

UMKC LAW REVIEW

DE JURE

Vol. 4

Fall 2015

No. 4

AFFIRMATIVE ACTION AND THE STRUGGLE AGAINST SYSTEMATIC OPPRESSION: HOW RACE-BASED ADMISSIONS ARE NOT A THREAT TO AMERICA

Linda Adeniji*

I. INTRODUCTION

In June 1965, President Lyndon B. Johnson delivered the commencement address at Howard University, where he said:

Freedom is not enough . . . You do not take a person, who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity.¹

President Johnson delivered this speech as formal discrimination came to an end in the 1960s with the passage of The Civil Rights Act and as many African-Americans were still confronted with informal and debilitating discrimination.² As a result, Affirmative Action was born, giving preferences to African-Americans in higher education admissions and hiring practices, and igniting a fierce debate over the constitutionality of such policies that continues today.³

Opponents of Affirmative Action argue that such consideration of race in the admission and hiring of African-Americans violates the Equal Protection Clause of the Constitution.⁴ Many opponents of Affirmative Action argue that discrimination in the United States is a fleeting practice that is no longer salient to the African-American experience, making Affirmative Action unnecessary.⁵ Other opponents argue Affirmative Action leads to increased tensions and

* Linda Adeniji is a 2016 Juris Doctor candidate from the University of Missouri – Kansas City School of Law.

¹ WILLIAM S. CLAYSON, FREEDOM IS NOT ENOUGH: THE WAR ON POVERTY AND THE CIVIL RIGHTS MOVEMENT IN TEXAS 5 (2010).

² *Id.*

³ SAMUEL LEITER & WILLIAM M. LEITER, AFFIRMATIVE ACTION IN ANTIDISCRIMINATION LAW AND POLICY: AN OVERVIEW AND SYNTHESIS 23 (2002).

⁴ BRUCE P. LAPENSON, AFFIRMATIVE ACTION AND THE MEANINGS OF MERIT 28 (2009).

⁵ BRON RAYMOND TAYLOR, AFFIRMATIVE ACTION AT WORK: LAW, POLITICS, AND ETHICS 192 (1991).

hostilities between traditionally underrepresented minority groups and White Americans.⁶ While such arguments raised by opponents of Affirmative Action may have some weight and legitimacy, they do not invalidate the practice of Affirmative Action. The Supreme Court in *Grutter v. Bollinger* upheld Affirmative Action practices, holding that race-based preferences can avoid violating the Equal Protection Clause by compelling the states to increase their interests in diversity.⁷ Additionally, Affirmative Action does not exacerbate tensions in inter-group relationships because such prejudice typically reduces in situations where Affirmative Action is enforced; Affirmative Action draws people from diverse backgrounds together and allows them to work together and obtain exposure to various cultures.⁸

It is important to bear in mind the history of oppression and racism imbedded in American history, leading to the need of policies and laws such as Affirmative Action. Arguably, the United States was built upon a foundation of racial inequality in areas such as wealth, work, and social benefits.⁹ A critical component of today's Affirmative Action debate is the legacy of oppression and racism, seen through the history of differential treatment of African-Americans and White Americans.¹⁰ The need and implementation of Affirmative Action was born out of the ashes of the oppression of African-Americans.¹¹

In addition to the history of oppression in America, one must also consider the importance of Affirmative Action because of the need for diversity. Many opponents of Affirmative Action address the constitutionality question, but would the argument be different if we viewed race-based consideration within the context of increasing diversity in education, just as the court in *Grutter* held? What if diversity was viewed through a property lens, equating diversity with a managed property resource? Viewing Affirmative Action as a property resource sheds light on the important diversity aspect Affirmative Action policies seek to address. As signified in *Grutter*, diversity is a resource to assist colleges and universities in creating an environment that benefits students by fostering creativity and providing exposure to numerous perspectives.¹²

Affirmative Action is a necessary and beneficial social policy that not only empowers traditionally disenfranchised minorities by providing them access to formally closed-off opportunities, but also benefits society as a whole. This Comment discusses two major arguments to justify the necessity of Affirmative Action in higher education. First, the long history of oppression in the United States led to the need for Affirmative Action in higher education. Therefore, Affirmative Action policies are needed to counteract the centuries-long oppression of African-Americans by White Americans.¹³ The centuries of oppression sectioned certain racial and ethnic communities into disadvantaged,

⁶ *Id.*

⁷ *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

⁸ TAYLOR, *supra* note 5, at 193-4.

⁹ PHILIP F. RUBIO, A HISTORY OF AFFIRMATIVE ACTION, 1619-2000 3 (2001).

¹⁰ *Id.* at 2.

¹¹ *Id.*

¹² *Grutter*, 539 U.S. at 330.

¹³ See *infra* Part II: The History of Systematic Oppression and Racism.

lower income brackets with less access to resources than their White American counterparts.¹⁴

Second, diversity resembles a commons or shared resource arrangement. Those who file anti-Affirmative Action suits do so in an attempt to “enclose the education diversity commons,” effectively destroying diversity.¹⁵ Opponents of Affirmative Action resemble those seeking to enclose the diversity commons to the detriment of everyone who would want to experience and benefit from diversity in higher education. Opponents of Affirmative Action seek to privatize diversity in education by enclosing the commons for their own benefit, essentially cutting off the commons for everyone, namely African-American applicants. This comment compares Affirmative Action with a commons through one main approach. Diversity is equivalent to a commons because of its shared nature. Individuals and institutions have a similar right to experience diversity in higher education.¹⁶ In property, there are instances when individuals, acting in their own self-interest, deplete shared resources for themselves without any regard for anyone else’s interest in the resource.¹⁷ Such instances are commonly referred to as the “tragedy of the commons.” In higher education, diversity is a shared resource opponents to Affirmative Action seek to deplete by challenging the policy, without regard for others’ interests. Just as in property, neglecting diversity can lead to its downfall and destruction through the tragedy of the common.¹⁸

II. HISTORY OF SYSTEMATIC OPPRESSION AND RACISM

Professor Iris Young defines oppression as the systematic institutional process that prevents a particular group of people from engaging in and experiencing societal norms and rights typically afforded to the more dominant group in a society.¹⁹ Further, oppression is the attempt for the dominant group to maintain the status quo by stifling a servient group’s access to power and privileges.²⁰ Because oppression is both an institutional process of how inequality between groups is maintained and the state of being in a disadvantaged group, oppression results in separating people into groups. Such differentiating forces group members to determine how much power and access to resources a given person has.²¹

Five features typically mark oppression: “exploitation, marginalization, powerlessness, cultural imperialism and violence.”²² Marginalization and exploitation occurs when oppressors, who are either in power or dominant, use

¹⁴ *Affirmative Action Overview*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/education/affirmative-action-overview.aspx> (last visited Sept. 13, 2015).

