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HN-300-D
December 13, 2018

Affirming the Purpose of Affirmative Action: Understanding a Policy of the Past to Move Towards a More Informed Future

Affirmative action, a program started in the 1960s to address discrimination in employment, has always been controversial. Vigorous debate in the last several years has occurred over the application of affirmative action in higher education admissions. Recently, some of the country's most elite institutions, including Harvard University and Yale University, have been the targets of lawsuits and intense public scrutiny. The purpose of this paper is to examine the origin and evolution of this scrutinized policy to better comprehend its current value. Overall, at the heart of its intended purpose, affirmative action is a critical and necessary policy; however, to maintain its true effectiveness, the policy needs to be studied and refined to minimize some of its negative consequences. In order to establish this argument, affirmative action will be viewed through an interdisciplinary lens, drawing on the fields of history, law, and ethics.

The Development of Affirmative Action

To appreciate the current higher-education debate, it is crucial to first understand the policy of affirmative action as a whole. The concept of affirmative action in its earliest form can be traced to the post-Civil War era of Reconstruction. On March 3, 1865, slightly over a month before General Robert E. Lee and the Confederates surrendered at Appomattox, Congress ratified an act that established the Bureau of Refugees, Freedmen and Abandoned Lands.[1] Referred to as the Freedmen's Bureau, this agency within the War Department sought to provide

[1] "Freedmen's Bureau," History, accessed November 10, 2018, https://www.history.com/topics/black-history/freedmens-bureau.

basic necessities, as well as medical and legal aid, to newly freed slaves and impoverished white Southerners.[2] As the Bureau continued to develop and evolve, its responsibilities expanded to include securing employment, educational benefits, and property claims for marginalized groups.[3] According to Georgetown law professor Girardeau Spann, the establishment of the Freedmen's Bureau marked the earliest indication of an affirmative action frame of thinking because special accommodations were guaranteed based solely on the belief that race would prevent individuals from receiving equal treatment and opportunities.[4]

The reasoning behind affirmative action reemerged in 1954 with the *Brown vs. Board of Education of Topeka* decision rendered by the United States Supreme Court. To summarize, the case questioned the legality of segregation within school systems in a number of states including Virginia, South Carolina, and Kansas. The plaintiffs argued that being denied admission into a school based on one's race violated the Equal Protection Clause of the Fourteenth Amendment. This position had been rejected in the lower courts, which followed the legal standard of "separate but equal" established in *Plessy v. Ferguson* (1896). Yet, the case was challenged all the way to the Supreme Court, where it was unanimously decided that "separate but equal educational facilities for racial minorities is inherently unequal."[5] On paper, that ruling seemed incredibly promising and, to a certain extent, it was. This landmark case ended segregation in schools—a massive historical feat. However, it was not the panacea to all of the issues of discrimination in the nation.

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[2] Ibid.
[3] Girardeau Spann, *The Law of Affirmative Action: Twenty Five Years of Supreme Court Decisions on Race and Remedies* (New York: NYU Press, 2000), 3.
[4] Spann, *The Law of Affirmative Action*, 4.
[5] "Brown v. Board of Education of Topeka," Oyez, accessed November 10, 2018, https://www.oyez.org/cases/1940-1955/347us483.

The 1960s ushered in the Civil Rights Era, a period critical to the establishment and evolution of affirmative action. In 1961, President John F. Kennedy first coined the term "affirmative action." In Executive Order 10925, aimed at establishing equal employment opportunities, President Kennedy stated, "The contractor will not discriminate against any employee or applicant. The contractor will take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."[6] It was within this context that this idea of ensuring equality for minority groups in employment and academic opportunities came into existence. From there, the policy further was expanded to other sectors in which the federal government had leverage, such as the hiring of contractors (a portion of federal contracts had to go to minority-owned businesses) and funding for public education.

