

## **The Misallocation of Human Capital Resulting from Race-Conscious Admissions Policies**

Many affirmative action programs were adopted in American after President Lyndon Johnson signed the Civil Rights Act of 1964. In 1968 the Department of Labor forced contractors to have timetables for increasing minority presence in their field. And in 1971 the Supreme Court held that the Civil Rights Act forbade practices that appear fair but are discriminatory in operation to minorities. In the period following these government actions, universities began implementing policies that factored race into admissions. Some policies were subtle; some were overt. The ensuing legal debate surrounding race-conscious admissions policies has focused on the equal-protection clause of the Fourteenth Amendment. The rest of society often debates the fairness and need for such policies. In this paper, I will show that race-conscious admissions policies are facially unfair to all parties involved and fail to correctly allocate seats at selective universities to deserving students.

### **Judicial History of Race-Conscious Admissions Policies**

Before discussing the issue of race-conscious admissions policies, it is important to understand the judicial framework and history established by the Supreme Court. In the last 35 years the Court has heard four landmark cases regarding race and admissions into schools with another landmark case, *Fisher v. University of Texas*, waiting to be handed down in June. Each case presents a different variation of race-conscious admission programs but still falls under the same question: is this admissions policy constitutional under the Equal Protection Clause of the Fourteenth Amendment or Title VI of the Civil Rights Act of 1964?

In *Regents of the University of California v. Bakke*, Allan Bakke, a thirty-five-year-old white man had twice been denied admission to the University of California Medical School at Davis. As part of an affirmative action program to integrate underrepresented minorities into the

medical profession, each year the school allotted 16 spots out of 100 available for minorities. Both years Bakke was denied, his test scores and grade point average were higher than any of the 16 minorities that were admitted. Bakke believed he had been denied admission solely due to his race and brought a claim challenging the constitutionality of the affirmative action program. In a split vote, the Court held that the program violated the Fourteenth Amendment's equal protection clause, and the Civil Rights Act of 1964. Writing for one plurality, Justice Powell stated that the racial quota system violated the Civil Rights Act of 1964 because it excluded candidates based solely on race. Consequently, the medical school was forced to admit Bakke. However, siding with the other plurality, Justice Powell concluded that race could factor into an admissions decision provided it is not the exclusionary reason. He envisioned a “program [that] treats each applicant as an individual” and treats race or ethnic background as a plus.<sup>1</sup>

The second landmark case in race-conscious admissions jurisprudence, *Grutter v. Bollinger*, was handed down in 2003. In this case, a white resident of Michigan applied to the University of Michigan Law School in 1996. Grutter applied with a 3.8 undergraduate grade point average and 161 LSAT score, but was placed on the waiting list. She was subsequently denied admission later. She challenged the Law School’s admissions policy that “sought to ... achieve student body diversity.”<sup>2</sup> The policy also stated a goal to achieve a “critical mass of [underrepresented] minority students.”<sup>3</sup> However the policy requires admissions counselors to evaluate all available information about candidates before issuing an admissions decision. Just like *Bakke*, the question before the Court was whether this admissions policy violated the Equal Protection Clause of the Fourteenth Amendment or Title VI of the Civil Rights Act of 1964. In a 5-4 opinion for *Bollinger*, the Court held that the Equal Protection Clause “does not prohibit the

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<sup>1</sup> *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)

<sup>2</sup> *Grutter v. Bollinger*, 539 U.S. 306, 314 (2003)

<sup>3</sup> *Id.* at 316

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.”<sup>4</sup> Essentially, the Court believed that taking race into account, along with other factors that could contribute to a diverse student body, was constitutional because it sought to further a compelling state interest.

A third ground-breaking case was also decided by the Supreme Court in 2003. In *Gratz v. Bollinger*, Jennifer Gratz and Patrick Hamacher, white residents of Michigan, challenged the University of Michigan's undergraduate admissions policy that assigned points to various aspects of applications. Applicants needed at least 100 points out of 150 possible to guarantee admission; however the University's policy allotted 20 points to three racial minority groups: African-Americans, Hispanics, and Native Americans. This point system was designed to reinforce the University's policy to achieve diversity among its student body. Like *Grutter*, both Gratz and Hamacher were denied admission to the University and blamed the point system. The Court voted 6-3 in favor of Gratz, holding that Michigan's point system violated the Equal Protection Clause and Title VI. Similar to *Grutter*, the Court analyzed whether the point system was narrowly tailored enough to achieve the compelling state interest of diversity. Drawing from the opinion in *Bakke*, the Court held that assigning points based only on race did not give adequate “individualized consideration.”<sup>5</sup>