¹⁵ Sheldon Bernard Lyke, *Diversity as Commons*, 88 TUL. L. REV. 317, 321 (2013)).

¹⁶ See *infra* Part IV: The Importance of Diversity in Higher Education as a Whole.

¹⁷ THE COMMONS: ITS TRAGEDIES AND OTHER FOLLIES 33-36 (Tibor R. Machan ed., 2001).

¹⁸ See, e.g., RICHARD W. MANSBACH & EDWARD RHODES, GLOBAL POLITICS IN A CHANGING WORLD: A READER 364 (4th ed. 2009)).

¹⁹ IRIS M. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 38 (1990).

²⁰ INTERNALIZED OPPRESSION: THE PSYCHOLOGY OF MARGINALIZED GROUPS 3 (E.J.R. David ed. 2014)).

²¹ *Id.*

²² YOUNG, *supra* note 19, at 40.

their influence, power, and privilege to impose their personal views on oppressed people. Imposing on an oppressed person a set and structured way of life contrary to their own desires fosters powerlessness.²³ Oppression by deprivation occurs when the oppressed are deprived of jobs, an education, homes, etc.²⁴ Oppression is also rampant on an institutional or systematic level, with laws and policies adding to the marginalization of oppressed groups.²⁵

One of the most noticeable groups affected by oppression in the United States are African-Americans. As the first non-European group to be an integral component of a “white-controlled economy,” African-Americans were oppressed for nearly 400 years, which snowballed into the long lasting “imbed[ded] color-coded oppression.”²⁶ Most of America’s history was occupied by slavery or legal segregation, so it is no surprise that remnants of oppression are still evident today.²⁷ The United States never fully recovered from the oppression of African-Americans and the ramifications are very clear in the realm of higher education.²⁸ But first, it is important to begin to understand individual and systemic racial oppression by looking at the American history that produced it. The long and brutal history of racial oppression began at the Jamestown colony in 1619 when the first African slaves were bought by white settlers and brought to the newly discovered land.²⁹ Those African slaves were brought to Jamestown to work under the rule and authority of white owners; they were not brought to America to partake in the resources and enjoyment of the land, nor were they brought to America to be equals to the white settlers.³⁰ Instead, they were forced to perform grueling activities and labor to provide a comfortable life for European American colonists.³¹ This set into motion those features that are markers for oppression.³² Part of this perpetuated oppression was the reinforcement of illiteracy amongst slaves.³³ Illiteracy – which resulted in powerlessness and marginalization – was a roadblock for African-Americans to fully participate in society; so with the fight for freedom, the fight also spread to the right to attend school and obtain an education.³⁴ The right to an education was reserved for the wealthy White Americans and was shut off from African-Americans.³⁵ The social relations between the dominant White Americans and the servient enslaved African-Americans were a catalyst to the deeply embedded and tenacious institutional system of racial oppression in America.³⁶

²³ David, *supra* note 20, at 3-4.

²⁴ *Id.* at 4.

²⁵ *Id.*

²⁶ JOE R. FEAGIN, SYSTEMIC RACISM: A THEORY OF OPPRESSION xi (2006).

²⁷ *Id.* at 2.

²⁸ *Id.* at xi.

²⁹ *Id.* at 53.

³⁰ *Id.* at 53-54.

³¹ *Id.* at 54; LAPENSON, *supra* note 4, at 28.

³² FEAGIN, *supra* note 26, at 54.

³³ HEATHER ANDREA WILLIAMS, SELF-TAUGHT: AFRICAN AMERICAN EDUCATION IN SLAVERY AND FREEDOM 69 (2005).

³⁴ *Id.*

³⁵ *Id.*

³⁶ FEAGIN, *supra* note 26, at 54.

Even after slavery came to an end with the ratification of the 13th Amendment to the United States Constitution,³⁷ legal segregation remained, but was met with much pressure to change the systematic oppression and racism through civil rights movements.³⁸ After passage of the Civil Right Acts of 1964,³⁹ White Americans were no longer able to legally marginalize African-Americans from “business, employment, healthcare, leisure, and educational institutions.”⁴⁰ African-Americans sought to experience and enter into this new world that was now opened up to them after them being closed off from such a world for nearly five centuries.⁴¹ However, even though such doors were now legally open to them, the long, tumultuous and scared history of treatment towards African-American made passing through those doors more difficult and challenging than initially believed.⁴² Such difficulty created the need for policies to directly target racial discrimination, especially within the education realm. Affirmative Action seeks to aid in repairing the scares of systematic oppression and racism left on America’s skin.

A. Oppression in Education

The desire for obtaining higher education seems to be at the core of any person. Few will argue that slavery was the main cause of deficiencies of African-American enrollment in higher education, especially in the period that stretched from America’s founding through the Civil War. Nevertheless, racial discrimination in enrollment drastically restricted and reduced the number of African-American students who enrolled in a college or university.

