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American Educational Research Journal
Spring 2001, Vol. 38, No. 1, pp. 3-36

Affirmative Action and the Creation of More Favorable Contexts of Choice

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This article presents an analysis of affirmative action policy that takes into account students' vastly different social contexts of choice. Oppressive societal structures may constrain individuals' contexts of choice and thus limit their real choices in such a way that their nominal choices do not reflect their potential talents, abilities, and aspirations. An unfavorable context of choice may hinder students' development of self-determination, which is a crucial underpinning of an education for justice and democracy. The aim of this article is to put forth a defense of affirmative action that is not considered within the current discourse. Because the development of a sense of self-determination is a crucial aim of a good and just education, I argue that affirmative action is necessary because of its role in combating oppressive educational structures, fostering more favorable social contexts of choice for students, and consequently, their self-determination.

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Affirmative action has emerged as the most contentious of all race-conscious¹ education policies in the United States. The affirmative action debate attracts opinions from nearly everyone because many people believe that the policy personally affects them. Whether one supports or opposes the concept, it seems that affirmative action and its implications for equality, justice, and democracy strike a tender chord in the lives of Americans, who are "arguably the most 'race-conscious' people on earth" (Marable, 1995, p. 185). Christopher Edley, one of Bill Clinton's advisors on affirmative action, observed that the controversy surrounding affirmative action is primarily concerned with people's competing ethical values and moral vision (Edley, 1996). People have competing intuitions about the issue of nondiscrimination and the role that race and gender should play in the awarding of educational and employment opportunities.

College and university campuses across the nation are embroiled in the controversy over affirmative action. Students who support the policy have protested the scaling back or abolishment of affirmative action programs. For example, students at Florida International University staged a protest at Governor Jeb Bush's office in response to his plan to end affirmative action in admissions to Florida's public universities (Selingo, 2000). Students of University of California at Los Angeles were arrested because they refused to vacate an academic building as they demanded their university's noncompliance with California's ban on affirmative action (Basinger, 1998). These protests exemplify a continued passion for affirmative action policies and the democratic ideals that they represent. Students are likely driven to protest because they believe that abolishing affirmative action in college admissions will result in deep losses not only for campus communities but for individual students as well.

A Contemporary Liberal Framework

Missing from the discussion of affirmative action policy is an analysis of affirmative action that takes into account students' vastly different "social contexts of choice" (Kymlicka, 1991, p. 166). The notion of a context of choice comes out of contemporary liberal political theory, the perspective I adopt in this article. For a long time the political theory of liberalism has been charged with being too atomistic, too oriented toward the individual, too blind to social and cultural embeddedness, and too noncommittal (neutral) about the good. Contemporary liberal theory transcends traditional liberal theory precisely because of its central concern with placing the responsibility for oppression and disadvantage within dominant societal structures, rather than with individuals. As a strand of liberalism that recognizes the critical importance of not only the individual, but of the individual's culture and community, it acknowledges as essential people's cultural and social contexts, within which a context of choice is framed by a society's history and structures in interaction with a person's cultural background (Kymlicka, 1991). It is thus important to distinguish contemporary liberalism from the traditional strands of liberalism (namely, libertarianism and utilitarianism)

that view social problems as the responsibility of the individual, in such a way that social policy must somehow compensate for individuals' cultural deficiencies. Contemporary liberalism, rooted in the philosophy of John Dewey and supported by scholars like Kenneth Howe (1997), Joseph Raz (1986), and Charles Taylor (1991), attempts to move liberal political theory beyond the idea that education policy needs to remedy individual cultural deficits, toward the idea that oppressive social structures and systems need to be changed so that oppressed persons in general, and students of color in particular, may flourish. It also embraces a perfectionist stance on the good, rather than a neutral stance. This is significant because perfectionist liberal tradition allows for a focus on an ideal such as self-determination as a specific constituent of the good life.

Self-determination is a capacity that can be constrained or expanded by one's place within a dominant structural context and resulting life circumstances. In striving for self-determination, while the focus is on the individual, contemporary liberal theory also explicitly includes the individual's family and cultural community as crucial parts of the individual.² Because a just and democratic liberal society requires that its citizens be autonomous, or self-determining, the development of self-determination among young people becomes most important. The education system plays a significant role in whether or not students will be able to become self-determining in a meaningful way, that is, become the primary authors of their life stories. According to Raz (1986):

The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is a (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives. (p. 369)

Richards (1989) in turn described this robust notion of personal autonomy as the reflective freedom to plan one's own life. A person with this reflective freedom is one whose life is characterized by self-determination, and who is able freely to choose one's own goals and relationships. Self-determination thus is more robust than the barest notion of autonomy defined only by the absence of coercion. Self-determining people make not only judgements, but significant judgments about substantial activities. Most importantly, they know the difference between the two. Self-determination is characterized, then, by a significant capacity for autonomy within which person's life choices are made in relation to their historical, cultural, and social contexts, and represent who they are and who they want to become, rather than who they cannot be due to unjust societal limits.

Because the ideal of self-determination is defined by the capacity to write one's own life story, self-determining persons do not have to capitulate to societal factors that are outside of their control. One major condition associated with the development of self-determination is that persons have a favorable context within which to make significant choices about their

lives. This affects the character of people's choices; even if a choice is not directly coerced, it cannot properly be thought of as a meaningful choice if it is made within an impoverished context. Because of the dominant societal systems that privilege white skin, the social contexts of choice of people of color may be seriously constrained (Young, 1990). Constrained contexts of choice may limit individuals' real choices in such a way that their nominal choices do not reflect their potential talents, abilities, and aspirations. An unfavorable context of choice hinders students' development of self-determination, which is a crucial underpinning of an education for justice and democracy.

With this framework in mind, the purpose of this article is to take the ideal of self-determination, traditionally considered to be an individualistic, atomistic ideal that is not hospitable to people of color, and refocus the priorities associated with it. By relying on contemporary liberal political theory as described above, the ideal of self-determination is characterized as an inclusive and democratic aim of education that strongly supports race-conscious policies like affirmative action. A reconceptualization of self-determination may help race-conscious policies garner greater favor.

This article addresses two central questions: (1) How does affirmative action foster self-determination among students? (2) In light of the many critiques of affirmative action, can a defense of affirmative action hinging on the educational aim of developing students' self-determination take us beyond the standard arguments toward a place where critics and supporters might actually agree? In answering these questions, I undertake a detailed examination of the most common criticisms of affirmative action policy. It is with an understanding of these dominant themes of the debate that I then offer a new defense of affirmative action in relation to a contemporary liberal framework. I use the concept of self-determination to augment the qualifications argument for affirmative action described by Dworkin (1978, 1998), Gutmann (1987), and Gutmann and Thompson (1996). I argue that affirmative action is necessary because it fosters students' self-determination by playing a crucial role in expanding their social contexts of choice, both while they are students and afterwards.³ I end with a discussion of the status of affirmative action policy in the United States.

The range of affirmative action programs is broad, from federal contracts to employment and promotion to college and university admissions. I specifically examine affirmative action policy for students of color in higher education admissions because colleges and universities are gatekeepers to most valued social positions (Gutmann, 1987). Higher education's gatekeeping role puts the selection of students for college and university places at the heart of the struggle for equal opportunity and social justice in education.

Background for the Affirmative Action Debates

In 1961, President John F. Kennedy signed into law Executive Order No. 10925 (1961), which demanded more of employers than merely passive nondiscrimination in all employment practices. It required that employers act affirmatively to hire and treat employees fairly regardless of their race,

creed, color, or national origin (Sovern, 1966). During Lyndon Johnson's presidential term, the 1964 Civil Rights Act became part of a substantial group of 1964–1965 legislation known as Johnson's Great Society and War on Poverty programs, which had the following goals: helping low-income people through education and health programs, stimulating the economy for new jobs, and removing race and sex barriers to educational and employment opportunity.

Most significant for affirmative action policy was the Civil Rights Act, specifically Titles VI and VII. Title VI "bars discrimination under any federally assisted activity" and Title VII bars employment discrimination according to "race, color, religion, sex, or national origin" (Sobel, 1980, pp. 1–2). Although the focus seemed to be on employment discrimination, Title VI also applied to college admissions. Any educational institutions that received active financial assistance risked losing their aid if they did not comply with the federal requirements. After the passage of the Civil Rights Act, Johnson added Executive Order No. 11246 to the civil rights legislation in 1965. Executive Order No. 11246 (1965) formally encompassed and overrode Executive Order No. 10925 (1961), so it is widely seen as the source of federal affirmative action policy.

Although one specific program may be a little bit different from another, affirmative action in higher education admissions is a policy that aims to take an applicant's race, ethnicity, and sex into account in making selection decisions. Generally, this means that if an applicant is African American, Latino, Asian American, Native American, and/or female, this fact is taken as one qualifying factor among many considered in the admissions process. Of course, just who is considered under affirmative action varies regionally according to specific populations. Massachusetts, for example, often includes Portuguese immigrants (Tierney, 1997).