In the final noteworthy case, *Parents Involved in Community Schools (PICS) v. Seattle*, students in the Seattle School District were allowed to apply to any of the District's high schools. However a handful of schools continually received more applications than there were available seats and needed a tiebreaker system. In these instances, the District's second more important factor was maintaining predetermined racial demographics. In a 5-4 decision in favor of PICS,

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<sup>4</sup> *Id.* at 317

<sup>5</sup> *Gratz v. Bollinger*, 539 U.S. 244, 2xx (2003)

Chief Justice Roberts distinguished this case from *Grutter* for two reasons: 1) *Grutter* limited itself only to cases of higher education and 2) Seattle’s tiebreaker system did not involve an individualized evaluation of students outlined in *Grutter*. Instead of using the system for "exposure to widely diverse people, cultures, ideas, and viewpoints”, it lumped students together by limited “white” and “non-white” classifications.<sup>6</sup> Consequently, the system was not narrowly tailored enough to meet the strict scrutiny standard from *Bakke*.

### **Takeaways from *Bakke*, *Grutter*, *Gratz*, and *PICS***

Starting with *Bakke* in 1978, each holding has further defined the constitutionally permissible relationship between race and college admissions. Personal politics of the Justices aside, three common themes can be observed when analyzing the four landmark cases as a group. First, the Court has agreed that diversity in higher education is a compelling state interest. Compelling state interests are always analyzed under a strict scrutiny standard, and therefore race-conscious admissions programs are as well. The cases indicate that admissions programs must be “narrowly tailored” to pass this standard. Race-conscious programs have only passed this standard when the Court holds them to use race as a factor in an individualized, holistic evaluation of candidates. Secondly, designating seats for only racial or ethnic minorities will never pass constitutional muster; anything resembling a quota or racial balancing has been deemed unconstitutional under Equal Protection and Title VI. It can be argued that the Roberts Court narrowed this further in *PICS* by labeling the District’s tiebreaker system as a way to achieve demographic goals instead of furthering education through diversity. Finally, it is constitutional to use race as a “plus” in an applicant’s file so long as it does not carry significant weight.

As I mentioned previously, each of these cases is similar in that they are all a derivation

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<sup>6</sup> *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007)

of the same constitutional issue. However, patterns in the opinions changed as the composition of the Court shifted from more liberal (Justices Brennan, Marshall, and White) in *Bakke* to more conservative (Chief Justice Roberts and Justices Scalia and Thomas) in *PICS*. The current political composition of the Roberts Court threatens to narrow race-conscious admissions policies further. In the *PICS* opinion, Chief Justice Roberts stated that “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” If history holds true, and Roberts’ opinion comes to fruition, the *Fisher* holding will likely mark the end of race-conscious admissions policies at the university level.

### **The Fairness in a Meritocracy**

People have numerous wants and desires, but the resources to fulfill these wants and desires are limited. This gap between desires and resources creates, what economists call, scarcity. Consequently, the goods that comprise these categories are considered scarce goods. Take money for example. It is always finite (aside from Ben Bernanke’s quantitative easing policy<sup>7</sup>) and is always in high demand by consumers.

There are only a set amount of seats available at elite universities for high school seniors; those seats can be considered scarce goods due to their limited number and desirability. An April 2 article in TIME indicates how much the gap is widening between available seats (the resource) and the number of applications to elite universities (the desire).<sup>8</sup> All but one of the Ivy League schools decreased its admissions rate for the class of 2017. Harvard accepted a record low of 5.8% of its 33,531 applicants; Yale accepted 6.72% of 29,610; and Princeton accepted 7.29% of 26,498. Cornell, Brown, Pennsylvania, and Columbia also saw their acceptance rates plummet

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<sup>7</sup> Quantitative easing is an expansionary monetary policy used by the United States Federal Reserve as a result of the recent financial recession. This involves central banks purchasing assets from private entities in order to expand the monetary base in the economy. Hence, the Fed is “creating more money”.

<sup>8</sup> Webley, Kayla. *College Admissions: Ivy League Acceptance Rates Decline*. TIME (April 2, 2013).

with Dartmouth being the sole outlier. Outside of the Ivy League, Stanford's acceptance rate dropped from 6.6% in 2012 to 5.69% this year. MIT also set a new university low by accepting only 8.2% of their record 18,989 applicants. While these figures are only representative of some of the more prestigious universities in the US, they still reinforce how competitive admissions are to top flight universities.