Even among those African-Americans who were adequately prepared to pursue higher education and had the motivation to do so, there were few doors open to those students to do so both before and after the Civil War.⁴³ Southern states did not want African-American students in their institutions and northern states, although more welcoming of African-Americans than the south, had social customs barring potential African-American students.⁴⁴

Before the Civil War brought down the institution of slavery, many abolitionists and supporters of African-Americans obtaining college degrees thought the solution to college enrollment deficiencies resided in creating black colleges specifically designed for African-American students.⁴⁵ Such proponents argued African-American students would not be able to gain admissions into

³⁷ U.S. Const. amend. XIII § 1, available at <http://www.loc.gov/rr/program/bib/ourdocs/13thamendment.html>.

³⁸ FEAGIN, *supra* note 26, at 191.

³⁹ See generally JUDY L. HASDAY, *THE CIVIL RIGHTS ACT OF 1964: AN END TO RACIAL SEGREGATION*. (2007). The Civil Rights Act of 1964 was arguably one of the most important pieces of civil rights law to be passed. The law prohibited discrimination by the government, employers and in public facilities based on race, color, ethnicity, religion, or national origin.

⁴⁰ FEAGIN, *supra* note 26, at 192.

⁴¹ *Id.*

⁴² *Id.*

⁴³ See generally, CARTER G. WOODSON, *THE EDUCATION OF THE NEGRO PRIOR TO 1861* (1919).

⁴⁴ Roy L. Brooks, *Affirmative Action: American Democracy and Higher Education for Black Americans: The Lingering-Effects Theory*, 7 J.L. & SOC. CHALLENGES 1, 30 (2005) (discussing the increase in African-American literacy rates through 1930).

⁴⁵ *Id.* at 31.

“white institutions,” let alone thrive in such an environment.⁴⁶ An attempt, some argued, would be futile and would leave such African-American students no better off than they would have been without a college degree.⁴⁷

Historically Black Colleges and Universities [commonly referred to as HBCUs] were a product of the Civil War. Although HBCUs were the primary institutions of higher education for African-Americans and the number of African-Americans with higher education degrees increased, such degrees carried little educational value in the eyes of America as a whole.⁴⁸ HBCUs were met with insufficient financial grants and little federal governance.⁴⁹ The insufficient funding and governance lead to limited curriculum offered to students, low teacher salaries that did not attract the best professors, and lackluster equipment and facilities.⁵⁰ These deficiencies produced not only the appearance of, but also the reality that, HBCUs were behind the caliber of traditionally White colleges and universities. Though progress was made, HBCUs in general did not grant African-American students the “dream” of a college degree that their White counterparts were experiencing at historically white colleges and universities.⁵¹ There were set backs in relying on HBCUs alone to afford African-American students’ college degrees. Such setbacks were another strong push towards the implementation of Affirmative Action.

III. The Birth of Affirmative Action and Its Transformation

For many decades, Affirmative Action has been one of the most notorious and controversial policies in America.⁵² Our modern-day notion of Affirmative Action came from the English concept of equally administered justice in terms of what is considered fair in a given situation in place of following harsh rules with detrimental results.⁵³ The term defined and included “...any measure, beyond a simple termination of discriminatory practice, adopted to correct for past or present discrimination or to prevent discrimination recurring in the future.”⁵⁴ The term was originally applied to employment, specifically job discrimination, but the principle of preventing recurring discrimination spread beyond the workplace and into higher education as African-Americans struggled to achieve equality.⁵⁵

Affirmative Action seeks to create equal opportunities that are sought by students in the pursuit of higher education.⁵⁶ Essentially, Affirmative Action provides racial preferences in the admission of students into higher education

⁴⁶ *Id.*

⁴⁷ WOODSON, *supra* note 43, at 265.

⁴⁸ Brooks, *supra* note 44, at 34.

⁴⁹ *Id.*

⁵⁰ *Id.* at 34-5.

⁵¹ See generally Arthur J. Klein, *Survey of Negro Colleges and Universities*, U. S. DEPARTMENT OF INTERIOR, BUREAU OF EDUCATION (1929)), <http://files.eric.ed.gov/fulltext/ED540145.pdf>.

⁵² C. Lausanne Renfro, Anne Duran, Walter G. Stephan, Dennis L. Clason, *The Role of Threat in Attitudes Toward Affirmative Action and Its Beneficiaries*, 36 J. APPLIED SOC. PSYCHOL. 41, 41 (2006)).

⁵³ RUBIO, *supra* note 9, at 2.

⁵⁴ *Id.*

⁵⁵ *Id.* at 2-3.

⁵⁶ Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1786 (1993).

institutions.⁵⁷ Contrary to modern beliefs,⁵⁸ Affirmative Action does not set out permanent and long-lasting privileges for African-Americans; it is not an untamed beast that runs rampant without monitoring; nor does it result in White Americans being subordinate to African-Americans.⁵⁹ The end of slavery and the end of legal segregation were mere types of “formal equality” that only required not discriminating and “equal treatment,” but such formal equality overlooked the lingering disadvantages.⁶⁰ Contrastingly, Affirmative Action seeks to achieve equality by redistributing access to opportunities.⁶¹ Also, it is important to understand that forms of racial preference are not a unique and recent phenomenon that only arises to racial minorities. Instead, preferential treatment of White Americans is embedded into American history, and a major goal of Affirmative Action is to help historically oppressed minority students who may otherwise be disadvantaged – due to their socioeconomic status, geographical location, inability to attend accredited high schools, etc. – in their pursuit for a higher level of education.⁶²

A. Affirmative Action Supporters and Critics

Unlike equal opportunity policies, which seek to rid only of overt discrimination by ensuring all individuals are given the same treatment, affirmative action actively ensures equal opportunities actually exist by setting into motion policies that place underrepresented minorities in places where they will be able to recognize the same opportunities as those who are non-underrepresented people.⁶³ When there is no equality of a given opportunity, affirmative action sets out and implements a plan to actually eliminate any barriers to equality.⁶⁴ Overall, the goal of Affirmative Action is to empower disenfranchised groups. This empowerment does not simply mean increased representation of minorities in society; it instead means that the target group of Affirmative Action – minorities – is able to “operate effectively in the newly accessible organizations and positions.”⁶⁵ Despite this goal, there are many who are opposed to Affirmative Action.