In recent years, Bill Clinton supported race-conscious policies in general, and affirmative action in particular, yet he did not aggressively champion this portion of the civil rights agenda. In June 1995, he spoke on affirmative action and solidified his support for the policy even though he said that it needed reform. "When affirmative action is done right," he said, "it is flexible, it is fair, and it works" (Purdum, 1995, p. B10). Still, it was during Clinton's tenure in office that affirmative action policy faced the strongest attacks yet.

California has led the way in the backlash against affirmative action. Spurred on by Regent Ward Connerly, in 1995 the Regents of the University of California voted to bar the consideration of race and ethnicity in admissions decisions. In the November 1996 elections, California's Proposition 209, a ballot initiative entitled the California Civil Rights Initiative (CCRI), was passed with 54% of the vote. This constitutional amendment, written by two conservative academics, abolished all preferences based on race, ethnicity, and sex, but never specifically mentioned affirmative action. During the campaign, Clinton tried his best to stay out of the affirmative action debate, fearing that it would negatively affect his ability to get the White vote (Chávez, 1998). Opponents of the amendment challenged its constitution-

ality in court, but in 1997, the Supreme Court affirmed the 9th Circuit Court of Appeals ruling that had upheld Proposition 209. The impact on California's college student population was felt almost immediately. In Fall 1998, the most prestigious University of California campus, Berkeley, reported a 52% decrease in the number of African American and Latino first-year students for the first class admitted without affirmative action. Because of this, African American and Latino students made up only 9.9% of the first-year class compared with 20.7% the previous year (Healy, 1998). At Berkeley's law school, there was only one African American student in the first-year class of 1997-1998. The sentiments in California have spread to other states as well. The most significant developments have been in Texas, Washington, and Michigan.

In deciding the *Hopwood v. Texas*⁴ case on March 18, 1996, the Court of Appeals for the 5th Circuit ruled against race-conscious affirmative action policies in higher education admissions, thus nullifying the Supreme Court's *Bakke* ruling in all 5th Circuit states: Texas, Louisiana, and Mississippi. The three-judge panel, who, not coincidentally were all Reagan-Bush appointees, prohibited the use of race-based admissions criteria to achieve diversity at the University of Texas Law School. They found for Hopwood based on the notion that a state's interest in acquiring a diverse student body was not compelling enough to justify a program like that of the University of Texas Law School. Texas appealed the case to the U.S. Supreme Court. In declining to review the case, the Supreme Court both upheld the ruling and limited its applicability to only the 5th Circuit states.

In Washington state, 59% of the voters approved Initiative 200 in 1998, a CCRI-like referendum banning race and sex preferences in public employment, contracts, and university admissions. It was in this political context that White applicants to the University of Washington Law School contested their rejection in the *Smith v. University of Washington* case. In two other cases, both the University of Michigan and the University of Michigan Law School also have been sued by White applicants who were rejected for admission.

As the legislative challenges to affirmative action continue, the theoretical and ideological debate about whether the policy is right or wrong continues to rage.

The Major Arguments Against Affirmative Action

To propose an innovative defense of affirmative action policy in higher education admissions based on the key educational aim of developing self-determination among students, it is important first to grapple with the major arguments both against and for affirmative action policy in higher education.

Discrimination in Reverse?

One of the most common criticisms of affirmative action is that it violates our idea of equal rights for all. Critics argue that when colleges and universities take an applicant's race or ethnicity into consideration in the admissions process it is tantamount to discrimination against White students. Steele

(1990) maintained that affirmative action policies "have reburdened society with the very marriage of color and preference (in reverse) that we set out to eradicate. The old sin is reaffirmed in a new guise" (p. 115). According to critics such as Steele, this is an odious practice that results in the rejection of some applicants simply because they are White, which is just as objectionable as the rejection of applicants of color. However, supporters of affirmative action agree with attorneys Katzenbach and Marshall (1998):

To speak of . . . [affirmative action] efforts as though they were racially biased against whites and to equate them with the discriminatory practices of the past against African Americans is to steal the rhetoric of civil rights and turn it upside down. For racial bias to be a problem, it must be accompanied by power. (p. 45)

Nonetheless, charges of reverse discrimination abound in the public debate over affirmative action. Although the 14th amendment to the Constitution guarantees equal protection to all under the law, nowhere does it preclude the consideration of race, ethnicity, or sex. In fact, sometimes to treat people fairly, it is necessary to be conscious of race, ethnicity, and sex in education policies (Appiah & Gutmann, 1996). Yet, when it comes to challenges that affirmative action has faced in court, the chief complaint against affirmative action is that it amounts to reverse discrimination.

The civil rights legislation of the 1960s championed nondiscrimination. At the time, it went unquestioned that nondiscrimination banned discrimination against people of color or women, because White men were not in danger of being discriminated against for educational or employment opportunities because of their color or gender. In fact, both sides of the affirmative action debate usually agree that race, ethnicity, and sex should not be used to discriminate against people of color or women.⁵ The concept of nondiscrimination has evolved in such a way that policies that view a person's race, ethnicity, or gender as a qualification for selection are still considered legal. An applicant's race is a relevant qualification because the social purposes of (selective) colleges and universities include educating professionals and community leaders that can serve all communities (Gutmann, 1987). The notion of affirmative action was conceived as an active expansion of opportunities for people of color and women, not just as freedom from discriminatory practices. Given the past and present racism that is entrenched in American society, mere nondiscrimination can actually perpetuate the oppressive status quo. Young (1990) argued that it is precisely affirmative action's challenge to passive nondiscrimination that makes its case stronger, because it aims to combat the oppression and domination of marginalized groups. Oppression is the major wrong endured by people of color and women in United States society. Young pointed out that "if discrimination serves the purpose of undermining the oppression of a group, it may be not only permitted, but morally required" (p. 197).

Young's assertion underscores another important point: affirmative action policies take nothing away from White men that they actually earned or

deserve to keep. Because of societal inequality, they enjoy many unearned privileges (McIntosh, 1989). Affirmative action, in part, attempts to remedy that situation. Studies have shown that increases in the numbers of students of color in higher education, although positive, have been small and "have been made without causing undue personal or financial hardship to white males" (Ethridge, 1997, p. 70). Of the approximately 1,800 four-year institutions of higher education in the United States, about 120 of the most selective schools practice "serious affirmative action" because the other schools have much less competitive admissions processes (Chenoweth, 1997, p. 10). A recent study by The College Fund/United Negro College Fund (UNCF) found that between 1984 and 1995, the majority of the top 120 institutions accommodated the increase in African American and Latino students by expanding their first-year cohorts in toto. For example, at the University of Virginia, the entire 1995 first-year class included a total of 292 more students, while the number of African American and Latino students increased by 237 (Chenoweth, 1997). Regardless of education, White males still had higher wages than women and people of color. White students attend their first choice of college, whereas African American and Asian American students are more likely than Whites to attend a second or third choice college (Hurtado & Navia, 1997). Interestingly, following the 5th Circuit's decision in favor of Hopwood and two other White students, a lower court charged with awarding damages to the plaintiffs considered it so unlikely that any of them would have actually been admitted to the law school, even under a race-blind policy, that they were each only awarded one dollar (Dworkin, 1998). In 1995, the Department of Labor found that out of 3,000 discrimination cases filed, fewer than 100 involved reverse discrimination; of these, only six were actually validated (American Council on Education, 1996). Still, the widespread impression is that White people unjustly lose out because of affirmative action. In a 1995 *USA Today*/CNN/Gallup Poll, 15% of the White males believed that "they've lost a job because of affirmative action policies" (Marable, 1995, p. 85). Whether or not this perception is based in reality does not change the fact that a portion of White people feel cheated by the civil rights gains in the United States. These feelings may cause one to question the fairness of affirmative action. This leads to another argument often raised by affirmative action's critics, that some students of color are less deserving of college admission than some White students with higher standardized test scores or grade point averages (GPAs).

Who Merits Admission?

The idea that affirmative action is discriminatory is a misconception that stems from the myth of meritocracy. Those who make this argument never consider how much privilege, often afforded by skin color and the arbitrary circumstances of birth, influences one's ability to meet traditional standards of merit. Without this deep understanding of the meritocratic myth, White students become resentful. All they see is that the rules of the game that

privileged their fathers have changed; they cannot now always count on having the favored position.