There are two primary methods society can use for distribution of scarce goods: one through a market approach and one through a fairness approach. Admissions departments in higher education can, and have, employed both types of methodology. Some schools choose to employ race-conscious admissions policies (the fairness approach) while others select students strictly on the merits of their application (the market approach).

Selecting students based solely on their merits respects the inherent competitiveness of higher education. The market approach to higher education admissions (a meritocracy) provides the most level playing field for all college applicants. It answers the fundamental question of 'who is the most deserving?' by earmarking seats to the candidates with the highest levels of achievement. But at its core, a meritocracy in higher education allocates seats based on returns to scale. Universities admit the students with the best academic credentials. Typically those students are the most likely to succeed in the university's academically-centered environment. After being trained in rigorous degree programs, those students have a high probability of being successful post graduation. Many will pursue graduated degrees at other selective universities while others will flourish in demanding work fields. In this mutually beneficial relationship, the most qualified students are challenged intellectually by some of society's brightest minds. The university benefits by building a strong, well-connected alumni network of future leaders.

A 2009 study by Quinnipiac University suggests that Americans reject the inherent unfairness of race-conscious admissions policies; popular opinion has shifted in favor of market approaches to education. 55% of Americans believe “affirmative-action programs that give preferences to blacks and other minorities in ... college admissions” are unnecessary.<sup>9</sup> The Supreme Court may have accepted universities’ arguments that diversity in higher education is a compelling state interest, but the taxpayers and benefactors who fund these universities have not. Further, recent state ballot initiatives<sup>10</sup> reinforce the notion that the voters do not value diversity as a compelling state interest.

Beyond the delineation of returns to both university and student, an admissions policy that accounts for an applicant’s skin color, ethnicity, or nationality undermines the basic premise of an educational meritocracy: it is not predictive of future academic success. The best economic argument for this fairness approach is that seats may be allocated for applicants who value it the most. In other words, the marginal utility of a minority applicant could increase more than another applicant vying for acceptance at the same university. However this theory is conjecture at best. Typically, applicants with better academic credentials will a higher marginal utility regardless of race or minority status. And race-blind admissions would certainly guarantee higher returns to scale for all parties involved.

Like any other solution to an economic problem, meritocracies have their flaws. They can be open to exploitation by wealthy alums seeking a way for their under-qualified children to skirt the admissions system. And, naturally, evaluating a candidate on paper alone never provides the full story about them. There is much about an applicant’s home and family life that

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<sup>9</sup> *Id.*

<sup>10</sup> In 1996, California passed Proposition 209 which amended the California constitution to prohibit discrimination or preferential treatment of anyone based on race in public education. In 1998 Washington passed similar legislation; Michigan followed suit in 2006. Both the Ninth Circuit and the Sixth Circuit have upheld challenges to the initiatives’ constitutionality.

might be more telling of their academic potential than merely SAT scores and GPA. But continuing to use race-conscious admissions policies will perpetuate the misallocation of resources to less qualified students and away from applicants who could have been successful given those opportunities.

### **Race-Conscious Policies or Class-Conscious Policies?**

According to a study by the Century Foundation in 2012, admissions policies that account for class or socioeconomic status, rather than race, have seen a recent push.<sup>11</sup> Universities are using class-conscious policies to in states that have barred racial preferences as a criterion in admissions. The driving idea is that class or socioeconomic status is an acceptable proxy for race.

However critics claim this premise is incorrect. Purely class-based admissions make it impossible to keep the same levels of racial diversity as such policies generally reduce the number of black and Hispanic students. Alan Krueger, head of President Obama's Council of Economic Advisers, has stated that there is a strong correlation between race and income, but not strong enough to consider them the same for diversity purposes. Harvard Professor Thomas Kane found that "selective colleges and universities using class-based admissions would have to save six times as many places for low-income students to maintain the same level of black and Hispanic students."<sup>12</sup> However these criticisms only reinforce the previous notion that all racial minorities think the same. Again, race is a poor indicator of true diversity.