Some of the opposition to affirmative action centers on the belief that people of color are obtaining opportunities that exist in short supply – higher education – and should be given to more deserving people, such as White Americans, with some opponents arguing the group of deserving people are not necessarily the majority African-Americans enrolled in colleges and universities.⁶⁶ Such critics argue Affirmative Action “impose[s] unfair burdens on today’s White Americans, who are not responsible for injustices committed in

⁵⁷ TIM J. WISE, AFFIRMATIVE ACTION: RACIAL PREFERENCE IN BLACK AND WHITE 3 (2005).

⁵⁸ *Infra*, Part III(A): Affirmative Action Supporters and Critics.

⁵⁹ Harris, *supra* note 56, at 1786.

⁶⁰ *Id.* at 1788.

⁶¹ *Id.*

⁶² WISE, *supra* note 57, at 4.

⁶³ *Id.* at 94-95.

⁶⁴ *Id.* at 95.

⁶⁵ Rupert Barnes Nacoste, *If Empowerment Is the Goal . . . : Affirmative Action and Social Interaction*, 15 BASIC & APPLIED SOC. PSYCHOL. 87, 87 (1994).

⁶⁶ Faye J. Crosby, Aarti Iyer, Susan Clayton, Roberta A. Downing, *Affirmative Action: Psychological Data and the Policy Debates*, 58 AM. PSYCHOL. 93, 94 (2003).

the past...” towards African-Americans.⁶⁷ However, even though today’s White Americans may not have perpetuated racism and discrimination against African-American, they have benefited from the results of disadvantaged African-Americans.⁶⁸ Slavery, Jim Crow, and other racist policies and institutions gave an advantage to White Americans competing against African-Americans for jobs and admissions into college and universities.⁶⁹ Affirmative Action helps elevate disadvantaged African-Americans to a level where they have equal access to opportunities their White American counterparts have long experienced.

There are many public figures that oppose Affirmative Action, claiming the policy violates the notions of equity and equality. For example, Ward Connerly – one the Regents of the University of California – argues that Affirmative Action deviates from its goal of equality and fairness.⁷⁰ Opponents such as Connerly argue that Affirmative Action solely examines the ethnicity or race or possible candidates and disregards the quality of the candidates’ work and merit.⁷¹ Yet, even after World War II when African Americans proved their merit and qualifications to serve in the military, lawmakers continued to deny such African-Americans the right to prosper in the military solely because of their race.⁷² Though the merit was there, the military wasn’t integrated under President Truman issued an executive order in 1948.⁷³ The order established the Fair Employment Board in Civil Service, which was intended to end discrimination in federal employment and work performed through activities funded by the government.⁷⁴ The executive order issued by Truman mirrors Affirmative Action policies. In both the military and higher education, African-Americans had the merit but were denied access because of their race and institutionalized racism. Much like the Truman executive order, Affirmative Action seeks to help African-Americans, who otherwise have merit, gain access to various opportunities to which they might otherwise be denied. Because of this, the policy is grounded in furthering equality and fairness, just as Truman’s executive order.

Additionally, critics attack the policy as “preferential treatment” and “racial preference,” claiming the policy disadvantages more qualified white students by greatly reducing the admission standards and admitting students (because of their race) who are not ready nor adequately prepared for higher education.⁷⁵ Although a valid concern, this belief is not supported. This argument can be answered similarly to what was discussed previously in this comment: Affirmative Action used in the admissions process overwhelmingly selects from pools of equally qualified African-American and White American applicants.⁷⁶ For example, such a claim arises when opponents believe a white

⁶⁷ Claire Andre, Manuel Velasquez, & Tim Mazur, *Affirmative Action: Twenty-five Years of Controversy*, SANTA CLARA UNIV. (last visited Sept. 13, 2015), <http://www.scu.edu/ethics/publications/iie/v5n2/affirmative.html>.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ FAYE J. CROSBY, AFFIRMATIVE ACTION IS DEAD: LONG LIVE AFFIRMATIVE ACTION 35 (2004).

⁷¹ *Id.*

⁷² JOHN FOBANJONG, UNDERSTANDING THE BACKLASH AGAINST AFFIRMATIVE ACTION 6 (2001).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ WISE, *supra* note 57, at 3.

⁷⁶ Scott Plous, *Ten Myths About Affirmative Action*, 52 JOURNAL OF SOCIAL ISSUES 25-31 (1996),

applicant, with higher standardized test scores or higher grades than African-American applicants chosen from the same pool of applicants, is more deserving of admission into a college or university.⁷⁷ Opponents sometimes ignore the additional criteria – beyond test scores – that make an African American applicant equally or more qualified than a White applicant with higher scores, such as the application essays and socioeconomic standing.⁷⁸ Also, many African-Americans admitted into colleges and universities have test scores comparable to White American applicants. However, African-American students with comparable test scores may still be denied access to higher education institutions due to various factors: lack of opportunities or access to extracurricular activities and internships, etc. When test scores are viewed in light of the criteria schools apply during the admission process, it is evident that qualified African Americans are being admitted into colleges and universities.⁷⁹ Race, when viewed within the context of the criteria as a whole, is considered a form of merit.

Writers for the *Washington Times*, Edward Blum and Marc Levin, argue that Affirmative Action calls for African-Americans and White Americans to be treated differently – African-Americans are treated one way in certain situations and other way in different situations.⁸⁰ Blum and Levin believe Affirmative Action is merely a form of socially acceptable racial profiling.⁸¹ Much like the use of racial profiling by police officers that has been deemed wrong, Blum and Levin believe race-based admissions violates “[e]qual protection under the law [that] is built on colorblind principles.”⁸² In theory, having colorblind policies in realm of higher education admissions would be the best policy to have, but the reality is that such policies would likely continue to benefit White Americans and disadvantage African-Americans.⁸³ Unless preexisting inequalities between African-Americans and White Americans are addressed through programs and policies such as Affirmative Action,⁸⁴ colorblind policies would continue to reinforce White students being favored over African-American students.⁸⁵ This is because of established educational advantages to non-minorities.⁸⁶

What is sometimes deemed traditional or “colorblind” admissions usually focuses on test scores, grades, interviews, etc., but Affirmative Action seeks to also add in variables such as social background, extracurricular activities, life experiences, geographical location and such are also just as important, which may correlate with race.⁸⁷ Though admissions should not be entirely based on the race of an applicant, race should be examined within the context of other factors. An argument for color-blind policies could be that there

revised in *Understanding Prejudice and Discrimination* 206-12 (2003), available at <http://www.understandingprejudice.org/readroom/articles/affirm.htm>.