Despite President Kennedy's push for anti-discriminatory practices (further exemplified in the creation of the Equal Employment Opportunity Commission), racial diversity in education was still limited. According to the National Conference of State Legislatures, the minority population accounted for five percent of undergraduate students, one percent of law students, and two percent of medical students in the United States at the start of the Johnson administration.[7] Yet, through President Johnson's civil rights initiatives, namely the Civil Rights Act of 1964, attempts at improvement would continue to be made and affirmative action's scope would continue to expand.

The Initial Response to Affirmative Action

[6] "Executive Order 10925," EEOC, accessed November 10, 2018, https://www.eeoc.gov/eeoc/history/35th/thelaw/eo-10925.html. Emphasis added.
[7] Ibid.

The response to affirmative action's growth and legitimate development varied greatly upon its introduction in the 1960s. According to Dennis Deslippe's text, *Protesting Affirmative Action: The Struggle Over Equality After the Civil Rights Revolution*, affirmative action was met with opposition upon its initial implementation. The degree of opposition varied depending on the region of the nation and in the case of employment, the industry in focus. Yet, in terms of strictly education, affirmative action was seen as "this strange madness."[8] Debate ensued over how affirmative action should be implemented and furthermore, if it should even be implemented. According to the text, at one point 60% of faculty did not support modified admissions processes, including affirmative action.[9] In looking at this text, it becomes apparent that the debate has lasted as long as the policy has been proposed.

The Implementation of Policy

There are a number of misconceptions regarding affirmative action and how it is implemented in the context of educational admissions. Essentially, institutions receiving federal funding are required to document some form of affirmative action plan. This plan includes a focus on a number of candidate characteristics including race, gender, age, and disability.[10] In the context of race, institutions typically draw upon Title IV of the Civil Rights Act of 1964, entitled "Nondiscrimination Under Programs Receiving Federal Assistance Through the Department of Education."[11] This clause outlines that "race, color, or national origin" cannot play a role in the

[8] Dennis Deslippe, *Protesting Affirmative Action: The Struggle Over Equality After the Civil Rights Revolution* (Baltimore, MD: Johns Hopkins University Press, 2012), 49.
[9] Deslippe, *Protesting Affirmative Action*, 50.
[10] "Affirmative Action," Cornell Law School: Legal Information Institute, accessed November 10, 2018, https://www.law.cornell.edu/wex/affirmative_action.
[11] "Title IV," The United States Department of Justice, accessed November 10, 2018, https://www.justice.gov/crt/fcs/TitleVI-Overview.

denial of individuals from receiving educational services or benefits. Furthermore, segregation and preferential treatment for one group over another is not allowed.[12]

Bearing that in mind, the question arises: how is affirmative action applied in the admissions process? The answer is that there is really no single way, but a variety of possible strategies to use. Generally speaking, affirmative action begins with a school actively seeking out minority students (whether by race, gender, first generation status) and encouraging them to apply for various opportunities.[13] By aggressively presenting potential experiences to those who were most likely previously unaware, the belief is that the diversity within the incoming applicant pool will expand. From there, institutions build their own comprehensive plans in evaluating the applications they receive.

Perhaps one of the largest fallacies is that affirmative action is implemented via a "quota system," with each group within society designated a certain number of spots within the incoming class. While such systems did exist at one point, they were deemed unconstitutional in *Regents of the University of California v. Bakke*.[14] Following that decision, policies began to diverge, and institutions adopted programs that fit their locations and educational values.
One manifestation of affirmative action is in a "comparative policy." A comparative policy evaluates students in marginalized groups and compares statistics and involvement to see which students have excelled academically or have served as a leader in their community.[15] These factors then play a role in the selection process, as it determines the most competitive candidates

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[12] Ibid.
[13] Cornell, "Affirmative Action."
[14] Ibid.
[15] "What you should know about race-based affirmative action and diversity in schools," Washington Post, accessed October 18, 2018, https://www.washingtonpost.com/news/answer-sheet/wp/2018/07/03/what-you-should-know-about-race-based-affirmative-action-and-diversity-in-schools/?utm_term=.f46cae2c01cc.