Affirmative action caused people to question whether or not the students admitted under such policies were qualified enough, or worthy of admission.⁶ Many White students believed that affirmative action policies came at the expense of their fair educational opportunities, at the expense of merit-based selection. Representative S.I. Hayakawa (Republica, California) protested affirmative action policies in 1979, even though he had supported initial affirmative action efforts to draw attention to the problems of discrimination. Hayakawa wanted "to keep those opportunities from becoming color-coded handouts" (Sobel, 1980). He was wary of opportunities that may have gone to people who did not merit them. This is the crux of the merit objection to affirmative action, perhaps the most prominent of all the opposing arguments. A main part of the contention that affirmative action desecrates merit-based admissions processes is that it reinforces the idea of White superiority by tacitly confirming that applicants of color cannot meet the traditional admissions standards, which is exactly the idea that the Civil Rights Act tries to overcome (Belz, 1991). A recent study by two researchers at the University of California at Davis Medical School examined the career paths of 356 medical school students who were admitted to Davis under affirmative action policies. They compared the affirmative action beneficiaries with a matched sample of students who were not admitted under affirmative action. Their findings directly challenge the idea that students admitted under affirmative action policies are necessarily less qualified and less able to compete and succeed in higher education. The graduation rates of both groups were quite similar; 94% of the affirmative action beneficiaries graduated compared with 97% of the matched sample. In addition, after graduation, both groups performed equally well in their residencies, as evidenced by their evaluations and rates of completion (Dreier & Freer, 1997). Medicine is arguably one of the most challenging career paths one could undertake. This study makes it clear that although affirmative action helped some students of color gain entry, their qualifications and abilities enabled them to graduate and succeed as physicians.

An affirmative action policy such as the one at Davis Medical School is justifiable mainly because it compensates for biased and oppressive structural and institutional factors, rather than for the supposed deficiencies of students of color.⁷ It was (and is) not uncommon for students of color to receive little to no encouragement from school officials to attend college. Consider the experience of a well-respected Chicano scientist: "I was in an accelerated class, I was in the top 10% of my high school graduating class. I wasn't dumb; I was pretty good, I thought. She [the counselor] told me, 'Well, you should go into vocational school'" (Gándara, 1995, p. 62). Structural factors such as the attitudes of K-12 educators have an impact on students' perceived future options. Affirmative action tries to offset some of the structural inequities suffered by students of color within their K-12 educations. As Sturm and Guinier (1996) contended, the "tests and

informal criteria making up our 'meritocracy' tell us more about past opportunity than about future accomplishments on the job or in the classroom" (p. 957). Of course, the argument is made that students need better schools, college preparation, and encouragement from educators, not admittance to a college for which they are not qualified. Although this is certainly true, students should not suffer due to the inferior quality of their schools. It is also not right to assume that students of color do not have superior academic achievement. In 1998, Berkeley rejected 800 African American and Latino students who had perfect 4.0 GPAs (Takaki, 1998).

Still, critics will wonder why White students should suffer due to arbitrary circumstances of race. This raises an emotion-laden point. To be sure, White students should not suffer because of their race. However, the issue is far more complex than the answer intimates. Affirmative action policy does not entail that students be rejected because they are White. It also does not entail that students be accepted because they are Latino or Native American. It does entail that admissions officers select students who have the most to offer in accordance with the institution's mission and goals. When one of those goals is to educate students who will serve as leaders for all portions of United States society, then an applicant's race or ethnicity is a relevant qualification for admission (Dworkin, 1998; Gutmann, 1987).

Using race and ethnicity as a factor in admissions is somehow seen as being in opposition to regular or objective admissions criteria. What is perhaps more accurate is that it is the most thorny criterion. Race is one qualifying factor, not a sufficient qualification to guarantee admission. Other factors taken into consideration go relatively unquestioned. College and university admissions procedures have always taken special circumstances into account when selecting students. It is rather ironic that the practice of taking race into consideration raises such ire; the reliance on quantifiable scores to determine merit became standard practice only when more women and people of color began gaining access to college (Rodriguez, 1996). There is little (conservative) public outcry against other factors such as children of alumni (legacies), friends and children of large donors, athletic ability, veteran status, or geographic area. University of California admissions records from 1991 to 1996 show that influential people such as regents, politicians, and businesspeople often try to use their community standing to affect particular admissions decisions at the most selective institutions (Rodriguez, 1996). At Harvard, student legacies admitted in 1989 outnumbered all the African American, Mexican American, Native American, and Puerto Rican students, combined (Karen, 1998). Opponents of affirmative action nevertheless balk at the idea that selection criteria other than academic ability (as measured primarily by tests and GPAs) should matter in the admissions process. Although academic ability is very important, it is hardly the only, or even the most, important factor in deciding who should attend competitive institutions of higher education. As Gutmann (1987) wrote: "Academic ability is, by the best accounts, a very poor predictor of social contribution, however it is measured" (p. 197). This is especially so because an

important institutional aim of selective colleges is that their graduates will benefit society in some way. Qualifications are not separable from the "social function" of the institution (Gutmann & Thompson, 1996, p. 324).

Interestingly, a study of affirmative action showed that within the selective schools' admissions records about 90% of African American applicants had higher standardized test scores than the national African American average and about 75% had higher scores than the national White average (Bowen & Bok, 1998). According to this measure, their level of qualification was quite high. Even so, the African American students at these schools had lower mean scores than the White students. Facts such as these cause affirmative action critics to argue that college-minded students of color should simply attend less selective institutions. This way, the argument goes, they have a better chance of succeeding academically and graduating from college. Here again, the evidence from the Bowen and Bok (1998) study is relevant. African American students were more likely to obtain graduate degrees when their undergraduate college was more selective, even if their GPA was lower than it might have been at a less selective institution.

A Faustian Bargain?

Do students of color lose more than they gain from affirmative action policies? Some scholars of color would answer yes to this question (Chavez, 1991; D'Souza, 1991; Rodriguez, 1982; Sowell, 1993; Steele, 1990). They argue that affirmative action victimizes students of color who end up feeling inferior, first because they doubt that their own qualifications earned their admission, and second because they cannot compete with other students at selective institutions. According to Steele (1990), disclosing one's race or ethnicity on a college application amounts to a Faustian bargain. If students of color disclose their race or ethnicity, they risk presenting themselves as victims in need of special help, which may be damaging to their self-worth and confidence. Along these lines, Belz (1991) contended: "As long as legal rights and social benefits are conditioned on racial victimization, . . . it appears to be impossible for the beneficiaries of preferential treatment to achieve full equality" (p. 263). Indeed, these critics believe that affirmative action forces students of color to sell their souls to gain opportunities.

Although this line of argument is undoubtedly heartfelt, and despite the possibility that some students of color may have feelings of self-doubt, it is not affirmative action policies that cause those feelings. It is racism that causes people to doubt the abilities of students of color and it is oppression that causes these students to doubt themselves. Unfortunately, people of color who achieve in the educational realm are often questioned, whether or not affirmative action is at issue. Their qualifications and abilities are called into question despite the evidence of educational achievement and success. Consider what this Chicano student has to say:

I took my eighth grade diploma which was straight As, and I was valedictorian of my eighth grade . . . And I told him [the counselor] I would like to go to college and could he fit me into college-prep

classes? And he . . . said, well, he wasn't sure I could handle it. (Gándara, 1995, p. 61)

This type of incident is all-too common and has nothing to do with affirmative action. The fact is that college students at selective institutions whose race or ethnicity was considered in the admissions process are largely successful. From 1960 to 1995, when affirmative action policies were implemented, the percentage of African American college graduates (ages 25–29) and law school graduates increased, according to Bowen & Bok (1998). Between 1970 and 1995, the percentages of Latino college graduates (ages 25 and over) and law school graduates also increased. Bowen and Bok (1998) also found that the 6-year graduation rate for students of color at selective institutions was similar to that of White students. White students had a 94% graduation rate, whereas the graduation rate was 96% for Asian American students, 90% for Latino students, and 79% for African American students. The more selective the college, the higher the graduation rates for all groups. Bowen and Bok observed that these statistics refute the notion that affirmative action should be abolished so that students of color would attend less selective schools where they would have a better chance of success. They also rejected the idea that affirmative action harms its beneficiaries. Their study found that students of color at selective institutions that considered race and ethnicity in admitting students had high levels of success and satisfaction, as measured by their graduate and professional school success, satisfaction with their college experience, and perceived intellectual benefit of attending a selective school. Far from damaging its beneficiaries, affirmative action does what it is supposed to do—it views a student's race and ethnicity as a relevant qualification for admission and provides students with the real opportunity to attend a selective institution of higher education. From most accounts, affirmative action programs do not cause students of color to suffer as Faust. Instead, they gain knowledge and success through their own abilities.

Are the Neediest Overlooked?