⁷⁷ LAPENSON, *supra* note 4, at 28.

⁷⁸ *Id.*

⁷⁹ *Id.* at 29.

⁸⁰ CROSBY, *supra* note 70, at 37.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Plous, *supra* note 76.

⁸⁴ See *supra* Part II(A): Oppression in Education.

⁸⁵ Plous, *supra* note 76.

⁸⁶ *Id.*

⁸⁷ *Id.* at 4.

would be uniform admissions criteria among all social groups.⁸⁸ However, academics such as Roland Fryer, Glenn Loury and Tolga Yuret argue that the notion of having a pure colorblind admissions process is not a feasible and beneficial way to achieve diversity.⁸⁹ Affirmative Action does not seek to rid of the variables used in colorblind admissions but rather tack onto them more factors that will lead to the admission of more diverse students. Diversity cannot be achieved by having such a narrow view on who and how one should be admitted. Banning Affirmative Action policies and programs doesn't lower the efficiency of selecting good candidates for an institution, but instead creates more well-rounded criteria.

Further, the argument that Affirmative Action is merely socially acceptable racial profiling is a weak argument. Racial profiling is a practice by law enforcement that disproportionately target people of color for arrests, investigations, etc.⁹⁰ For example, when cops pull over an African-American merely because they look suspicious because of the color of their skin, they are not doing so to better society.⁹¹ Racial profiling exacerbates racial injustices and discrimination.⁹² Affirmative Action seeks to fix racial injustices, not perpetuate them. Affirmative action takes steps to include African-Americans in opportunities that were traditionally closed off to them, not exclude White Americans from higher education institutions.⁹³

Scholars such as Richard Sander argue against Affirmative Action in what he calls the "mismatch effect" in higher education.⁹⁴ Mismatch occurs when a school places a large preference and emphasis on admitting applicants based on race, causing students to have weak academic preparation in comparison to a great number of their classmates.⁹⁵ This, according to Sander, shows a great downfall to Affirmative Action: the admittance of such African-American students who are not prepared for higher education get lower grades, lower ranks, and dropout at higher rates than White Americans.⁹⁶ Further, Sander argues that although colleges and universities may be successful in creating a racially diverse student body through Affirmative Action, the program hurts rather than benefits such students when examined on a classroom-sized basis rather than a global student body-sized scrutiny.⁹⁷ For example, in 2008, African-American students diversified the student bodies of higher education institutions by representing one-tenth of all applicants.⁹⁸ However, those students had low grades and scores, with African-Americans greatly

⁸⁸ Debraj Ray & Rajiv Sethi, *A Remark on Color-Blind Affirmative Action* (2009), available at <http://www.nyudri.org/wp-content/uploads/2011/10/driwp41.pdf>.

⁸⁹ Roland G. Fryer, Jr., et. al, *Color-Blind Affirmative Action* (2003), available at <http://www.law.yale.edu/documents/pdf/fryer.pdf>.

⁹⁰ *Racial Profiling*, AMERICAN CIVIL LIBERTIES UNION (2014), <https://www.aclu.org/blog/tag/racial-profiling>.

⁹¹ See *supra*, notes 76-93.

⁹² STEVE COOPER, A CLOSER LOOK AT RACIAL PROFILING, RACIAL PROFILING: ISSUES, DATA, ANALYSES 26 (2006).

⁹³ Plous, *supra* note 76.

⁹⁴ RICHARD H. SANDER & STUART TAYLOR, JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT 3-4 (2012).

⁹⁵ *Id.*

⁹⁶ *Id.* at 4.

⁹⁷ *Id.*

⁹⁸ *Id.* at 22.

underrepresented at the top levels of each class and overrepresented at the bottom of each class, hurting African-American students in the long run.⁹⁹

However, in response to opponents such as Sander, Affirmative Action defenders argue that a diverse student body is important, essential and beneficial to students because such an environment exposes “otherwise isolated persons to those from different backgrounds and experiences.”¹⁰⁰ These benefits can be broken down into three categories: (1) heterogeneous learning environments that benefit student learning, (2) prepares students for future interactions in a diverse society, and (3) social stability in society.¹⁰¹ First, a study performed by Gurin, Dey, Hurtado and Gurin, where data was collected from more than 10,000 college and university students throughout the country, showed students who learned in racially diverse settings and had informal interactions with racially diverse students had increased academic engagement.¹⁰² Affirmative Action creates a blended environment that allows students who come from different backgrounds, cultures and ethnicities to learn from each other, shaping their beliefs and mindsets.

This leads to the second category: Affirmative Action prepares students for future interactions in a diverse society. Students who interact with diverse individuals while attending colleges or universities are typically more equipped to participate and function in our complex and diverse society.¹⁰³ In 2000, the US Census Bureau estimates that by the year 2050, White Americans will make up only 52.8% of the US population.¹⁰⁴ This suggests that students are better off learning how to interact with individuals and groups of diverse backgrounds to thrive in an “increasingly heterogeneous and complex society.”¹⁰⁵

Additionally, Gurin et al.’s analyses of data from University of Michigan students revealed that experiences with diversity led to students being open to learning about different backgrounds and to understanding that group differences are compatible with a sense of community generally. Gurin et al. suggested that students who are exposed to diverse peers are better equipped for an increasingly diverse society.¹⁰⁶

Third, Affirmative Action helps with social stability in American society. A study looked at records from more than 80,000 students who had enrolled at 28 colleges and universities in 1951, 1976, and 1989.¹⁰⁷ Among the students were

⁹⁹ *Id.*

¹⁰⁰ WISE, *supra* note 57, at 3.