in the applicant pool. There is some debate surrounding the use of this system; yet the stated justification is that the most qualified students within these specific focus groups are being admitted, which reaffirms that merit is the guiding standard. Other methods of implementing affirmative action include percentage plans, specifically selecting candidates from underrepresented high schools, and decreasing the emphasis on standardized test scores in the hopes of encouraging more students from disadvantaged groups to apply.[16]

Because of local legal and political developments, some regions and institutions are exempt from affirmative action policies. In California, for instance, race-based selection processes are actually illegal. This statute developed as a result of California Proposition 209, occurring in 1996.[17] In regard to specific institutions, how does affirmative action factor into admissions at schools with specific values or student qualifications (e.g. single-sex schools)? Essentially, these schools are exempt from affirmative action plans, as long as there is an equivalent institution available for the "discriminated" group. For instance, an all-girls institution can operate so long as there are all-boys and mixed-gender institutions available with similar services and opportunities. This speaks more to education before college because most, if not all, single-sex colleges are private.[18] This means that federal funding is not provided and therefore, an affirmative action policy is not required.

The Debate

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[16] Kristen M. Glasner, Christian A. Martell, and Julie R. Posselt, "Framing Diversity: Examining the Place of Race in Institutional Policy and Practice Post-Affirmative Action," *Journal of Diversity in Higher Education* (2018).

[17] "The Future of College Admissions: Experts Weigh the Harvard Case," Bloomberg, accessed November 13, 2018, https://www.bloomberg.com/news/articles/2018-11-12/the-future-of-college-admissions-experts-weigh-the-harvard-case.

[18] "Guidelines regarding Single Sex Classes and Schools," U.S. Department of Education, accessed November 12, 2018, https://www2.ed.gov/about/offices/list/ocr/t9-guidelines-ss.html.

As seen currently in the media, the debate surrounding affirmative action is multi-faceted and, at times, a bit convoluted. Both sides of the debate need to be dissected and analyzed for the validity of their claims.

Those who support affirmative action base their justification on a number of concepts, including the significance of ensuring opportunities for disenfranchised groups and the overall benefits to society of diverse university classes. To speak to the first point, supporters of affirmative action typically note that the program provides students with opportunities that would not have existed had the policy not been implemented. According to William Bowen and Derek Bok, authors of *The Shape of the River: Long-term Consequences of Considering Race in College Diversity Admissions*, graduation from "selective universities" provides students with opportunities "beyond the workplace" that would not have existed without their undergraduate experience.[19] These opportunities allow for more long-term success and furthermore, greater positive contributions to the community. Elaborating on community contributions, proponents of the policy also argue that in ensuring more diversity in schools, racial attitudes improve. As students are exposed to different backgrounds and cultures, it is believed that acceptance of racial and ethnic differences improve.[20] The last major justification for affirmative action is the idea of compensating for past injustices. In other words, by providing increased opportunities now, previous discrimination will be erased or diminished. Though the power of this justification has weakened over time as the United States moves further away from the era of legal segregation, the compensation argument is still referenced as key support for affirmative action at times.[21]

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[19] Bill Shaw, "Book Review," *Business Ethics Quarterly* (July 1, 2001), 2.
[20] "The Case for Affirmative Action," Harvard University, accessed October 1, 2018, https://www.gse.harvard.edu/news/uk/18/07/case-affirmative-action.
[21] "Arguments For and Against Affirmative Action," Mount Holyoke, accessed October 18, 2018, https://www.mtholyoke.edu/~jesan20l/classweb/arguments.html.