Universities that are serious about diversity of ideas and opinions should incorporate class status, not as a proxy for race, but instead of race into admissions policies. Class-conscious

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<sup>11</sup> *A Better Affirmative Action: State Universities that Created Alternatives to Racial Preferences*, Century Foundation (2012) available at <http://tcf.org/assets/downloads/tcf-abaa.pdf>

<sup>12</sup> *Class-Based vs. Race-Based Admissions*, New York Times. (November 18, 2012) available at [http://www.nytimes.com/2012/11/19/opinion/class-based-vs-race-based-admissions.html?\\_r=0](http://www.nytimes.com/2012/11/19/opinion/class-based-vs-race-based-admissions.html?_r=0)



admissions are a superior method of diversifying student bodies for several reasons. First, these policies do not amalgamate the world views and opinions of all racial minorities into a single perspective. Secondly, class-conscious programs still integrate populations that are traditionally underrepresented at selective universities. For example, selective universities typically have large populations of upper class and upper-middle class students from suburban America; students from less affluent rural or urban areas would contribute to the exchange of ideas and bring about true diversity. Finally, unlike race-conscious policies, class-conscious admissions respect the inherent fairness of the educational meritocracy. They still evaluate applicants based on academic performance within the means available to them, not on skin color.

Controlling for academic preparation, students on the low end of the socioeconomic status spectrum are 80% less likely than high socioeconomic status students to attend college after high school. Using the same controls, blacks are 30% more likely than whites to attend college (at elite colleges the percentage is much higher).<sup>13</sup> This caption shows the imbalance in current race-preference policies. To put the same point differently, universities could significantly increase socioeconomic diversity with much less use of preferences than are currently used in pursuit of a predominantly racial diversity and the results would be entirely fairer.

Class-conscious policies are better evaluators of merit and are more predictive of success because they factor in academic achievement in the face of financial adversity. In their holistic analysis, they capture factors about applicants that contribute to true diversity. By using race as a proxy for diversity, race-conscious programs lack the depth of evaluation employed by class-conscious policies. Instead they cling to antiquated notions that only skin color brings diverse

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<sup>13</sup> Richard Sander, *Listening to the Debate on Reforming Law School Admissions Preferences*, 89 DENV. L. REV. 881 (2011)

perspectives and experiences. Socioeconomic policies will not capture every important aspect about an applicant, however; admissions officials must put in the necessary legwork to ensure holistic evaluations. But restructuring university policies toward class would bring admissions closer to correctly allocating seats at selective universities.

### **The Insulting Flaw of Diversity in Higher Education**

All four landmark Supreme Court cases held diversity in higher education to be a compelling state interest. Several large corporations, such as Dow Chemical, Halliburton, Shell, and Wal-Mart, filed amicus briefs in support of the University of Texas in the *Fisher* case. Georgetown and six other Catholic universities also filed amicus briefs supporting UT-Austin's First Amendment right to admit students. They claimed that racial diversity is important to the "intellectual, moral, and religious development of its students."<sup>14</sup>

Claiming that universities and employers benefit from a diversity of ideas is a fair point. Society can learn much from opposing points of view and different cultures. However, Admissions policies like Justice Powell's "plus" system in *Bakke* and the "holistic" approaches debated in *Grutter* and *Fisher* belittle what diversity *actually* is and what it brings to our nation's universities. Characterizing it this way is a complete misnomer. Those programs suggest a "bleak view of human imagination" because they imply skin color causes some inherent diversity of ideas.<sup>15</sup> This is patently false – not all black people share the same world views as all Hispanic people. Race might be a factor in which region, city, or neighborhood an applicant lives. Their region, city, or neighborhood might in turn provide them with a certain world view. However that scenario describes a correlation between skin color, nationality, or ethnicity and world view – not causation.

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<sup>14</sup> *Universities File Brief on Supreme Court Admissions Policy Case*, Georgetown University (2012) available at <http://www.georgetown.edu/news/supreme-court-case-brief.html>

<sup>15</sup> *Time to Scrap Affirmative Action*, THE ECONOMIST (April 27, 2013) at page 11.

Because a correlation can be observed does not mean it holds true for all parties. Race-conscious admissions programs treat applicants of color in a one-size-fits-all manner. Assuming that race *inherently* adds diversity of ideas undermines true diversity and minimizes applicants' other qualifications. If anything, these programs halt racial progress by treating all applicants of a certain race as having the same world views.

### **Race-Conscious Admissions Policies and University “Mismatch”**

UCLA Law professor and economist Richard Sander and journalist Stuart Taylor spent many years studying the effects of racial preference in college admissions before publishing their book, *Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It*. Their findings do not paint the rosy picture of equal opportunity and diversity often portrayed by university deans. Instead, the study shows that giving preference to race hurts underrepresented minorities far more than it helps them. Their study reinforces the misallocation of resources mentioned previously.

