

Affirmative Action and the Crisis in Higher Education

Scott D. Gerber*

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I. INTRODUCTION

A new academic year is upon us. Students, parents, and faculty are excited. But they are also nervous. These are difficult times for higher education in America. At all but the nation's top colleges and universities, enrollments are down and budgets are strapped. Many explanations have been offered about why higher education is floundering: wasteful administrative bloat and a reckless construction frenzy make almost every critics' list. Rightly so. After all, how many assistant deans and new athletic fields does a college really need? Far fewer than academic bureaucrats seem to think, in my humble opinion.

The heavy-headed use of racial and ethnic preferences in student admissions, financial aid, and faculty hiring is also to blame, but almost nobody ever mentions that. The explanation for the conspiracy of silence about affirmative action is easy to identify: As this year's entering class will quickly learn, higher education is dominated by the Left and racial preferences are the sacred cow of the Left. Worse yet, critics of racial

*Professor of Law, Ohio Northern University. I thank Brown University's Political Theory Project for hosting me while I wrote this article. The article first appeared in the *Huffington Post* on August 15, 2014 and, with the exception of the addition of footnotes and a few minor edits, is unchanged from that version. I presented the article at the University of Akron School of Law on August 21, 2014, and the *Akron Journal of Constitutional Law and Policy* has kindly asked to reprint it. I am delighted to let the journal do so.

preferences are often retaliated against in both subtle and not so subtle ways. (Opposition to preferential treatment is not well received at faculty meetings, to put it mildly.)

The term “affirmative action” originated with an executive order signed by President John F. Kennedy on March 6, 1961 that was designed to promote non-discrimination in the United States.¹ President Lyndon B. Johnson took the next major step when he issued an executive order of his own in 1965 that required government employers to take “affirmative action” to hire “without regard to . . . race, creed, color, or national origin.”² Gender was added to the anti-discrimination list in 1967.³

Fast forward five decades and, to borrow a line from Dorothy in *The Wizard of Oz*, “We’re not in Kansas any more.”⁴ Bluntly stated, there is systematic discrimination in all three categories of affirmative action in higher education: admissions, financial assistance, and faculty hiring. Indeed, the people of Michigan were reacting to that discrimination when they amended the Michigan constitution in 2006 to forbid preferential treatment on the basis of race, ethnicity, gender, and national origin in education, public employment, and contracting. The U.S. Supreme Court ruled, 6 to 2, in 2014 in *Schuette v. Coalition to Defend Affirmative Action*⁵ that the people of Michigan were allowed to ban preferential treatment in the state. California’s Proposition 209, enacted a decade before the Michigan amendment, was motivated by similar concerns, and recent attempts to repeal it would adversely impact Asian-Americans in particular, who do extremely well in merit-based processes.

II. ADMISSIONS

The Supreme Court has struggled for decades with how colleges and universities may use racial and ethnic preferences in admissions. At present, the law is this: (1) an institution of higher education may consider the race and ethnicity of applicants as a factor in admissions decisions for purposes of “diversity,” provided that it is not used too mechanically and that all applicants are evaluated on an individualized basis; and (2) a reviewing court is not permitted to give any deference at all to the college or university when assessing the constitutionality of an

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1. Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961).
 2. Exec. Order No. 11,246, 30 Fed. Reg. 12319 (Sept. 24, 1965).
 3. Exec. Order No. 11,375, 32 Fed. Reg. 14303 (Oct. 13, 1967).
 4. *THE WIZARD OF OZ* (Metro-Goldwyn-Mayer 1939).
 5. *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014).

admissions program.⁶

The first point stems from the Supreme Court's 5 to 4 decision in the 2003 University of Michigan law school case.⁷ The second is from the Court's 2013 ruling in the University of Texas case.⁸ If—and it's a big “if”—lower courts abide by the Supreme Court's 2013 directive, admissions programs across the nation will start dropping like flies because race is used heavy-handedly rather than modestly on almost every occasion. If, however, lower courts continue to defer to academic institutions, the institutions will continue to dissemble and prevaricate in order to try to avoid having their illegal programs declared illegal. That happened recently on remand in the U.S. Court of Appeals for the Fifth Circuit in the University of Texas case.⁹ We will have to wait and see what the Supreme Court does about it.

III. FINANCIAL ASSISTANCE

Many colleges and universities offer diversity scholarships that are awarded on the basis of race. While the Supreme Court has said that race may be a plus factor in admissions decisions,¹⁰ it has never said that race can be the basis for scholarship awards once an applicant has been admitted. In the apt words of Terry Pell, the president of the Center for Individual Rights, “A scholarship awarded on the basis of race inevitably stigmatizes talented minority applicants, who come to be recognized for their race rather than their considerable academic achievements.”¹¹

Facing threats of litigation and, before President Obama was elected, pressure from Washington, some colleges and universities have started opening to white students hundreds of thousands of dollars in fellowships, scholarships, and other programs initially earmarked for minorities. For example, Southern Illinois University reached a consent decree with the Justice Department during the latter years of President George W. Bush's administration to allow non-minorities and men access to graduate fellowships originally created for minorities and

6. See *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003) (it is the University's obligation to “ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application”); *Fisher v. Univ. of Texas*, 133 S. Ct. 2411, 2414 (U.S. 2013) (stating that “the University receives no deference”).

7. *Grutter*, 539 U.S. 306.

8. *Fisher*, 133 S. Ct. 2411.

9. See generally *Fisher v. Univ. of Texas*, 758 F.3d 633 (5th Cir. 2014).

10. *Grutter*, 539 U.S. at 334.