Those who oppose affirmative action, on the other hand, frequently invoke worries about reduced meritocracy to portray their perspective. In regard to meritocracy, opponents of the policy argue that race as a preferential factor has the tendency to take attention away from an individual's academic credentials. Supporters of this theory argue that unqualified applicants take the positions of qualified candidates simply due to their minority status.[22] Another major argument against affirmative action is the idea that race-conscious admissions perpetuate racism and stereotyping. In emphasizing race as a notable factor in admissions, it is believed that notions of inferiority are further cemented in society.[23]

Evidently, this debate is complex and it is questionable whether a compromise will be reached. In a study conducted by Matthew DeBell of Stanford University, the idea of progress was examined in relation to opinions regarding equality and affirmative action practices. At the start of the study, two separate groups consisting of all white individuals and all black individuals were asked to rate the progress made in five distinct policy areas over the last fifty years. Both groups tended to state that the other group was favored in the policy area in focus (e.g. government treatment). When further questioned on progress and equality, both groups asserted that they believed that equality was crucial, with minimal discrimination or interracial conflicts serving as the cornerstones of social policy. Yet, despite agreement in that area, the study diverged when both groups were asked for their opinions regarding affirmative action and the current state of equality. For the group of white individuals, affirmative action was not viewed as a necessary policy, because they believed that white-black equality was largely achieved in American society. Conversely, the group of black individuals viewed affirmative

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[22] Mary J. Fischer and Douglas S. Massey, "The effects of affirmative action in higher education," *Social Science Research* 36, no. 2 (2007): 532-534.
[23] Ibid.

action more positively, as they felt that there was still a long way for the country to go to reach equality.[24]

At the conclusion of the study, DeBell noted that the differences shown in this study exist not because of the view of progress. Instead, DeBell attributed much of the debate to the subjective perspectives on the notion of ideal equality. To each individual and social group, an ideal standard of equality exists. Essentially, how far society lies from that ideal point of equality influences individuals' views on social policy and advancement. To reiterate, the subjective nature of ideal equality essentially keeps this debate in motion because it is nearly impossible to agree on what is ideal given past history, unique cultures, and critical experiences.

Policy and the Law

Regarding such a contested policy, it is crucial to analyze the legal fight and evolution of affirmative action to understand where power is vested. Supreme Court rulings have played a large role in the formation and evolution of affirmative action. When examining the influence of the Supreme Court, it is beneficial to study the evolution of policy in three distinct areas: before, during, and after the *Bakke* decision of 1978.

Pre-Bakke Decisions

As emphasized earlier, *Brown vs. Board of Education of Topeka* in 1954 turned the tides in favor of establishing an environment where a policy like affirmative action could potentially thrive. Following the *Brown* decision and into the 1960s, two cases emerged that further set the tone for a national discussion regarding affirmative action: *DeFunis v. Odegaard* (1974) and the case of *United Jewish Organizations v. Carey* (1977). Though majority opinion decisions were

[24] Matthew DeBell, "Polarized Opinions on Racial Progress and Inequality: Measurement and Application to Affirmative Action Preferences," *Political Psychology* 38, no. 3 (2017).

not officially delivered regarding these two cases, thus displaying that a unified consensus did not exist, the opinions and deliberations released revealed much about the early circumstances of affirmative action.

The *DeFunis* case involved an early affirmative action based plan that had been adopted by the University of Washington Law School. A white applicant who claimed that they were denied admission in favor of a "less-qualified minority applicant" raised the case, essentially challenging the institution's use of race-conscious admissions.[25] When the case reached the Supreme Court it was dismissed, as the court argued that the plaintiff's forthcoming graduation from law school rendered the lawsuit "moot." According to Spann, the Supreme Court's decision "foreshadowed the fact that a majority of the Court would be unable to agree upon anything other than the contentiousness of the affirmative action issue."[26] Thus, nothing was truly resolved; however, the lack of a decision reflected the growing hesitation regarding race-conscious practices.