¹⁰¹ CROSBY ET. AL., *supra* note 66, at 94.

¹⁰² Patricia Gurin, et. al, *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330, 330–66 (2002).

¹⁰³ Biren (Ratnesh) A. Nagda, Gretchen E. Lopez, & Patricia Gurin, *The Benefits of Diversity in Education for Democratic Citizenship*, J. OF SOC. ISSUES (2002).

¹⁰⁴ U.S. Census Bureau. (2000), *Projections of the Resident Population by Race, Hispanic Origin, and Nativity: Middle Series, 2050 to 2070*, Retrieved March 2, 2002, <http://www.census.gov/population/projections/files/natproj/summary/np-t5-g.pdf>.

¹⁰⁵ CROSBY ET. AL., *supra* note 66, at 94.

¹⁰⁶ *Id.*

¹⁰⁷ *See generally* WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998). This book provides empirical evidence to show how race-sensitive admissions policies have the ability

ethnic minority students who were “special admits” under an affirmative action program, and the study contrasted the educational and professional lives of the students admitted under the affirmative action program and those who were not.¹⁰⁸ The data showed that the special admits graduated from college, attended and graduated from professional and graduate schools, and held professional jobs at the same rate as did the other students.¹⁰⁹ However, the special admits differed from the other students in one major way: decades after graduation, those who were special admits were more likely than their White counterparts to be active in their community as civic leaders.¹¹⁰ This study shows that social stability is both created and enhanced by educating citizens from diverse backgrounds, which occurs through the use of Affirmative Action. Additionally, another study of Affirmative Action in professional schools showed that minority graduates were more likely than their White counterparts to serve in underserved and underrepresented communities.¹¹¹ Banning Affirmative Action would have the negative affect of creating a shortage of qualified minority professionals who seek to help those in underrepresented communities.¹¹² This study further strengthens the argument the Affirmative Action benefits students.

Many states have tried implementing alternative policies and plans to affirmative action, with hopes of discrediting the policy. For example, the state of Texas implemented what is commonly referred to as the “Texas 10-percent plan,” which guarantees admission to public higher education institutions to those students who graduate in the top ten percent of their Texas high school.¹¹³ Supporters of the Texas 10-percent plan and critics of affirmative action argue that the plan successfully creates diversity without having to use specifically race in the admission process.¹¹⁴ With African-Americans specifically, such critics point to the statistic that percentage of African-Americans in the University of Texas at Austin and Texas A&M University – two of the most prominent public schools in Texas using the 10-percent plan – increased from 4-percent before the plan was implemented to 4.5-percent afterward.¹¹⁵ However, supporters of this plan ignore that a reason the Texas 10-percent plan has been able to increase

to work and the positive lasting effects of Affirmative Action. This study by Bowen and Bok reveals how Affirmative Action, and like programs, increase the chances that African-Americans will be admitted into colleges and universities, and the negative effects ridding of the program would have on both minority students and the institutions.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See, e.g., G.E. Fryer, Jr., et. al., *Hispanic Versus White, Non-Hispanic Physician Medical Practices in Colorado*, 12 J. OF HEALTH CARE FOR THE POOR AND UNDERSERVED 342, 342–51 (2001); M. Komaromy, et. al., *The Role of Black and Hispanic Physicians in Providing Health Care for Underserved Populations*, 334 NEW ENGLAND J. OF MED. 1305, 1305–10 (1996); N.E. Penn, et. al., *Affirmative Action at Work: A Survey of Graduates of the University of California, San Diego Medical School*, 76 AM. J. OF PUB. HEALTH 1144, 1144–46 (1986).

¹¹² WILLIAM A. EDWARDS, *STUDENT ATTITUDES TOWARD AFFIRMATIVE ACTION IN COLLEGE ADMISSIONS AND RACIAL DIVERSITY BEFORE AND AFTER PROPOSITION 209* 5 (2008).

¹¹³ D. LEE MCGAHEY, *AFFIRMATIVE ACTION IN THE HIGHER EDUCATION ADMISSIONS PROCESS* 30 (2007).

¹¹⁴ Richard Kahlenberg, *Does the Texas Top-10-Percent Plan Work?*, THE CHRONICLE OF HIGHER EDUCATION (April 20, 2012), <http://chronicle.com/blogs/innovations/does-the-texas-top-10-percent-plan-work/32298>.

¹¹⁵ *Id.*

diversity in Texas public universities was because the number of African-Americans in general increased.

One of the most striking examples of this is the migration of African-Americans from New Orleans to Texas after hurricane Katrina. Of the estimated 250,000 people who moved to Houston after Katrina, around 111,000 stayed in Texas, according to the Texas Health and Human Services Commission.¹¹⁶ Similar numbers could be seen in many of the major of Texas cities, including San Antonio and Dallas.¹¹⁷ When other factors are taken into consideration beyond the numbers of the Texas 10-percent plan, the Affirmative Action alternative doesn't seem as pure as Affirmative opponents attempt to make the plan appear. Additionally, even if the plans like the Texas plan were the most efficient policy to create diversity on college campuses, the Supreme Court would likely not be persuaded.¹¹⁸ Rather, relying on such percentages within the Texas plan could be likened to the distribution of 20 points that was deemed unconstitutional by the Supreme Court in *Gratz v. Bollinger*.¹¹⁹ It is possible this connection would be made looking to the 10-percent plan and judging its success with increasing diversity based solely what percentage of that 10-percent makes up diverse students would reduce the 10-percent rule to the same scrutiny and unconstitutionality that the Supreme Court found in *Gratz*.