Sander and Taylor coined the term “mismatch” to describe the situation in which a racial minority benefits from racial preferences in admissions but is ill-prepared to attend and compete with other students. This often results in students falling so far behind their better-prepared classmates that it is impossible for them to catch up. Further, students admitted on racial preference “seek out courses and majors where they will suffer least – academically and personally – from their relatively weaker preparation.”<sup>16</sup> Over time these students tend towards softer majors and courses. This results in self-segregation and negligible effects on diversity. For the University of Texas, racial diversity in classrooms actually decreased from 1996 and 2002 even though minority representation increased.

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<sup>16</sup> Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party, *Fisher v. University of Texas*, (August 13, 2012) at pg. 27

Sander and Taylor's mismatch theory is supported by substantial evidence conducted by labor economists in the wake of *Grutter* and *Gratz*. In an article in *The Atlantic*, Sander shows how the data supports the premise of mismatch. Black college freshmen have higher rates of science and engineering majors than white freshmen. However black students drop these majors at roughly twice the rate of white students. And about half of all black students rank in the bottom 20 percent of their college classes; and the same percentage rank in the bottom 10 percent of their law school classes. Black law school graduates are also four times as likely to fail bar exams as are whites. There is not a clearer illustration of the way in which race-conscious admissions misallocate resources than the figures presented above.

Schools that employ race-conscious policies are guilty of exacerbating these figures. They place students into classes and majors for which the students are not prepared, cause them to lose confidence and underperform, and reinforce the stereotype that they are poor students. The University of Texas' admissions policy, which is being scrutinized by the Supreme Court in *Fisher*, is a prime example of such an offender. In 2009, when Ms. Fisher applied to the school, the mean SAT score (out of 2400) for incoming Asian students was 467 points higher than the average score for incoming black students; incoming white students scored an average of 390 points above blacks as well. Asian students accepted to the University were in the top 93<sup>rd</sup> percentile of all SAT test takers that year while white students were in the top 89<sup>th</sup> percentile. However black students were only in the 52<sup>nd</sup> percentile. Essentially, Texas is enrolling average black college-bound students in a highly-competitive academic environment. Unfortunately, extreme mismatches to the tune of several hundred SAT points are the norm at selective universities. It also begs the question if selective universities are being forthcoming about the reasons for employing racial preferences in admissions.

## **Admissions Policies Are No Longer “Conscious” of Race, They “Prefer” Race**

The most disturbing part of racial preference is the academic community’s unfounded commitment to this failing model. In fact, universities are not just committed to racial preferences, they are expanding them. Admissions data from six state law schools (including the University of Michigan Law School) from 2002-03 and 2005-07 revealed racial preferences becoming both larger and more mechanical after *Grutter* and *Gratz*.<sup>17</sup> Another study of over 40 public law schools reinforces this as a national pattern.<sup>18</sup> This data suggests that universities no longer employ truly race-conscious admissions policies, but rather ones in which race is the paramount factor. They are not holistic approaches to evaluating applicants; they are unconstitutional facades used to mask racial balancing from the public. University administrators continue to use the First Amendment and faulty notions of diversity to hide behind clever ruses to bolster their position by ranking services.<sup>19</sup> They continually defy Justice O’Connor’s statement in *Grutter* that racial preferences should be phased out by 2028; that statement was the basis for her decision to vote with the majority and the deciding vote in favor of Michigan’s admissions policy. Without O’Connor’s qualification, racial preferences would have been dead in the water 10 years ago. If the Court upholds Texas’ admissions policy in *Fisher* as constitutional, it is effectively accepting a lie and permitting universities to ignore binding precedent.

### **Conclusion**

On their face, racial preferences do not provide any tenable diversity of thought and idea to higher education; if anything, they exacerbate racial divides and foster less diversity. They are

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<sup>17</sup> Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party, *Fisher v. University of Texas*, (August 13, 2012) at pg. 17

<sup>18</sup> *Id.*

<sup>19</sup> See *Universities File Brief on Supreme Court Admissions Policy Case*, Georgetown University (2012) available at <http://www.georgetown.edu/news/supreme-court-case-brief.html>

unfair and defy the free market forces that make education a meritocracy. The result is Mismatch: a serious misallocation of scarce resources away from deserving students because of the color of their skin. Further, racial preferences are insulting because they suggest that all racial minorities share the same perspectives and that those perspectives are always different than those of white people. If selective universities are truly serious about fostering diversity among their student bodies, racial preferences would have been abandoned years ago in favor of socioeconomic status. However they continue to mask racial preferences as a way to bolster their rankings.