The *United Jewish Organizations v. Carey* case that occurred nearly three years later marked somewhat of a change, but nonetheless still displayed mixed feelings on race-conscious policies. In this particular case, Hasidic Jews in a New York community felt their political voice was being suppressed after district reapportionment favored African-American voters. In the suit, the Jewish community challenged the constitutionality of the reapportionment action, which was proposed under the Voting Rights Act of 1965. Collectively, the court decided that the constitutionality of the action could not be disputed; yet, the justices could not reach a majority ruling on the stance of race-conscious practices. Essentially, four justices argued that the plan

[25] Spann, *The Law of Affirmative Action*, 14.
[26] Ibid.

was acceptable because it did not violate constitutional statute, despite the use of target quotas. Three justices argued that the reapportionment did not "burden white voters" and thus, despite a racial preference, it did not weaken anyone's vote. The remaining two in favor argued that since the plan did not purposely set out to burden white voters, its implementation was justified.[27] Essentially, this case further displayed the mixed opinions on affirmative action, though unlike the *DeFunis* case, its establishment was upheld.

Bakke Decision

The 1978 *Regents of the University of California v. Bakke* case is, to date, the most monumental affirmative action case in the United States. Though the Court was divided in the two aforementioned cases, the opinions handed down had the effect of supporting the growth of race-conscious policies. This landmark case, on the other hand, presented the first challenge to affirmative action and the implementation of race-conscious admissions.

The case challenged the admission practices of the University of California at Davis Medical School, which set aside 16 percent of the seats in the incoming class for minority students (16 out of 100 seats). Thirty-five year old Allan Bakke applied to the school twice, in which he was rejected both times. Bakke questioned the legitimacy of the affirmative action program, as his qualifications exceeded those of the minority students accepted into the school.[28]

Similar to the other two cases, there was no single majority opinion released in the case. Yet, unlike the other cases, the general consensus asserted that a racial quota system was unconstitutional (although the use of affirmative action was still valid).[29] In a 5-4 decision,

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[27] Ibid.
[28] "Regents of the University of California v. Bakke," Oyez, accessed November 13, 2018, https://www.oyez.org/cases/1979/76-811.
[29] Ibid.

Justice Lewis Franklin Powell asserted that race could be considered as a factor in admissions as long as other factors were considered, and it was used on a "case-by-case basis."[30] This confirmed the use of race-based admissions practices. With that being said, in a 5-4 plurality decision also authored by Powell, it was determined that "the Equal Protection Clause prohibits the university's specific race-based admissions program."[31] This determined that the quota system specifically was unconstitutional. In making that determination, this was the first challenge to the implementation of affirmative action. Though it confirmed the policy, it also restrained it for the first time in over a decade.

Post-Bakke Developments

Following the *Bakke* decision, a series of events and decisions developed that refined the critical viewpoint of affirmative action. In the 1990s, Civil Rights Ballot Initiatives were released that sought to ban race as an evaluating factor in employment and education. Furthermore, the question of affirmative action began to flood state courts in places such as California, Colorado, and Michigan. In California and Michigan, the policy of race-conscious practices was successfully banned through Proposition 209 and *Schuette v. Coalition to Defend Affirmative Action*, respectively. In Colorado, attempts were made to restrict affirmative action through the 2008 proposal Amendment 46; however, the initiative did not pass.[32]

The state of Texas has played a key role in the evolution of affirmative action. Texas is known for opposing affirmative action practices, as seen in the *Hopwood v. Texas* case of 1996 and more recently, the 2013 *Fisher v. University of Texas* case. In both cases, affirmative action was

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[30] "Regents of the University of California v. Bakke," Thirteen, accessed December 11, 2018, https://www.thirteen.org/wnet/supremecourt/rights/landmark_regents.html.
[31] Oyez, "Regents of the University of California v. Bakke."
[32] "The History of Affirmative Action in Education," Pearson, accessed October 18, 2018, https://www.pearsoned.com/history-of-affirmative-action-in-education/.

