversity Racial Justice?**

The analysis in this chapter reveals three key popular conceptions of race and diversity in law and higher education today. The first is an interpretation of race as a cultural identity, expressed in interaction. This is not an interpretation of race as a basis of division, disadvantage, and privilege. Nor is it an outright colorblind denial of race’s relevance.

The second popular conception of race is that diversity is productive. This is the idea that expressing our unique perspectives and learning about others’ can generate societal benefits such as learning, personal enlightenment, and inclusive behaviors. Law and university administrators have made race into diversity and extolled its pay-offs for instrumental goals. The Court’s decision in *Grutter* gave legitimacy to both this formulation of race and this conception of diversity.

Finally, diversity can provide a politically palatable catchall term for engaging in a race-based progressive policy such as affirmative action. At the same time, such an emphasis can also facilitate a turn *away* from group-level racial dynamics and institutional problems of racial inequality. A university can readily, and without much opposition, focus on individuals’ expression of their viewpoints and on alternative forms of diversity, particularly geographic and intellectual diversity.

These conceptions of diversity are important in both the legal realm and the realm of university identity-making and institutional practice. Diversity, both as legal doctrine and as an organizational identity, affirms the cause of minority inclusion, but it fails to recognize the structural foundations of racial inequality.

The university’s success at the Supreme Court rescued affirmative action from a colorblind challenge. The diversity rationale can be understood as a Hobson’s choice: a choice between what is available and nothing at all. This defense of affirmative action protected a modest yet effective corrective policy by cutting off recognition of the United States’ troubling problem of racial injustice.

The university was not directly responsible for the demise of an argument for correcting racial discrimination, although it was part of a long line of cases that made this argument unviable. Today, diversity continues to hold sway as the most popular justification. A 2013 opinion poll found that, of the 53% of respondents who said they support affirmative action, 63% favored the policy to increase diversity while 24% favored it to make up for past discrimination (CBS News 2013).

In 1980, critical race scholar Derrick Bell made the astute point that progress toward racial equality for Black people is only politically viable when White people see it is as expedient for themselves. While he was writing about the historic *Brown v. Board of Education* case, his observation holds true for the diversity rationale. Affirmative

action supporters seem to perceive that White people see themselves in diversity or at least find the idea appealing and non-threatening. Likewise, according to psychologists, White people have more positive associations with an all-inclusive conceptualization of diversity than one that seems to be just for minorities (although, overall, White people associate diversity as exclusive of themselves) (Plaut, Garnett, Buffardi, and Sanchez-Burks 2011).

Today, racism in college admissions—like racism throughout American society—have become less explicit and more subtle. Nonetheless, it remains pernicious and consequential and tightly bundled up with class discrimination. A decline in the enrollment of students of color at top public schools means that they are unfairly blocked from opportunity, given the many ways that racial inequality is already baked into the technicalities of the college admissions process, elementary and secondary education, school funding, and society at large. It also means that our country is missing out on affirmative action's incredible social effects, both on campus and beyond. The prospects of these changes are deeply troubling. Even with affirmative action policies, those who attend predominantly White campuses groups routinely report feeling isolated and unsupported by administrators, faculty, and other students. Without affirmative action or effective alternative policies, their enrollment numbers plummet, and their sense of isolation becomes ever more acute.

At the time of this writing, a few important developments will bear on the future of affirmative actions. The first of these is the ongoing mobilization of affirmative action opponents. Two cases were filed in late 2014 challenging the policies at Harvard College (*Students for Fair Admissions Inc. v. President and Fellows of Harvard College*) and University of North Carolina (*Students for Fair Admissions Inc. v. University of North Carolina*). Brought by investment broker Edward Blum and groups of anonymous applicants who were rejected by both schools, the litigation is developing a case that will likely reach the Supreme Court in a few years. The Harvard litigation is particularly significant, as the university is the most prestigious in the United States and among the first to do affirmative action. It also created the template for contemporary affirmative action; Justice Powell's opinion cited extensively "the Harvard plan" as an acceptable model of individualized race-conscious admissions, and *Grutter* reiterated that this approach was lawful.

While the plaintiffs' charges are for colorblindness—they are challenge the universities' practice of continuing to "unconstitutionally use racial preferences in admissions decision"—the specifics of the argument are new. The claim against Harvard alleges that, just as the university discriminated against Jews in the past, it now engages in racial discrimination by setting admissions quotas on Asian American students and doing "racial balancing." The activists have put pressure on seven other elite colleges, including Yale Law School, regarding the transparency of their admissions processes. Given the conservative voting record of the majority of the Supreme Court justices, the legal fate of affirmative action seems quite dire.

Another development influencing the future of affirmative action is the growing popularity of alternative policies that, at face value, are racially neutral, especially those that seek to increase enrollment of low-income students. Richard Kahlenberg of The

Century Foundation has been the foremost thought leader of this movement (see, e.g., Kahlenberg 2014). He has worked fastidiously, using empirical evidence, to demonstrate the effectiveness of alternative policies and to champion class-based affirmative action. While supporters of these alternative strategies cite their effectiveness at boosting enrollment of students of color, critics argue that racial inequality is an issue in its own right, deserving of special attention, and that policies such as percent plans rest on the problematic racial segregation in U.S. K-12 education. In a surprising convergence of political agendas, many conservative and progressive activists agree that the admissions process would be much more fair if universities eliminated their legacy admissions. There also is a small chorus of people who argue that eliminating standardized tests would offset obstacles for students of color; rigorous sociological research supports this claim (Alon and Tienda 2007).

Perhaps this is a sign that, at least in the public imagination, the meaningful cleavage in American society is not the color line but the deepening class divide between rich and poor. Such a shift is promising for addressing serious problems of class inequality but further undermines the imperative of addressing the ongoing, vexing, unresolved problem of racial injustice.

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