Many believe that affirmative action in higher education admissions primarily benefits students of color who need it least (D'Souza, 1991; Steele, 1990). It may be true that affirmative action disproportionately benefits students of color from middle or higher-income families rather than students from lower income families, because those from higher-income families are likely to have better college preparation and more family assets. That said, it is important to realize that in admitting students of color from any wealth background, colleges and universities are fulfilling their social purposes of, for instance educating officeholders and enabling graduates to choose from among good lives (Gutmann, 1987). It would be difficult to argue that only students of color from working class and poor backgrounds will offer something new to the diversity on campus or to postgraduate positions of leadership. Middle-class students of color bring relevant experiences to the campus related to their race and ethnicity. Through his research on the black

middle class, Cose (1993) found "America is filled with attitudes, assumptions, stereotypes, and behaviors that make it virtually impossible for blacks to believe that the nation is serious about its promise of equality—even (perhaps especially) for those who have been blessed with material success" (p. 5). These are compelling reasons for the continued emphasis on race consciousness in affirmative action programs, even if students from middle-class families benefit the most. So, if the question is whether affirmative action should benefit a middle-class Latino child of an attorney or a poor child of a rural white farmer,⁸ I would say the answer is both. We are, in essence, comparing apples to oranges. However, if we compare a Latino child of an attorney with a similarly situated White child, it is fair to say that the Latino student will have a different experience in that in her or his life, she or he will always have to deal with the issue of ethnicity (Edley, 1996).

There are those on both sides of the affirmative action issue who would solve the controversy by simply replacing race and ethnicity with socioeconomic class (D'Souza, 1991; West, 1993). They argue that the neediest Native Americans, Asian Americans, African Americans, and Latinos would benefit most from increased access to college. Middle-class students of color would then compete in the same way that White students do now. We must remember, however, that when affirmative action is done right, students of color do compete in the same way as White students. The only difference is that being White is not seen as a relevant qualification for admission, whereas being, say, Native American is. One major concern is that viewing class as a proxy for race would dilute the unique importance of a focus on race and ethnicity. In her study of law school admissions, Wightman (1997) found that using an admissions model focused on class rather than race does not help to identify a racially and ethnically diverse group of applicants. Similarly, Kane (1998) has found that substituting class for race as an admissions factor in California would favor low-income White and Asian students instead of African American and Latino students. Even though West (1993) favored class-conscious affirmative action, he acknowledged that race-based policy has been necessary given United States history. Another concern is that it seems dishonest to substitute class for race in the admissions process when the policy is still intended to benefit students of color. It is as if we are somehow pretending that race is no longer the central issue.

While, using class as a proxy for race is neither an honest nor an effective solution, I think it is important to take class into consideration within the college admissions process because poor and working-class students would benefit from affirmative action in similar ways as students of color do. Feinberg (1998) maintained that there is a significant difference between racial injustice and injustices based on socioeconomic class, and I agree. However, he went on to argue that as a result poor people may sometimes be more to blame for their economic misfortunes than people of color are ever to blame for the misfortunes they face due to racial and ethnic considerations. This seems to be a wrong-headed way to resolve the contention that class should be substituted for race in affirmative action policy.

On the contrary, class considerations fit appropriately into the socially conscious mission of selective colleges and universities. Students from poor families, depressed inner city neighborhoods, or those who are the first in their family to attend college have a background characteristic that is relevant in the admissions process. In addition, there are regional cases when it would be especially appropriate to take class issues into account (e.g., Appalachia). Nonetheless, I want to underscore the idea that a solely class-based system of affirmative action is not an effective solution to the lack of racial and ethnic diversity on college and university campuses. A class-conscious policy would likely benefit many poor White students, which is certainly good. However, because poor White people outnumber poor people of color, there would be fewer students of color at selective institutions.

Shouldn't We See Past Color Already?

As yet another argument against affirmative action, opponents such as D'Souza (1991) point to campus tensions surrounding issues of race as evidence that affirmative action policy augments racial divisions. Without a policy that admits students using race and ethnicity as a factor, students would not feel such separation due to race. Opponents argue that it is time to return to the ideal of color-blindness, that the divisiveness of affirmative action has been endured long enough. The separation that affirmative action policies create leads to racial conflicts between White students and students of color, often because of the resentment that White students feel. True, incidents of racism and hate on campus underscore this point. Nevertheless, proponents of this view appear to be overlooking the fact that conflicts related to racism and stereotyping are far more attributable to our past and present history of racial tension than they are to affirmative action policy. In addition, present racial oppression makes the ideal of genuine race neutrality in education policy little more than a pipe dream. Hurtado and Navia (1997) made the excellent point:

Since social construction of inferiority and beliefs about cultural differences predate the implementation of affirmative action policies, the dismantling of these policies is not likely to eradicate the deeper problem of longstanding stereotypes or institutionalized racial, ethnic, gender, and class discrimination. (p. 114)

A study of college students shows that when a college or university has a strong emphasis on diversity, students gain more cultural awareness and a deeper commitment to promoting racial and ethnic understanding than they would have otherwise (Astin, 1993). Indeed, in reviewing the literature on the educational benefits of diversity, Milem and Hakuta (2000) found empirical evidence documenting that a diverse campus is beneficial for individual students, the campus as a whole, and society overall. More specifically, both the African American and White graduates in Bowen and Bok's (1998) study said they value the diversity to which they were exposed as undergraduates. One of the goals of affirmative action culled from the mission of selective institutions is to create a healthy climate, one in which

students have a diversity of backgrounds, experiences, and opinions so that they can learn from one another and bring their knowledge into the community as graduates.

"Diversity" is an oft-cited justification for affirmative action (Chang, Witt, Jones, & Hakuta, 1999; Liu, 1998; Mann, 2000; Milem, 1999; Milem & Hakuta, 2000). This is due in part to the legal precedent of Justice Powell's *Bakke* opinion, in which he affirmed diversity as a worthy goal for which colleges and universities should strive. Recent research shows that campus diversity is beneficial for all students, as well as for institutions of higher education and society (Marin, 2000; Milem, 1999). Legal analysis by Liu (1998) posited diversity as a constitutionally compelling interest, intimating that the diversity rationale for affirmative action could withstand court challenges. The judges who heard the University of Washington Law School and University of Michigan undergraduate cases agreed with this rationale (Schmidt, 2000). With the understanding that the diversity rationale is crucial to the defense of affirmative action policy in court, it should not stand alone. Admitting a few students of color in the hopes of increasing campus diversity does not necessarily ensure intellectual diversity or diversity of viewpoint. Similarly, because a student body is diverse does not mean that different perspectives will be heard. A study of law school participation discovered that White men participate the most in selective law school classroom discussions, regardless of the racial, ethnic, or gender composition of the class (The Chronicle of Higher Education, 1998). However, this study also supports the notion that faculty and student diversity that is not token in nature does make a difference in the quality of classroom interactions. If the professor was a person of color, more students of color participated in classroom discussions.

What these findings show is despite the fact that affirmative action cannot guarantee that a campus will have a real and noticeable diversity of viewpoints, it can ensure that students of color will be represented in higher numbers. This, in turn, moves us toward the noble goal of a diverse and rich campus environment; when diversity is strongly lacking, White males tend to dominate the classroom discourse. Because the ideal of color-blindness sits well with many of us does not mean that it is a good, or even decent, course of action for education policy. Genuine race neutrality would be preferred if there were more doctors, lawyers, scientists, and teachers of color, but there have been small increases in these fields even with race-conscious policies. Reverting to so-called color-blindness and dismissing affirmative action will not solve this problem.

Color-blind policies cannot be championed in a society that is not color-blind. Consider these facts: 50% of African American and 44% of Latino children under the age of 6 years live below poverty level, as compared with 14.4% of White children (Edley, 1996); African Americans make up just 4.2% of all doctors, 5% of university teachers, and 3.3% of attorneys, even as they make up some 12% of the U.S. population (Feinberg, 1998); among accomplished graduates of selective colleges, Whites still earn much more than their African American counterparts (Bowen & Bok, 1998). In an experiment

that placed a White man in a similar set of life situations as a Black man and as a Latino man of the same age and qualifications, the Black participant fared worse than the White participant 24% of the time, and the Latino participant fared worse than the White participant 22% of the time. The situations included a search for entry-level employment and a trip to an employment agency for a job referral. When it came to searching for housing, the Black and Latino men fared worse 50% of the time (Edley, 1996). Because race continues to matter in the United States, education policies ought to take it into account. Although in some aspects it would be nice if race neutrality could do the trick, the United States has not yet reached that point. Color-blindness will not reduce oppression just because we wish it could.

Having now considered the most common arguments against affirmative action put forth in the debate, I would like to move on to a defense of affirmative action that is not considered within the current discourse. Because the development of a sense of self-determination is a crucial educational aim if all students are to receive a good and just education, a race-conscious education policy such as affirmative action is necessary because of its role in fostering more favorable societal contexts of choice for students of color.