challenged for allegedly awarding spots to unqualified individuals simply due to their race. Yet most recently, it was determined that affirmative action could be applied on a limited scale.[33] In 2018, the Harvard case was introduced in which Asian-American students argued that the Ivy League school was discriminating against that particular population of students. This lawsuit has been key in inciting discussion about the policy, as critics have gone as far to say that the policy should be removed in favor of a "race-blind" process. In establishing a race-blind process, it is believed that the notion of merit will be restored as opposed to racial preference.[34] The case concluded several weeks ago, with the intention to reconvene to reach a decision. It will be interesting to see what implications this case holds for the future of affirmative action.

Overall, it is apparent that the legal status of affirmative action has fluctuated. Yet, in understanding its initial purpose and the challenges it has garnered, the debate and current circumstances can be more easily understood.

Ethical Implications

As noted throughout this paper, affirmative action undoubtedly poses points of contention, one of which is its social and ethical implications. Some of these implications are positive and beneficial, while others tend to be more negative, and perhaps unintended consequences. When balancing both sides, it is difficult to determine if certain implications outweigh others; thus, examining them collectively allows for an informed understanding of the issue at hand.

One the most prominent negative implications of affirmative action is the seemingly unintentional yet continued practice of racism and stereotyping in society. In 1999, Mary J.

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[33] Ibid.

[34] "Justice Dept. Backs Suit Accusing Harvard of Discriminating Against Asian-American Applicants," The New York Times, accessed October 1, 2018, https://www.nytimes.com/2018/08/30/us/politics/asian-students-affirmative-action-harvard.html.

Fischer of the University of Connecticut and Douglas S. Massey of Princeton University conducted a study on the impact of affirmative action in two respects: if the policy indeed favors unqualified candidates (physical appearance vs. meritocracy), as well as if the policy creates a stigma of all minorities being inferior. In terms of qualifications, the study found that black students at "selective universities" were more likely to graduate than black students at "less selective universities." This shows that the individuals admitted at higher level or elite institutions excelled and thus clearly met the institution's qualifications. Furthermore, students with below average SAT scores upon entering college actually ended up outperforming some of their counterparts throughout their undergraduate career.[35] Thus, concerns about affirmative action leading to a proliferation of unqualified candidates are called into question by this study. On the other hand, the study found some validity in the concern about promoting stigma. The study sought to examine if the degree to which an institution utilized affirmative action impacted minority students' success as well as the perception of minorities on campus by students in the majority. This reflects the "stereotype threat hypothesis," a term that refers to the "deeply ingrained belief" in American society that minority students are intellectually inferior.[36] According to Fischer and Massey, this phenomenon is not a result of affirmative action; however, it may be intensified by the use of race-based admissions practices. To elaborate, the hypothesis may be perpetuated by affirmative action if white students feel that minority students are only at the school due to the lowering of academic standards, or if minority students perceive that the majority population views them as inferior.[37] The key to understanding this concept is recognizing that it is based on perception of classmates and peers.

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[35] Fischer and Massey, "The effects of affirmative action."
[36] Ibid.
[37] Ibid.

Through analysis of a number of variables, it was determined that the more an institution relies on affirmative action practices, the more the "stereotype threat hypothesis" is exacerbated.[38] To clarify, students do not know if their enrollments are the product of an affirmative action practice; it is more about the *perception* of them by the student body. Nonetheless, if that perception is negative, meaning that a significant number of white students believe that minority students were granted admission due to their race/ethnicity alone, then minority students will feel inferior. This is important to recognize because as stereotypes and racism are continued, they have the potential to impact a student's educational experience. According to the study, the impact of the hypothesis could lead to lower grades, a greater probability of leaving an institution, and less fulfillment in one's college experience. Though complicated to find one coherent solution to this problem, Fischer and Massey mention that diversity within faculty and increased awareness of this problem could help to diminish the potential impact.[39]

Despite that analysis, it is significant to note that the impact of the "stereotype threat hypothesis" is considered to be "modest" on the institutional level.[40] Thus while it does exist, it is not the most significant factor in determining a student's success. Drawing upon this conclusion, Fischer and Massey continue on to state that according to the research, the benefits of affirmative action outweigh these negatives.

