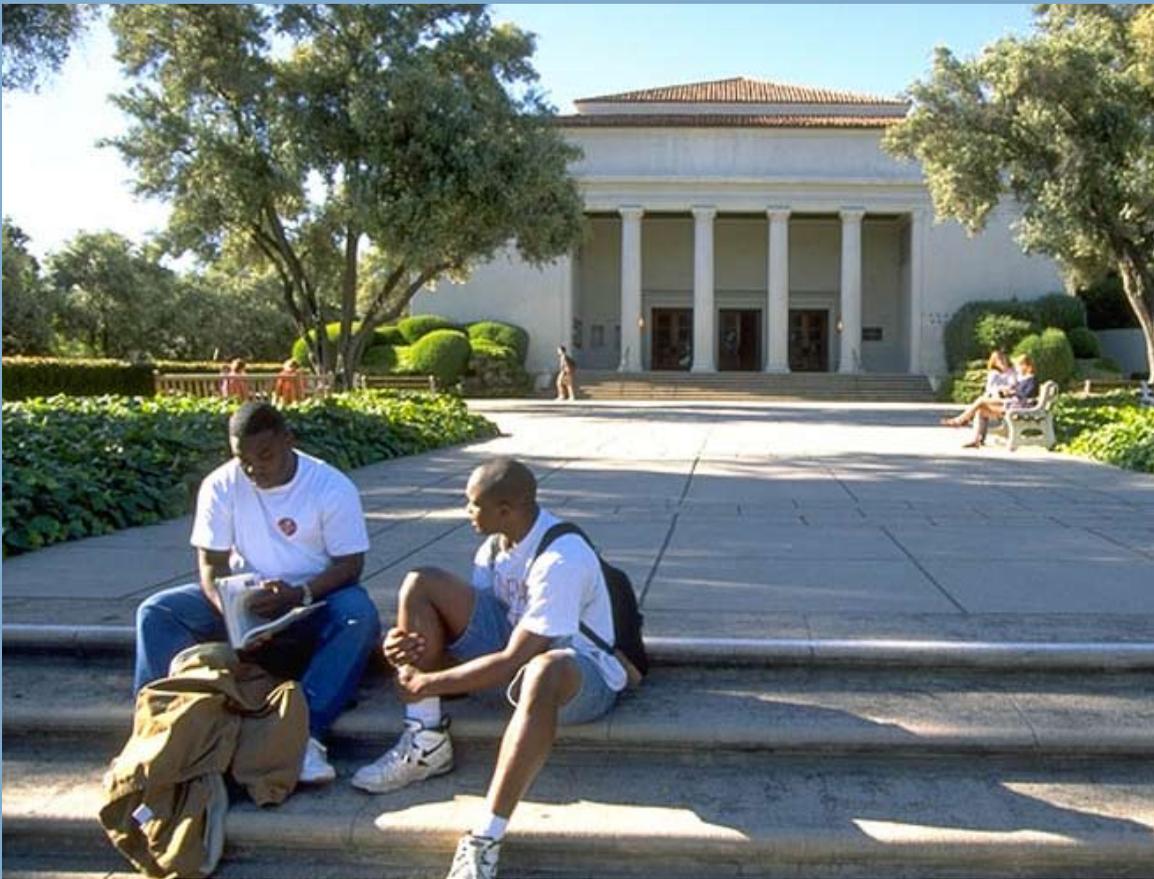


After Michigan, What? Next Steps for Affirmative Action



John Brooks Slaughter



About the Author

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Suggested Citation: Slaughter, John Brooks (2007). "After Michigan, What? The Next Steps for Affirmative Action." *Policy Perspectives* (February 2007).



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The mission of EPI is to expand educational opportunity for low-income and other historically-underrepresented students through high-level research and analysis. By providing educational leaders and policymakers with the information required to make prudent programmatic and policy decisions, we believe that the doors of opportunity can be further opened for all students, resulting in an increase in the number of students prepared for, enrolled in, and completing postsecondary education.

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Preface

The affirmative action debate has been hanging around the collective heads of public higher education for the last three decades, with the debate coming to a head more recently with the impact of Proposition 209 in California and the expansion of similar legislative actions in a number of states.

Higher education has always had preference for a variety of students: gender, arts, and, most certainly, legacy students. But the aftermath of affirmative action has pushed colleges into a zone which requires the reconsideration of all activities that may suggest preference, especially regarding race and ethnic issues.

While colleges and legal analysts are focusing on what to do in the post-Hopwood world, some of us are still asking whether a move away from affirmative action was a prudent move from the beginning. Is it fair for society to move away from supporting students who have not had an equitable chance at the educational brass ring just because, in most terms, of their real estate?

Dr. John Brooks Slaughter, an eminent scholar and president of NACME, Inc., brings back our focus to look at the origins of affirmative action and the potential impact of recent legislative rulings on the educational opportunity of students of color. The Educational Policy Institute is pleased to offer this policy perspective on a critical issue in higher education.

Dr. Watson Scott Swail

President & CEO

Educational Policy Institute

After Michigan, What?