11. Dominic Lynch, *Mixed-Race Student Sues University, Says It Misled Her To Promote Racial Diversity*, COLLEGE FIX (July 1, 2014), <http://www.thecollegefix.com/post/18237/> (quoting Terry Pell).

women, while the State University of New York made white students eligible for \$6.8 million of aid in two scholarship programs also previously available just for minorities.¹²

“They’re all trying to minimize their legal exposure,” Susan Sturm, a law professor at Columbia University, said about colleges and universities.¹³ Indeed, the quote from Terry Pell was in response to a lawsuit that the public interest organization he heads filed against the University of Connecticut earlier this summer. The suit alleges that Pamela Swanigan was not allowed to compete for a prestigious merit-based scholarship despite being the top applicant the year she applied. Although UConn told Swanigan, who is biracial, that she had received a merit-based scholarship, it had actually changed her award to one in a less prestigious and largely segregated scholarship program intended to increase diversity. Consequently, she was deprived of the opportunity to compete for an academic award that would have benefitted her career, and she also has been forced to work multiple jobs to finish her degree. Swanigan has stated publicly that “My goal is to ensure that students are treated as individuals regardless of race and regardless of other efforts to promote racial diversity. I wanted—and still want—to compete on the basis of my academic abilities just like any other student.”¹⁴

Another university used to operate an academic support program that tutored white students in one room and non-white students in another room. The “rationale” for that unconscionable program was that the faculty had concluded that minority students would be “too intimidated” to speak if white classmates were in the study session with them. The segregated program was discontinued only after a brave minority student objected to it on both legal and moral grounds.

To mention one additional example in the financial assistance area, some law schools permit students to apply for a LSAC DiscoverLaw.org Prelaw Undergraduate Scholars Program only if they aren’t white. At least one of the schools had the common sense to amend its applications advertisement after a law professor on the faculty complained to the president of the university about the blatant illegality of the existing advertisement.

12. Jonathan D. Glater, *Colleges Open Minority Aid to All Comers*, N.Y. TIMES (Mar. 14, 2006), http://www.nytimes.com/2006/03/14/education/14minority.html?pagewanted=print&_r=0.

13. *Id.*

14. Lynch, *supra* note 11 (quoting Pamela Swanigan).

IV. FACULTY HIRING

Although the Supreme Court held in 1986's *Wygant v. Jackson*¹⁵ that it violates the Constitution's equal protection clause to prefer minority faculty over non-minority faculty in order to ensure faculty role models for minority students, academic institutions nevertheless strongly prefer minority candidates in their faculty hiring processes. As I have described previously for the National Association of Scholars under the pseudonym "Nevin Montgomery" so as to try to avoid being retaliated against for speaking truth to power, race is used much more aggressively in faculty hiring than it is in student admissions, in large part because there are far fewer faculty positions available than there are admissions slots. Several conspicuous examples come quickly to mind.

First, a friend of mine who teaches at a different law school copied me on the following email that he sent to a prominent civil rights lawyer: "Our university has offered the Law School money for an extra faculty slot, but only if the appointee is black. I know we're not alone in this, but it seems even more obviously illegal than arrangements that give preferences to minorities."

Second, the dean of a large public law school uses her law school's faculty hiring process to advance her vision of "social justice," a vision that her own faculty—as liberal as any in the country, by the way—has criticized because it has led to the virtual disqualification of every white male faculty candidate since that dean's tenure began.

Third, the dean of a small private law school (not the one at which I teach) informed me that he had "promised" the American Bar Association that he would hire only minority faculty for the next several years. Both the ABA and the Association of American Law Schools strongly encourage law schools to hire minority faculty.

Fourth, and related to the third example, a different law school was criticized by both the ABA and the AALS for not hiring enough minority faculty, even though that law school had (i) invited every minority faculty candidate listed in the AALS faculty recruitment registry to interview with the law school at the hiring conference in Washington, D.C., (ii) asked every minority faculty candidate who interviewed with the law school in D.C. to fly back to campus, all expenses paid, to interview further, and (iii) offered a job to every minority faculty candidate who accepted the invitation to visit the campus. In short, there was nothing else the law school could do to try to recruit minority faculty candidates—and what it did was illegal—but

15. *Wygant v Jackson*, 476 U.S. 267 (1986).

that still wasn't good enough for the accrediting bodies.

V. CONCLUSION

There are, I'm sure, colleges and universities that don't insist on using race, ethnicity, and gender in such a heavy-handed fashion, although I'm not aware of any. Put directly, it's difficult to imagine a worse example to set for students than that involving affirmative action practices in higher education. The Supreme Court has assumed ever since the *University of California v. Bakke*¹⁶ decision in 1978 that colleges and universities are administering their affirmative action programs in good faith.¹⁷ It's time for the Court to acknowledge that assumption is incorrect.

To make the point another way, decisions about which students to admit, what financial aid to award, and which faculty to hire are too important for the Court to do anything but forbid altogether the use of race, ethnicity, and gender as considerations. As my father, a retired college professor and devoted husband to a strong and talented black woman, wisely put it after reading the email I quoted above about faculty hiring, "The reason great schools have great programs is because they have faculty who have a deep knowledge of their area and also add knowledge in their area. To hire faculty on any other basis is leading to the destruction of their own reputation and the quality of the product."

Who knows? If the nation's colleges and universities return to their original mission of educating students rather than trying to indoctrinate them about social causes, they might actually stop hemorrhaging money. They also finally would be in compliance with decades of unambiguous Supreme Court precedent that holds that, by law, affirmative action programs cannot be justified with arguments about rectifying past social injustices.

16. *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978).

17. *Id.* at 318-19.