In a second analysis of the ethical implications, Leah Shafer of Harvard University presented the positive implications of affirmative action and interestingly, her argument is somewhat opposed to Fischer and Massey. In her 2018 analysis on affirmative action, Shafer

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[38] Ibid.
[39] Ibid.
[40] Ibid

argued that the policy is necessary for ensuring diversity in both the educational and employment fields. In ensuring diversity in an educational setting, Shafer argues that professional leadership will become more diverse. This would allow for more cultural and race-based conversations to develop, thus having the capability to potentially improve individuals' acceptance of differences. Furthermore, in a strict educational setting, other classmates can benefit from diversity as they "have more positive racial attitudes toward racial minorities, they report greater cognitive capacities, [and] they even seem to participate more civically when they leave college."[41] This point is interesting, as Fischer and Massey essentially implied the alternative. Yet, that is not to say that this principle is not situational and therefore, could induce certain feelings at one university and not another.

While there are negative ethical implications of the program, both studies outlined above seem to show that affirmative action is more of a positive program in higher education. Even in the case of the Fischer and Massey study where negatives were brought to light, it was asserted that the benefits outweigh the issues of affirmative action. Thus, in terms of the ethical perspective, there seems to be strong evidence and support for the program.

Analysis

To recap, U.S. District Judge Allison Burroughs concluded the three-week long Harvard affirmative action case by urging both sides to reexamine the evidence and present written accounts prior to the court's reconvening on February 13.[42] It is difficult to know when

[41] "The Case for Affirmative Action," Harvard University, accessed October 1, 2018, https://www.gse.harvard.edu/news/uk/18/07/case-affirmative-action.

[42] "The Future of College Admissions: Experts Weigh the Harvard Case," Bloomberg, accessed November 13, 2018, https://www.bloomberg.com/news/articles/2018-11-12/the-future-of-college-admissions-experts-weigh-the-harvard-case.

Burroughs will deliver her decision; yet, perhaps more clear is that this case will head to the Supreme Court for further argument.[43]

As discussed in previous paragraphs, there have been a number of cases that contributed to the policy's evolution. Therefore, the Supreme Court must navigate those legal precedents to determine if and how race will continue to play a role in the admissions process. A number of speculations have developed considering the consequences that may arise from any court decision. According to Jennifer Mnookin, the dean of the UCLA School of Law, the breakdown of affirmative action would lead to less diverse classes within various institutions. This line of thinking represents one camp that has developed as a result of this case. For Mnookin, there is a firsthand experience with California's Proposition 209, which essentially made it illegal to consider race or gender in the admissions and employment process. Though UCLA Law found some loopholes, Mnookin recognized that the initial impact of the 1996 ballot measure greatly reduced diversity within incoming classes. Thus, if the Supreme Court determines that "race-blind" admissions are preferential to that of affirmative action, there is the fear that diversity will diminish.[44]

In contrast to Mnookin's perspective, those who support race-blind admissions procedures, such as Roger Clegg of the Center for Equal Opportunity, argue that having a check on affirmative action will essentially only level the playing field again. According to Clegg, "It's clear that there's an enormously disproportionate number of Asian-American students with top credentials getting turned down, as opposed to other groups."[45] In removing race from the

[43] Ibid.
[44] Ibid.
[45] Ibid.

admissions equation, individuals like Clegg or plaintiff Edward Blum argue that admissions will be founded on merit as opposed to other identifying factors.