Affirmative Action and the Argument From Self-Determination

Good affirmative action policies implemented by institutions of higher education do much more than merely help students of color to gain admittance. When race is used as a factor in the college and university admissions process, the context from which students make their choices in life is greatly expanded. When an expanded context of choice is fostered by education policy, students are better able to become self-determining persons. The systemic oppression of people of color in the United States warrants an education policy that combats limiting societal structures. Because affirmative action policy places value on nondominant races and ethnicities and expands access to the opportunity structure, it counteracts oppression. Affirmative action policy, therefore, greatly contributes to the development of students' self-determination, especially students of color by contributing to the expansion of their contexts of choice.

In advancing this argument for affirmative action, I will first outline just how affirmative action helps students develop self-determination. Then I will show why this justification is both more defensible and more attentive to concerns of justice than the others presently available.

Expanding the Social Context of Choice

A well-respected Chicano political scientist recounts how significant it was for him to have a sibling who attended a top university. He explained: "My sister was a tremendous influence on me . . . I can remember, how many times I used to tell people my sister was at Berkeley. That was sort of a success image, a very important success image" (Gándara, 1995, p. 35). This

political scientist is one of 50 Chicanos with doctorate, medical, or law degrees from selective institutions that Gándara (1995) studied in an effort to understand the factors that influenced their educational success and social mobility. One common theme was that examples of family success like a sister at Berkeley helped to expand the context within which these students made their educational and career choices. Gándara found that having role models of intelligence, achievement, and success made a big difference for these successful Chicanos. In addition, over one half of the study's participants attributed their enrollment in college and/or graduate school to outreach and recruitment programs such as affirmative action for students of color.

A higher education is widely viewed as key to the pursuit of equity and upward mobility. When higher education in America began, there was great concern about the role it would play for equality and democracy (The Institute for Higher Education Policy, 1998; Tierney, 1997). On measures such as teacher quality, money spent per student, and curriculum offerings, public schools with a large number of students of color enjoyed fewer resources than predominantly White schools (Darling-Hammond, 1998; Kozol, 1991). Inasmuch as affirmative action contributes to greater educational opportunities and possibilities of highly valued positions in society for students of color, it significantly enhances their ability to become self-determining in a meaningful way. In addition, it combats oppression and contributes toward a healthy democracy. Without people of color and women in positions of professional and community leadership, it is fair to say that there is a substantially reduced chance of eradicating institutionalized racism, sexism, and oppression. A corollary benefit is that when Whites embrace the need to share power with all members of society, their humanity becomes more meaningful, a notion championed by Freire (1970). Diminishing racial injustice can be seen as a special obligation held by White people (Gutmann, 1987). Until the policies and programs that fight oppression are protected, those who have traditionally benefited from the oppressive and racist societal structures remain morally stunted and less than fully human (Freire, 1970). According to Edley (1996): "The diversity we experience enriches our lives in immeasurable material and immaterial ways, changes who we are and how we develop. This has little to do with instrumentalism and everything to do with wanting completeness in our humanity" (p. 130). To be sure, there are those who will disagree with this idea, arguing that their humanity feels complete enough as is. In spite of that, it seems right and good to strive for a moral ideal where all people feel worthy of respect, can conceive of themselves in positions of power, and have an overall sense of possibility about their lives. Surely this a humanity worth wanting by all.⁹

When the dominant social structure places one at a disadvantage in competitive higher education admissions, thereby constraining one's context of choice, affirmative action policy adds to one's capacity for self-determination by taking that oppressive structure into account. By helping to expand the social context of choice of students of color, affirmative action takes a step closer to humanity worth wanting. The argument can be made

that affirmative action programs restrict White students' contexts of choice. Prima facie this seems to be the case because as access is increased for students of color, White students may be displaced. However, that is not what has happened. Traditionally, top institutions of higher education have chosen instead to make more room for increased numbers of students of color (Chenoweth, 1997). Admissions examples from court cases like *Bakke* and *Hopwood* dramatize this issue by making it seem like a zero-sum calculus. However, in both cases, the White plaintiffs would not have been admitted even if the university's affirmative action policy had not been in place. What is most important is that affirmative action policy serves the interests of justice for students of color. Through affirmative action, students of color enter selective institutions of higher education in greater numbers than they would have otherwise been able to do. Graduation rates for White students and students of color are similar at such institutions (Bowen & Bok, 1998). Once students are accepted to college or graduate school, the context within which they make decisions grows much wider. Recent research measuring the value of a higher education proves this to be true. College-educated individuals enjoy higher rates of employment, improved health, better working conditions, higher salaries and benefits, greater personal status, and better overall quality of life (The Institute for Higher Education Policy, 1998). They are not forced to rely on only a high school education for the skills and training needed for good employment opportunities. These outcomes contribute to an expanded context of choice for college graduates, who enjoy greater life options. This has broader implications because that expansion leads not only to the development of self-determination and more worthwhile opportunities for individual students, but also to a more favorable social context of choice for other members of society who interact with college-educated role models of color.

Widening access to higher education through affirmative action contributes to justice (Dworkin, 1998; Lawrence & Matsuda, 1996). Dworkin noted: "We expect educational institutions to contribute to our physical and economic health, and we should expect them to do what they can for our social and moral health as well" (p. 100). Without college-educated role models of color in the positions of power to which affirmative action policies facilitate access, children receive unhealthy hidden messages. If they are White or male students, they learn that people in power usually look like they do; if they are students of color or female students, they learn that those in power do not look like them. Whether or not affirmative action is in place, Whites and males benefit from unearned race and sex privileges (McIntosh, 1989). With the implementation of affirmative action policies, we publicly recognize that people of color and women add something vital to college campuses and to society. It is this recognition that puts us on the road to fuller humanity. It is in everyone's best interest that all persons do as well as possible. The evidence shows that affirmative action expands people's social contexts of choice and their possibilities in life. According to at least one researcher, there is not much evidence of White backlash against affirmative

action; White persons with personal experience with affirmative action programs are more likely to support race-conscious policies (Winkler, 1995). Because of firsthand experience with the way affirmative action programs work, White people recognize the overall benefits of affirmative action.

Nevertheless, we cannot necessarily assume that if White people understood why affirmative action is ultimately good, then they would support it in large numbers. It is predictable and even understandable that White people might not like affirmative action because they have benefited, both directly and indirectly, from long-standing preferences. Affirmative action does not feel like it is beneficial for most White people, who see it as an unfair policy. Some scholars of color charge that this is indicative of a tendency to deny real racial and ethnic oppression, despite evidence to the contrary. Patricia Williams, an African American law professor, recounted an incident in which she attempted to enter a Bennetton store. Even though it was obvious to her that the store was open for business, the employee refused to let her enter. Williams spoke publicly about the incident and encountered a strong unwillingness to believe that things like this happen all too often to people of color (Williams, 1991). The catch is that not only do they happen, but they have a profound impact on the people to whom they happen. Incidents like this as well as more serious incidents cause people like Williams to question their inherent worth and place them in an impoverished context of choice. Those who refuse to believe that such incidents occur are also unlikely to support race-conscious policies like affirmative action. Accordingly, Edley (1996) noted that Americans have moral confusion over race-conscious policy.

One step toward clearing up this confusion is to use the principle of self-determination in conjunction with Gutmann's (1987) qualifications argument as the best philosophical justification for race-conscious policies like affirmative action. Because it advances the self-determination of students of color, critics and supporters can begin to view affirmative action as a fair and ethical policy. Affirmative action carries a moral cost (Edley, 1996). Whether Americans ultimately embrace or reject affirmative action, certain of us will likely feel worse off. Nonetheless, if we can all step back, even briefly, from the emotions surrounding the issue of race consciousness, we can begin to understand that social justice requires affirmative action and other such policies. The current oppression of people of color due to dominant institutional structures, systems, and ways of being is both undemocratic and unjust.

This portion of the argument is not likely to convert the most diehard of naysayers. It still will not feel good to certain White critics to embrace affirmative action as a morally just policy when it continues to use what they see as arbitrary characteristics—race, ethnicity, and sex—as factors in awarding opportunities. What they seem to choose not to see is that race and sex have always been factors. This time, however, it is not their own race or sex that is viewed as an important qualification, and that is somehow not palatable. In the final analysis, affirmative action is justifiable because race and ethnicity ought to be seen as relevant qualifications for admission (Gutmann,

1987). An important addition to this is that affirmative action improves the self-determination of people of color, while it does not significantly diminish the self-determination of White students. In the cases where a White student's context of choice became more limited due to affirmative action, we must realize that it was a context of choice based on intolerable injustice in the first place. As a result, the bottom line is regardless of its costs, affirmative action is morally justifiable because it plays a significant role in fostering marginalized student's development of self-determination, educating leaders and professionals, and reducing societal oppression. What is more, all told, it is the right and good thing to do.