IV. THE IMPORTANCE OF DIVERSITY IN HIGHER EDUCATION AS A WHOLE

Diversity benefits colleges and universities because it brings to campuses various opinions, largely shaped by race, gender, and income, that seek to foster a unique and more prosperous learning environment for students.¹²⁰ Without Affirmative Action in higher education admissions processes, many universities have issues providing a diverse learning environment for their students.¹²¹ The benefits of a racially diverse student body in colleges and universities can be seen in both a social and educational context. Socially, students who obtain an education in racially diverse environments are more likely to function better as citizens in society than those who do not experience such an environment.¹²² Positive outcomes occur when members of different races interact with each other in class, extracurricular activities, and other aspects of life at a college or university.¹²³ Additionally, because students within racially diverse student bodies are exposed to students of different races and from different backgrounds, such students harbor fewer feelings of “intergroup hostility, distrust, and fear” and significantly reduce racial prejudice and stereotyping that would otherwise

¹¹⁶ Maria Godoy, *Katrina: One Year Later, Tracking the Katrina Diaspora: A Tricky Task*, NATIONAL PUBLIC RADIO (last visited Oct. 2, 2015), <http://www.npr.org/news/specials/katrina/oneyearlater/diaspora/>.

¹¹⁷ *Id.*

¹¹⁸ Kahlenberg, *supra* note 114.

¹¹⁹ *Infra* text, Part III: The Birth of Affirmative Action and Its Transformation.

¹²⁰ RICHARD F. TOMASSON, ET. AL, AFFIRMATIVE ACTION: THE PROS AND CONS OF POLICY AND PRACTICE 189 (*quoting* Charles E. Young, Chancellor at UCLA) (2001).

¹²¹ Edwards, *supra* note 112, at 4.

¹²² *See, e.g.,* *Estes v. Metro. Branches of Dallas NAACP*, 444 U.S. 437, 451 (1980).

¹²³ Eboni S. Nelson, *Examining the Costs of Diversity*, 63 U. MIAMI L. REV. 577, 587 (2009).

likely be evident and present.¹²⁴ Educationally, researchers such as Michael Kurlaender and John T. Yun have found that students immersed in racially diverse learning environments typically have increased academic achievements that are commonly seen through test scores.¹²⁵ Such achievements occur because interacting with students of different racial backgrounds furthers exposure to various societal perspectives and cultural knowledge.¹²⁶

A. Diversity as a Commons and the Tragedy of the Commons

To understand the importance of diversity in higher education, it is beneficial to view educational diversity within the context of a common property resource, allowing both proponents and opponents of Affirmative Action to view diversity as an essential tangible resource maintained through Affirmative Action. A commons is an economic concept developed in early English history to protect members of the community by protecting their rights to use common land on private property.¹²⁷ The concept of a commons eventually spread into the realm of preserving natural resources and protecting public land used generally by a community.¹²⁸ This notion of protecting the rights of a community has further been applied to examine diversity and its importance within not merely society, but within higher education. As discussed by Sheldon Lyke, a common has two distinct characteristics: membership and the right of those members to use the resource.¹²⁹ A commons requires a community to be a part of a membership that owns some resource.¹³⁰ Additionally, community members are each considered equal members with equal rights to use some resource in a variety of ways.¹³¹

Lyke describes the members of an educational diversity commons as largely comprised of admitted students who attend colleges and universities where no member within the diversity commons is prohibited from benefiting from diversity.¹³² For example, when looking at The University of Texas at Austin, the students who attend the university [from undergraduate students to students obtaining their Ph.D. to law schools students] are members of the educational diversity commons at the university. No student can be excluded from experiencing this diversity commons because they not only have the right of membership but they also have the right to partake in and use the commons

¹²⁴ *Id.* at 587-88.

¹²⁵ *Id.* at 590-91. *See also*, MICHAEL KURLAENDER & JOHN T. YUN, IS DIVERSITY A COMPELLING EDUCATIONAL INTEREST? EVIDENCE FROM LOUISVILLE, IN DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 111, 116 (2001.).

¹²⁶ Nelson, *supra* note 123, at 591.

¹²⁷ Julian C. Juergensmeyer & James B. Wadley, *The Common Lands Concept: A "Commons" Solution to a Common Environmental Problem*, 14 NAT. RESOURCES J. 361, 363-4 (1974).

¹²⁸ ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990) (exploring any alternate solutions for managing natural resource commons beyond privatization).

¹²⁹ Lyke, *supra* note 15, at 327.

¹³⁰ *Id.* (explaining that those in a community who are part of a membership are all considered owners that share a resource or set of resources among all members of the community. This distinction is important because a commons property does not belong to everyone, but rather, belong to only members.).

¹³¹ *Id.*

¹³² *Id.* at 332.

available to their fellow students. When racial minorities are admitted and attend a college or university, they are infusing their own diversity into the campus to be shared by all students who are also members and, therefore, cannot prevent a non-minority student from experiencing the diversity that having various races and ethnicities creates.

The “tragedy of the commons” is an economic theory developed by Garrett Hardin to discuss the economic use of natural resources and the natural environment.¹³³ The Tragedy of the commons suggests that individuals acting independently with regard only to their own self-interest will act contrary to the desires of the group’s long-term goals and interests by depleting a shared common resource.¹³⁴ According to Hardin, the amount of a resource that could be used by the group was significantly reduced because all people within the system had the ability to use as much livestock as they desired on the common land; this consumption led to an over-use of the resources.¹³⁵ So, when certain members of a group enclose a common resource, two things occur. First, the shared commons becomes privatized for the sole benefit of those seeking to privatize. Second, the nature of the commons is effectively destroyed, preventing any members of the group from benefitting for the resource. This concept is applicable to educational diversity commons achieved through Affirmative Action policies and programs, which resembles a commons although not necessarily a commons on its own.