It is clear that this issue is complex, and that there is merit in both perspectives. When the topic is boiled down, it is apparent that affirmative action's initial intentions were positive. During the time of its establishment and even into modern day, there was and is discrimination and inequality that prevents individuals from receiving equal opportunities and access to various services. In establishing race as a considerable factor in admissions and employment, some of that inequity was seemingly bridged.

In providing greater opportunities for minority and previously marginalized groups, the overall educational community experienced a transformation. Diversity in class settings enriches a student's learning experience, as they become exposed to different lifestyles and experiences previously unbeknown to them. In addition, as some of the previous studies highlighted, racial attitudes can improve as students are exposed to different races and ethnicities.[46]

Yet, a policy that aims to overcome discrimination also can ironically contribute to the very thing it is attempting to prevent. As race becomes a key factor in admissions decisions, it becomes questionable if other qualities and characteristics suffer. Furthermore, are particular races favored over another? As seen in the Harvard case, minority groups were seemingly pinned against each other as Asian Americans argued that black and Hispanic applicants were favored despite lesser credentials in some cases. Overall, all of these points seem valid in consideration.

In an ideal world, one could simply advocate for the moderate, middle of the road implementation; however, as outlined by DeBell in his study, the moderate or ideal point in this

[46] "The Case for Affirmative Action," Harvard University, accessed October 1, 2018, https://www.gse.harvard.edu/news/uk/18/07/case-affirmative-action.

topic is extremely subjective. What constitutes moderate for one individual may be considered underwhelming or overwhelming to others. Thus, when evaluating something as contested as affirmative action, it is hard to pinpoint what costs outweigh the benefits and vice versa. Yet, that is not to say that this policy cannot be thoroughly scrutinized to attempt to find some sort of balance between the concerns at hand. Affirmative action is not a perfect program, as clearly evidenced in the number of Supreme Court challenges; however, improvements can be made to inch closer towards a notion of perfection.

For one, there could be attempts made to try and resolve the feeling of inferiority that could develop as a result of the "stereotype threat hypothesis." As outlined in Fischer and Massey's study, this could potentially be achieved by increasing diversity amongst university faculty and increasing education and awareness regarding affirmative action and its significance.[47] Additionally, policies could be manipulated to place more emphasis on holistic perspectives as presented by the comparative or percentage policies. Furthermore, other studies have argued that affirmative action could take a different route, in terms of geography-based practices that may ensure similar results.[48] Overall, as long as there is discrimination, this policy has a purpose; yet, in ensuring anti-discrimination practices, this program has to be sure that it is not potentially fueling what it is attempting to resolve.

Conclusion

The idea for affirmative action dates back to the mid-19th century; however, effective affirmative action policies only took hold in the in mid-1960s. Initially, affirmative action sought to create basic fairness in employment and education by ensuring that discrimination against

[47] Fischer and Massey, "The effects of affirmative action."
[48] Sheryll Cashin, "Place not Race: Affirmative Action and the Geography of Educational Opportunity," *University of Michigan Journal of Law Reform* 47, no. 4 (2014), 951-958.

certain races and ethnicities would not occur. Yet as time progressed, the policy evolved to lead to an active seeking of certain marginalized qualities in the interest of promoting more diverse schools, workplaces, and other social settings. When examining the initial purpose, it is clear that the policy is necessary; however, when examining it from a modern standpoint, affirmative action should be refined to attempt to reduce any of the negative implications (e.g. discriminating one group over another). Perhaps that statement is too idealistic; yet, the program does not reach its full potential when it is in fact denying opportunities to certain groups in favor of others; hence, creating its own discrimination. There are clear and evident benefits as well as glaring flaws. Moving forward, it is significant to work on strengthening those benefits and attempting to reduce the flaws.

Acknowledgements

Thank you to Dr. Brian Stiltner and Dr. Suzanne Deschenes for their contributions to my capstone, as well as their assistance throughout the revising process. This study would not have been possible without their help.

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