Relevant qualifications. When a college practices affirmative action, both students of color and White students learn that the experiences, perspectives, and ideas that students of color bring to the campus environment are worth extra attention by admissions committees. It is important to a selective institution's mission to enroll students from a variety of cultural backgrounds that they consider minority, racial and ethnic background a plus factor. Being a person of color is seen as a qualification that is relevant to the mission and social function of a selective institution of higher education¹⁰ (Gutmann, 1987).

The idea that one's race or ethnicity is a relevant qualification for admission to a selective college or university stems from the work of Amy Gutmann¹¹ (Gutmann, 1987; Gutmann & Thompson, 1996). She presents a presentist defense of affirmative action policies designed to diminish structural and institutional repression and discrimination. Her argument relies on the main principle of nondiscrimination, which stipulates that qualifications for selection be relevant to the social function of the institution (or job, as the case may be). Nondiscrimination prevents repression and allows educational opportunities to be distributed on grounds that are relevant to legitimate social purposes. Nondiscrimination entails taking all relevant qualifications into account in admissions decisions and hiring practices. For example, within public schools, it is essential to view sex as a relevant qualification when hiring elementary school principals. If schools are to be nonrepressive and fulfill their social purpose of educating all students so that they can rationally deliberate about different conceptions of the good life, then being a woman is a relevant qualification for the position of elementary school principal. Because most elementary school principals are men and most elementary school teachers are women, both boys and girls receive, implicitly through the hidden curriculum, an education in gender role stereotypes and power positions. According to Gutmann (1987):

Girls learn that it is normal for them to rule children, but abnormal for them to rule men. Boys learn the opposite lesson. The democratic problem lies not in the content of either lesson per se, but in its repressive nature: the lessons reinforce uncritical acceptance of an established set of sex stereotypes and unreflective rejection of reasonable (and otherwise available) alternatives. (p. 114)

In order to provide the children with a nonrepressive and nonoppressive¹² education, more women need to be hired as elementary school principals. A similar, albeit more controversial, argument can be made regarding elementary school teachers, but this time male teachers would have an extra qualification for the job. Gutmann argued that affirmative action provides students with the experiences necessary in order for them to be able to deliberate in a rational way about differing conceptions of the good life. It helps to diversify the people in positions of authority and status as role models to whom students can look for a sense of what is possible in life.

A parallel example can be constructed regarding college and university admissions. There is a clear need for more physicians of color, both as role models for students and because they are more likely than White doctors to practice in underserved minority communities (Schroeder, 1996). As a result, race and ethnicity are relevant qualifications for admission into medical school. One of the functions of medical schools is to provide doctors for medical services in all types of communities. Fewer than 5% of all doctors are African American and Latino (American Council on Education, 1996). Due to affirmative action rollbacks in the 1990s, the number of students of color enrolling in medical school declined by 11% (Srinivasan, 1997). Because selective higher education is a privilege that one must earn, rather than a right that everyone has, qualifications matter (Gutmann, 1987). As part of their social function in a democracy, institutions of higher education serve as the gatekeepers to and educators for the highest status and highest power positions in our society. It is the exception rather than the rule that someone without at least a college degree could reach the highest levels of professional success and prestige in the United States.

Race is obviously not the only qualification considered by admissions committees. Academic ability, generally measured by standardized test scores and grades, is perhaps the most well-known and supported qualification for higher education. Opponents of affirmative action see it as the only relevant qualification. In actuality, academic ability has always been one of many factors that admissions officers take into account in selecting students who they believe have the best chance to succeed in higher education. Test scores predict a student's first-year grades, not overall college success. Therefore, admissions committees must also consider nonacademic qualifications. These qualifications need to be publicly defensible and related to the university's legitimate social functions (Gutmann, 1987). Non-academic qualifications include intangibles such as creativity, motivation, maturity, and perseverance. It is within these categories that admissions committees can consider factors such as special talents, athletic ability, and hardships in life. It is often not the most academically gifted (at least as measured by standardized tests and grades) students who have the most to gain from and to contribute to higher education (Gutmann, 1987). Another relevant nonacademic qualification that is related to the university's social purposes is the ability to serve society and to help others. Insofar as a varied student body contributes to the robust exchange of ideas and to intellectual

stimulation on campus, it is relevant to consider factors such as race, ethnicity, sex, ability, and religion. Of course, race and sex are also relevant because of how they serve the university's social functions of gatekeeping and educating officeholders. It is often students of color who have much to contribute in moving the university toward positive change.

In justifying affirmative action because it contributes to students' development of self-determination, I have been relying not only on Gutmann's qualifications argument, but on Howe's (1997) principle of nonoppression as well. Race and ethnicity are relevant qualifications for college and university admission; in admitting more students of color, selective institutions of higher education are taking an important step toward the reduction of societal oppression. Affirmative action combats the primary wrong of oppression. By having a policy of affirmative action, institutions of higher education begin to address institutional oppression and domination. For example, one study found that if law schools abandon their affirmative action policies, there will be a striking decrease in the numbers of law students of color (Wightman, 1997) and consequently, fewer lawyers who would be most likely to serve communities of color (Bowen & Bok, 1998). The increase in self-determination gained by college and professional school graduates and the concomitant contributions that they can make to society seem to be in the best interests of those on both sides of the affirmative action debate.

This is admittedly a forward-looking argument. Other arguments look more toward the past for a primary justification for affirmative action policy. Of these, the argument from historical debt is the most prominent. The argument from historical debt is based on the ethical need to redress the racist and sexist history of the United States. Generally, this defense only applies to groups that were either brought to the United States against their will or were already living here and were treated extremely poorly by White people. As such, affirmative action would only apply to women, African Americans, Native Americans, and Latinos. The argument, put forth recently by Feinberg (1998), goes something like this: We owe a special debt to women, African Americans, Native Americans, and some Latinos due to the outrageous violations of rights they suffered through our history of the subjugation of women, slavery, genocide, and cultural imperialism. Feinberg (1998) explained:

The assault on a culture has real consequences for many people in terms of truncated expectations and opportunities both denied and overlooked and in terms of a general social attitude on the part of others that accepts as part of the natural state of affairs lower levels of material well-being. Affirmative action—that is, race-based, backward-looking affirmative action—can be part of a strategy for repairing the rupture. It attempts to reconstruct the opportunities to which intentions and expectations must be attached. (pp. 69–70).

Thus, according to the argument from historical debt, policies of affirmative action play one part in redressing the United States' shameful history by

providing the affected groups with increased educational opportunity to make up for the legacy of the opportunities missed in the past.

The idea that the sole, or most important, aim of affirmative action policy is to correct past wrongs against people of color is faulty for two reasons. First, it emphasizes the past to the detriment of the present. There is no small amount of current discrimination in need of remedy. Second, and more compelling, to think of affirmative action as justifiable only or mainly because of the need to compensate for past wrongs is a significant roadblock to wider acceptance because individual persons today do not feel responsible for these historical wrongs. They refuse to accept the blame and the guilt that inevitably accompany this argument. Feinberg (1998) acknowledged this problem, but argued that even though White people should not feel responsible for historical racism, they should still feel obligated to personally right past wrongs. Although the very real debt that is owed to people of color in our society should not be overlooked, a better way of defining the aim of affirmative action policy is to correct present oppression. As some contemporary liberals have pointed out, the principle of nonoppression rather than nondiscrimination would satisfy the spirit of civil rights policy and contribute to the cause of justice for people of color (Howe, 1997). It would also place affirmative action firmly within the project of fostering social justice now rather than addressing wrongs committed by people in the past with whom many White Americans feel no kinship. Appeals to a reduction of oppression and injustice will likely carry more weight with most Americans. The argument from historical debt is just not the most compelling, especially for White people who believe that they had no part in that racist and discriminatory history. A more compelling justification relies on the idea that affirmative action furthers social justice goals both by helping students develop self-determination and by fighting oppression.

A mutually agreeable ideal. One of the attributes that makes this justification of affirmative action especially appealing is that self-determination is a principle on which both proponents and critics of affirmative action can agree. Basing the argument for affirmative action on the ideal of self-determination gives it a favorable starting point that other points of arguments do not enjoy. If we ask people whether or not all Americans ought to have an education that fosters their self-determination, we are likely to garner mostly positive responses. This makes the argument for affirmative action from self-determination more viable than other defenses. One significant criticism of affirmative action offered by conservatives is that it constrains the freedom and autonomy of individual Americans. Belz's (1991) libertarian view exemplified this opinion. He wrote: "The chief historical significance of affirmative action . . . has been to promote statist intervention into the free market and weaken political and social institutions based on individual rights" (p. 265). Affirmative action is viewed disparagingly as a big-government policy concerned with the rights of groups to the exclusion of individuals, which is seen as undemocratic. What could be more democratic than the attempt to combat oppressive societal structures, broaden

people's social context of choice, and, consequently, help them to develop meaningful self-determination? Self-determining citizens make the biggest contributions to a democracy because of their capacity to engage thoughtfully in democratic deliberation and participation. Our democracy was conceived with self-determining citizens in mind. Affirmative action policies deeply affect the lives and imaginations and consequently, the self-determination, of the individual students who benefit from them.