I define “educational diversity” as having two prongs: (1) the right for racially diverse students to gain admittance into colleges and universities, and (2) the right for both racially diverse and non-racially diverse students to partake in the benefits that learning in a diverse environment brings. Opponents of Affirmative Action seek to “enclose the educational diversity commons, leading to a similar result as with the enclosure of a shared economic resource. The result of ridding of Affirmative Action is the destruction of the commons’ management structure and policies...” with the result being the privatization of education to be used by such opponents for their own benefit through admissions into the elite colleges and universities for which applicants vie.¹³⁶

B. The Risks of Enclosure

Enclosure is the process of making a common property resource, such as educational diversity, private.¹³⁷ The effect of making a commons private does more than just limit access to the resource; it effectively destroys the common property right held by a community prior to privatization.¹³⁸ The enclosure of the educational diversity commons destroys the two prongs of educational diversity. First, such enclosure destroys the right for racially diverse students to gain admittance into colleges and universities through the privatization of the

¹³³ MICHAEL COMMON & SIGRID STAGL, *ECOLOGICAL ECONOMICS: AN INTRODUCTION* 339 (2005).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Lyke, *supra* note 15, at 321.

¹³⁷ Robert L. Bush, *Environmental Resource Management: Public or Private?*, in *MANAGING THE COMMONS?* 69 (1998).

¹³⁸ Thráinn Eggertsson, *Open Access Versus Common Property*, in *PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW* 83 (2003).

admissions process. By opponents attempting to rid of Affirmative Action, they effectively close off the gates of admissions to racially diverse students. Secondly, such enclosure destroys the right for both racially diverse and non-racially diverse students to partake in the benefits that learning in a diverse environment brings. The commons part of the tragedy comes into play by the right of students to learn in a diverse environment enclosed upon. Students attending a college or university, as members of the student body, are the direct beneficiaries of diversity [a diverse learning environment] because they benefit from being immersed in diverse learning environments. Through these diverse environments, such students learn the importance of social difference and interacting with other people and obtain a diverse perspective that enhances their experiences.¹³⁹ Despite this importance, opponents of Affirmative Action who enclose on the program take away this common right. For example, when natural resources become scarce and more valuable, few members in a community may seek to erect fences to enclose some resource in order to divide the land into private property or resources.¹⁴⁰ With Affirmative Action, cases such as *Fischer* seek to interfere with a student's right to use the diversity resource available at their university by attempting to limit how the university achieves educational diversity, especially through the race-conscious admission process of Affirmative Action.¹⁴¹

An example of this is the decision in *Bakke*, which represents a form of enclosure.¹⁴² The decision sought to enclose educational diversity by "privatizing" the educational experience in favor non-minority students and hurting the community of students seeking to be part of a diverse learning environment. As discussed by Lyke, decisions such as *Bakke* act as an enclosure even though some would argue that "small" acts of limiting the scope and reach of Affirmative Action are not forms of enclosure because they don't present a community of students from experiencing and using the diversity resource commons, and such decisions don't privatize diversity.¹⁴³ However, it is important to bear in mind that enclosure is the elimination of a commons resource through privatization.¹⁴⁴ Lyke offers an example of fencing some commonly shared land.¹⁴⁵ For enclosure to occur with this example, merely fencing land subject to a community's common rights to use the land results in a "socially destructive enclosure."¹⁴⁶ Similarly, putting up a fence around Affirmative Action by slowly chipping away at the policy encloses upon the common right to access the educational diversity commons. It is important to maintain the diversity many Affirmative Action opponents seek to destroy through them litigating diversity as a factor in college and university admissions processes.

V. CONCLUSION

¹³⁹ See, *supra* Part IV: The Importance of Diversity in Higher Education as a Whole.

¹⁴⁰ *Id.*

¹⁴¹ *Fischer v. Univ. of Tex.*, 631 F.3d 213 (2011).

¹⁴² *Regents of Univ. of Cal v. Bakke*, 438 U.S. 265 (1978).

¹⁴³ Lyke, *supra* note 15, at 344.

¹⁴⁴ Bush, *supra* note 137, at 69.

¹⁴⁵ Lyke, *supra* note 15, at 345.

¹⁴⁶ *Id.*

This comment has sought out to support Affirmative Action as an important policy and program that should be sustained. A broad overview of the history of oppression and racism helps to understand how that history led to the need for a policy and program to help remedy the centuries of oppression experienced by African-Americans. More specifically, the history of oppression in higher education created the need for Affirmative Action policies to be in place to allow underserved and underrepresented minority students to be given access to higher education institutions. Opponents of Affirmative Action tend to argue the following points: (1) African-Americans who benefit from Affirmative Action are getting opportunities that exist in short supply that should be given to more qualified and deserving people; (2) the policy violates the notions of equity and equality; (3) the policy disadvantages more qualified white students by greatly reducing the admission standards and admitting students who are not ready nor adequately prepared for higher education; and (4) the policy calls for African-Americans and White Americans to unfairly be treated differently. In response to these claims, research and evidence shows that the points opponents raise, although valid, are not reasonable and aren't reasons to rid of the policy. Additionally, between the Court's decisions in *Bakke* to its decision in *Grutter*, the Court has taken the position that Affirmative Action policies are constitutional and beneficial only when they are implemented and done properly. According to O'Connor, legitimate Affirmative Action policies make sure not to discriminate against non-minority students by using race as only one factor of many in deciding whether to admit a student, rather than the sole factor.

Diversity in higher education is critically important and Affirmative Action is a legitimate means to achieve this goal. Diversity is an essential resource in colleges and universities that should be preserved and not diminished. Additionally, a great deal of writing focused on the concept of the "tragedy of the commons"¹⁴⁷ and how it can be applied to diversity in higher education. Anti-Affirmative Action proponents are similar to those wanting to enclose commons and how the enclosure of diversity – ridding of Affirmative Action policies and programs – shouldn't be done because it would rid students at higher education institutions the common right to pursue and experience diversity. Finally, there are two necessary steps that should be taken with the Affirmative Action to successfully use the policy. First, colleges and universities have to decide what success looks like for their institution. Second, colleges and universities have to remember that in addition to recruiting diverse students, those students – and the diversity they bring to a university – must be retained. Affirmative Action programs and policies are not the threat to education like opponents make it seem. Affirmative Action is a worthwhile policy and program, although imperfect, that is necessary to bolster American higher education.

¹⁴⁷ MANSBACH & RHODES, *supra* note 18, at 364.