However, this argument could possibly be turned on its head. If one believes that affirmative action policies restrict the personal autonomy of White students, the ideal of self-determination would actually preclude the support of affirmative action. Using the example of Cheryl Hopwood, one could argue that because she could not attend the University of Texas Law School, her social context of choice was impoverished and, consequently, her self-determination restricted. Attending a less prestigious school would not afford her the same social capital as the highly selective flagship campus of the University of Texas. Although her individual context of choice was indeed limited by her Texas rejection, the contexts of choice of the students of color who benefited from the affirmative action program were expanded. The university's social purposes were fulfilled by educating a larger number of lawyers of color. Recall that I am not saying that there are no moral costs of affirmative action. I am saying that, on balance, affirmative action programs for students of color best serve the dual purposes of enhancing their individual development of self-determination and supporting the goals and functions of institutions of higher education. Unfortunately, there will be students like Hopwood who will not be selected because they lack some relevant qualification(s) for admission. Of course, Hopwood would most likely not have been accepted to Yale Law School¹³ either. The nature of highly selective universities is that there are many fewer places than students who would like to attend.

The argument from self-determination does not solve all of the possible problems with affirmative action perfectly. It cannot; no argument could. The substantive components of specific affirmative action policies need to be carefully considered and constructed. One aspect that makes this argument for affirmative action policy defensible is that it is based on an ideal—self-determination—that has a good chance of mutual acceptance. Another is that it is centrally focused on resisting systemic oppression and promoting social justice. The lives of the individual students are profoundly affected by a policy that is often formulated, changed, scaled back, or even abolished without their input.

The Current Status of Affirmative Action in American Higher Education

As of this writing, affirmative action in higher education admissions is still alive and well in most of the United States. However, the U.S. Supreme Court has not ruled on it since the *Bakke* case. In the 1990s, state initiatives abolished affirmative action in two states and there were at least five court cases

important to affirmative action's well-being. The legacy left by the *Bakke* case provides the legal guidelines for affirmative action policy.

Bakke as Law

It was widely believed that no other court case, not even *Brown v. Board of Education*, had attracted such immense media attention as the *Regents of the University of California v. Bakke*¹⁴ case. After the University of California at Davis School of Medicine rejected the plaintiff, Allan Bakke for the second time, he decided to sue on the grounds of reverse discrimination that put the University of California at Davis School of Medicine in violation of the 14th Amendment and Title VI of the Civil Rights Act. *Allan Bakke v. Regents of the University of California* was adjudicated in California Superior Court, which ruled in favor of Bakke on both counts. On appeal by the university, the California Supreme Court also ruled 6-1 in favor of Bakke, but this time only on one count—the 14th amendment, not Title VI (Bennett & Eastland, 1979; Sobel, 1980). In the majority opinion, the justices cited the Davis School of Medicine admissions program as unconstitutional because the special program was “a form of an education quota system, benevolent in concept perhaps, but a revival of quotas nevertheless,” which was in violation of the 14th Amendment (Ravitch, 1983, p. 286). Davis decided to appeal the decision to the U.S. Supreme Court.

On June 28, 1978, the Supreme Court announced its decision. They held 4-1-4 that “(a) the minority-admissions program of the University of California Medical School in Davis had discriminated illegally against a White male applicant, but (b) that universities could legally consider race as a factor in admissions” (Sobel, 1980, p. 145). In the swing vote, Justice Lewis Powell decided against the quota part of the Davis policy, but in favor of using race as a factor in admissions. Justice Powell became the court's majority opinion, because he was the deciding vote for both sides. This type of split decision showed that the justices were as divided as the nation.

Justice Powell's deciding opinion in the *Bakke* split decision stated that universities should be allowed to admit any students who they believe will add most to the robust exchange of ideas on campus; the search for a diverse student body, Justice Powell explained, is a constitutionally acceptable goal (O'Neill, 1985). Thus, race could be a legitimate factor to consider in admissions decisions. The opinion of the justices who sided with Bakke, written by Justice Stevens, cited that Title VI could be interpreted as forbidding quotas, saying that “race cannot be the basis of excluding anyone from participation in a federally funded program.” This invalidated the University of California at Davis Medical School's admissions procedures because a specific number of spaces were set aside for students of color, which excluded Bakke presumably because of race (Sindler, 1978, p. 294). By contrast, the justices who sided with the Regents and University of California at Davis Medical School argued that Title VI and the 14 Amendment justified the use of racial preferences in university admissions (Sindler, 1978).

In Justice Powell's *Bakke* opinion, he appended Harvard College's affirmative action program as a guide to the constitutionality of such admissions programs. Within the plan, diversity was held as the most important rationale for affirmative action. Harvard officials believed that a diversity of students enhanced their student body (Sindler, 1978). With this in mind, the admissions committee looked at myriad activities, heritages, talents, and career objectives in selecting students for admission. One might conclude that because the Supreme Court rated Harvard's program as constitutionally permissible and fair, much of the debate over affirmative action in higher education admissions would have been squelched. However, that has certainly not been the case, despite the fact that prominent legal scholars have also endorsed the *Bakke* idea that well-crafted race-conscious admissions policies are indeed constitutional. According to Dworkin (1998), "we have no reason to forbid university affirmative action as a weapon against our deplorable racial stratification, except our indifference to that problem, or our petulant anger that it has not gone away on its own" (p. 102). Nevertheless, there have been various legislative attempts to bar affirmative action policies and to establish their unconstitutionality despite the *Bakke* precedent.

The Politics of Intimidation

Conservatives have led political campaigns against affirmative action in many states. As a result, voters in California and Washington State approved initiatives banning affirmative action in higher education admissions, contracting, and hiring.

The onslaught against affirmative action in the courts is led by the conservative Center for Individual Rights (CIR) in Washington, D.C. They are, by far, the leaders in the politics of intimidation that characterize the campaign against affirmative action. Attorneys for the nonprofit legal center represented the plaintiffs in *Hopwood v. Texas* and they represent the plaintiffs in *Smith v. University of Washington* and the two University of Michigan cases. However, their role goes beyond just helping disgruntled students sue universities. They are engaged in a crusade to intimidate administrators and officials of selective institutions of higher education. Their primary method is to spark fear of lawsuits and to recruit White students as plaintiffs against colleges and universities that have affirmative action programs. According to one CIR attorney, the group's ultimate goal is to see affirmative action policies declared unconstitutional by the Supreme Court (Greve, 1999). The CIR released two guidebooks, one for college and university trustees that focuses on how to avoid lawsuits over affirmative action in admissions and one for students that explains how to review institutional policies and sue to change them. The book for trustees warns college officials that nearly every selective institution of higher education is violating the law with their affirmative action programs, and that, if challenged in court, individual trustees can be held personally liable for those violations (Bronner, 1999; Healy, 1999a). Of course, those contentions are a matter of considerable public debate. The

Bakke decision has not been overturned by the Supreme Court even though they have had the chance to do so, and there is no clear legal precedent for holding trustees personally liable for institutional policies (Hebel, 1999). In fact, in 1999 and 2000, the *Bakke* standards were upheld in Federal court during the *Smith v. University of Washington* and *Gratz* cases.

The Consequences of the Conservative Campaign

Those engaged in the politics of intimidation are making headway. After seeing a CIR advertisement in their campus newspaper and receiving the trustee handbook, officials at the University of Virginia began to review their admissions policies (Healy, 1999c). As a result, the policies were changed so that African American applicants no longer received qualifying points due to their race. Perhaps related to this change, the number of African American applicants seeking Fall 2000 admission to the University of Virginia decreased by 25% (Hebel, 2000). Similarly, in the aftermath of California's Proposition 209, the *Hopwood* case, and Washington State's Initiative 200, there have been decreases in the numbers of students applying for admission to and enrolling in the selective institutions in these states. There had previously been steady (albeit slow) increases in the numbers of students of color in the ranks of undergraduate and graduate students. Between 1985 and 1993, 36% more African Americans, 34% more Native Americans, 75% more Latinos, and 103% more Asian Americans graduated from college (American Council on Education, 1996). In 1994, these increases resulted in 7% of all college graduates being African American, 4% Latino, 0.5% Native American, and 4.4% Asian American. Although these are not high percentages, they are more substantial than they were before affirmative action policies were initiated. Between 1996 and 1998, while affirmative action was attracting negative publicity due to Proposition 209 and the *Hopwood* case, the percentage of students of color in the first-year classes at all colleges decreased by 1.8% (Geraghty, 1997; Reisberg, 1999). For the most prestigious University of California campuses, Berkeley and Los Angeles, the percentage of students of color accepted for admission to first-year classes declined dramatically the first year that affirmative action was not used. At Berkeley, for example, 66% fewer African Americans, 60.9% fewer Native Americans, and 52.6% fewer Latinos were admitted (Ramage, 1998). In 1999, the number of applicants of color to the University of Washington Law School declined significantly from the previous year. For Latinos, the decline was 21%, for Filipinos 26%, and for African Americans a whopping 41% (Selingo, 1999). As for University of Washington's undergraduate admissions, the number of Latino students in the 1999 first-year class decreased by 30%, African American students by 40%, and Native American students by 20% (Ma, 1999). No African American students were admitted to the University of California at San Diego's School of Medicine in 1997, even though 196 applied; only 4 of 143 Latino students were accepted (Selingo, 1997). In the 1998-1999 first-year class at the University of California at Berkeley Law School, only 1 of

268 students was African American. At the University of Texas School of Law, only 4 of 468 are African Americans. These admissions and enrollment statistics only begin to demonstrate the impact of the legislation and court rulings against affirmative action policies.

Court challenges within higher education. Court cases challenging affirmative action have been brought against the University of Washington Law School, the University of Michigan, and the University of Michigan Law School. It is likely that these cases will be the deciding factors regarding the status of affirmative action in higher education admissions. In *Smith v. University of Washington*, three White applicants who were not accepted to the University of Washington Law School sued the university with legal representation from the CIR. Even though Initiative 200 caused the university to abandon the admissions program under question, the case moved forward. A victory for affirmative action supporters came in December 2000 when the 9th Circuit Court of Appeals ruled that the University of Washington Law School's affirmative action program was constitutional.

In both cases against the University of Michigan, the university's defense relies on the *Bakke* precedent of using the argument from diversity to justify affirmative action in its undergraduate and law school admissions (Elgass, 2000). Like the lawyers for Bakke in 1978, the plaintiffs' lawyers from the CIR maintain that the University of Michigan's use of race as a factor in admissions violates the equal protection clause of the 14th Amendment and Title VI of the Civil Rights Act. The *Gratz v. Bollinger et al.* case, in which two White students are challenging the University of Michigan undergraduate admissions policy, is the first case that is not centered on law or medical school admissions. The first court battle was won by the university of Michigan. In December 2000, a U.S. District Court judge ruled against the students and the CIR. This case, as well as *Grutter v. Bollinger et al.*, the Michigan Law School case, are also unique in that they name the current and former presidents of the University of Michigan as personally liable. Officials at the University of Michigan are strong in their stance that the university will not back down on its commitment to affirmative action.¹⁵

Institutions that are not facing court challenges to their affirmative action programs have begun to change their policies. Like the University of Virginia, the University of Massachusetts at Amherst announced a preemptive strike on its affirmative action policy. Following the 1st Circuit's ruling against Boston Latin School's affirmative action program, the University of Massachusetts made race and ethnicity less significant qualifying factors for admissions even though the university is not facing any legal challenges. University officials estimate that the percentage of students of color enrolled could decrease as much as 6% (Healy, 1999b).

Recent court cases and state initiatives demonstrate that the politics of intimidation threatens affirmative action policies, highlighting the need for even more compelling justifications for affirmative action such as the argument from self-determination.

Conclusion

Imagine, if you will, a world built over a long time by and for men, by and for whites. In that world there would be a thousand and one impediments to women and blacks working effectively and successfully. That world and its institutions would be suffused through and through with inhospitality to blacks and women . . . That's the world we still live in, isn't it? (Fullinwider, 1991, p. 13)

Indeed, that is the world we still live in. Affirmative action policies were implemented within higher education as part of an educational agenda for social justice that also includes other race-related policies such as bilingual education and multicultural curriculum policies.¹⁶ Affirmative action is a crucial policy effort because it adds to students' meaningful self-determination by challenging dominant societal structures and expanding their social contexts of choice. A defense of affirmative action that rests on the ideal of self-determination goes beyond the established defenses of affirmative action and has a good chance of widespread acceptance because it leads to social justice.

I did not argue that colleges and universities generally have affirmative action policies in place that are good and sound. As evidenced by the court victories against the University of Texas Law School and Boston Latin School, it is crucial for these policies to be well drafted and in keeping with current law in order for them to withstand inevitable court challenges. Of course, even a good affirmative action policy cannot eliminate all injustices in American education; dominant institutional systems and structures that are oppressive to people of color and women must be challenged on other fronts as well.

Federal affirmative action policy is at a crossroads. The ongoing dissatisfaction with affirmative action programs shows that many Americans want a more palatable alternative. Supporters stress the importance of affirmative action to ensure that oppressive practices against people of color are abated. Otherwise, as history has shown, the United States would surely retreat to a more discriminatory and oppressive time (West, 1993). As early as 1972, scholars said that in order to have sound affirmative action programs, "universities will have to develop and continually monitor and revise their affirmative action programs" (Shulman, 1972, p. 37). To that end, affirmative action must be reconceptualized in the public consciousness as a policy that creates more favorable social contexts of choice and, thus, a greater sense of possibility for people of color and women. Sound affirmative action policies successfully combat oppression against people of color, with the aim of promoting students' self-determination, and, ultimately, social justice.

Notes

I express my sincere gratitude to Ken Howe for his thoughtful feedback, Linda McNeil for her insightful comments, and the Spencer Foundation for the funding that made this research possible.

¹I use the term *race-conscious* not because I see race as a signifier for some kind of immutable biological difference between humans, but because of the socially constructed place that "race" has in our society. Manning Marable (1995) made a relevant point: "Race only becomes 'real' as a social force when individuals or groups behave toward each other in ways which either reflect or perpetuate the hegemonic ideology of subordination and the patterns of inequality in daily life. These are, in turn, justified and explained by assumed differences in physical and biological characteristics, or in theories of cultural deprivation or intellectual inferiority" (p. 186).

²See Kymlicka (1991) for a comprehensive treatment of the criticism that liberalism is only centrally concerned with individual autonomy and self-determination, to the detriment of culture and community. Kymlicka refuted the idea that contemporary liberal theory is too individualistic and insensitive to minority cultures.

³In arguing for affirmative action, I primarily have the interests of students of color and female students in mind, although there are important instances where White students and male students would also benefit from an expanded context of choice. This issue will be addressed in a later section.

⁴*Hopwood v. Texas*, 78 F. 3d 932 (5th Cir. 1996), certiorari denied, 116 S. Ct. 2582 (1996).

⁵There are some exceptions to this, such as when being male may be seen as a qualification for posts as elementary school teachers. This will be discussed in the next section.

⁶These questions were posed mainly regarding students admitted to elite and selective institutions.

⁷Related to this, the idea that standardized tests should be a major criterion of selection has been vigorously challenged. See Sturm and Guinier (1996) for a critique of higher education selection practices.

⁸This example is owed to Edley (1996).

⁹The concept of something worth wanting was described by both Dennett (1984) and Howe (1997).

¹⁰I have been focusing on selective institutions of higher education for that reason. Selective institutions aim to educate future community leaders. In addition, affirmative action is unnecessary in less selective or nonselective institutions because they admit almost all who apply.

¹¹These ideas were also provided by Dworkin (1978, 1998). However, I rely specifically on Gutmann's interpretations.

¹²Howe (1997) conceptualized the principle of nonoppression as stronger than Gutmann's (1987) principle of nonrepression.

¹³Yale Law School was ranked as the number one law school in the nation by U.S. News and World Report in 1999.

¹⁴*Regents of the University of California v. Bakke*, 98 S. Ct. 2733 (1978).

¹⁵See the University of Michigan website regarding these two cases: www.umich.edu/~urel/admissions/index.html for further information from the University of Michigan.

¹⁶Perhaps it should not go without saying that decent health care, public schools, and academic preparation are needed for all students.

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Manuscript received March 14, 2000
Revision received December 1, 2000
Accepted December 13, 2000

American Educational Research Journal
Spring 2001, Vol. 38, No. 1, pp. 37-70

Educational Standards, Assessment, and the Search for Consensus

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In this article, we critically examine the nature of the "consensus" reflected in educational standards used to orient high-stakes assessment programs. We analyze two complementary cases of practice in the assessment of teaching. One focuses on the discourse of standards creation and one examines how standards like these are typically used to orient assessment development and judgments about individual performance. We offer two (partially competing) theoretical perspectives that might illuminate and guide our practices in this currently undertheorized and underexamined area of standards development. One is based in the discourse ethics of Jürgen Habermas and one is based in critical elaborations of Hans-Georg Gadamer's philosophical hermeneutics. We argue that conventional consensus-seeking approaches to the development and public review of educational standards tend to mask diversity and relinquish authority for consequential decisions to assessment developers who work in far less public circumstances. We draw on hermeneutic philosophy to offer a more pluralist approach that allows dissensus to be represented and taken into account in the assessment process.

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