Next Steps for Affirmative Action

John Brooks Slaughter

In 1951, as a freshman in college, I wrote a term paper in an English Composition class, which had as a title, Racial Discrimination in Public Higher Education. The handwritten paper, now long lost, was a fledgling attempt to trace the history of the many attempts by black Americans to be admitted to “whites-only” higher education institutions. I described, among others, the struggles of Herman Sweatt in Texas, George McLaurin in Oklahoma, and Lloyd Gaines in Missouri, all of whom had been denied admission to law schools in their respective state universities. In each of these cases, the U.S. Supreme

Court ordered their admission under the “separate but equal” doctrine that had been the law of the land since 1896. All of this occurred, of course, before the *Brown v. Board of Education of Topeka* decision of 1954 and the more publicized admissions struggles of Autherine Lucy at the University of Alabama, Charlayne Hunter and Hamilton Holmes at the University of Georgia, and James Merideth, whom I knew as a young airman in Topeka, at Ole Miss. Little did I anticipate that I would still be writing about the same issue fifty years after I had graduated from college.

Background

The modern-day argument over diversity in higher education began with the 1978 United States Supreme Court ruling on *Regents of the University of California v. Bakke*. On two occasions, Allan Bakke, a white student, applied for admission to

the University of California, Davis medical school. Each time, his application was denied although

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minority students with lesser grades and test scores were admitted. Bakke sued the university on grounds of discrimination because of a medical school program that set aside spaces for students from “disadvantaged” backgrounds. His case reached the U.S. Supreme Court, which, in a divided opinion, upheld the earlier decision of the California Supreme Court to require the university to offer him admission and end the special program but at the same time ruled that it was appropriate for institutions of higher education to consider race in admissions decisions. The Bakke decision became the standard by which all later questions of the use of race consciousness in admissions were measured.

In 1992, Cheryl Hopwood, a white, female applicant to the University of Texas Law School, filed suit in a U.S. District Court against the University charging that she was denied admission while lesser-qualified minority applicants were accepted. She was later joined by three white males as plaintiffs. The district court upheld the University’s position. An appeal by the plaintiffs to the 5th Circuit Court of Appeals brought about a reversal of the opinion and an injunction forbidding the University from using race

as a factor in admissions. The University’s appeal to the U.S. Supreme Court to rehear the case was refused. The Hopwood v. Texas ruling applied not only to Texas but also to Louisiana and Mississippi. Its impact was immediate. The Texas attorney general suspended race-conscious admissions at all public institutions and even the private Rice University responded to the admonitions of its legal staff and eliminated its affirmative-action admissions activities. The year it took effect saw the admission of four black law students (one-tenth the number admitted in 1992) and 26 Latino students (less than one-half the admittees in 1992) at the University of Texas. By 2000, the admission of black and Latino students still trailed pre-Hopwood numbers; they had only grown to 18 and 34, respectively. In 2001, the law school stopped using LSAT scores as the primary determinant of admission eligibility. This change precipitated an increase in minority enrollments but still not up to pre-Hopwood levels.

In 1997, in an effort to provide some degree of mitigation of the effects of Hopwood, the Texas legislature passed the 10 percent rule that guaranteed admission of the top

ten percent of Texas high school graduates to the University of Texas. The existence of the new law brought about an increase in black freshmen to 3.5 percent of the enrollees by 2001, up from 2.5 percent in 1997.

In 1995, the University of California Board of Regents issued two rulings that presaged what would occur statewide a short time later. The first, SP-1, forbade the use of affirmative action in University admissions. The second, SP-2, extended the ban to employment and contracting. In 1996, California voters approved the California Civil Rights Initiative (CCRI), Proposition 209, by a vote of 54% to 46%. The decision banned the preferential use of race and gender by state and local governments and all public entities (including schools) throughout the state. The direct (and indirect) impact of Proposition 209 has been enormous, as I will point out later. Because of its passage, the University of California Regents rescinded SP-1 and SP-2 in May 2001, on the grounds that they were no longer needed.

Ward Connerly, the black California conservative, UC Regent and architect of the CCRI, led a similar effort in the state of Washington in 1998. Washington Initiative 200

(I-200), a measure patterned after Proposition 209, banned the use of affirmative action by state and local governments and preferences based upon race, gender, color, ethnicity or national origin in school admissions, employment or contract awards. I-200 was approved by 58 percent of the voters. One year later, the number of black applicants to the University of Washington fell by 17 percent.

In 1999, Florida governor Jeb Bush issued Executive Order EO99-281, which effectively pre-empted a similar initiative being presented to the voters of that state. His One Florida initiative had essentially the same effect of eliminating the use of racial and gender preferences in university practices, employment and contracting. The plan does contain a provision whereby the top 20 percent of Florida high school graduates automatically qualify for admission to Florida state universities.

Also in 1999, because of the fear of lawsuits, Oklahoma passed a law banning scholarships designated for minority students. In the same year and also in the face of threats of litigation, the University of Virginia ended an admissions program that gave bonus points to

black applicants. As a result, black freshmen enrollment dropped from 11.2 percent in 1999 to 9.9 percent in 2004.

In 2001, an affirmative-action admissions program at the University of Georgia was declared unconstitutional by a federal circuit court. One year later, the University experienced a 20 percent drop in black applicants.

To understand the context of the November 2006 vote on The Michigan Civil Rights Initiative (MCRI), Michigan Proposal 2, a constitutional amendment which prevents the use of preferences based on skin color and gender in public employment, public contracting and public education, it is necessary to take into consideration the 2003 decisions by the U.S. Supreme Court, *Grutter v. Bollinger* and *Gratz v. Bollinger*, which related to admissions policies and practices at the University of Michigan. In *Grutter*, the Court upheld the Michigan Law School admissions process that gave “individualized” consideration to the race of applicants in order to promote the University’s interest in enrolling a diverse student body. In the case of *Gratz*, however, the Court struck down as

unconstitutional the University’s undergraduate admissions program that automatically awarded points to students based upon their race.

Even before the decisions were handed down, many predicted that the outcome would prove to be confusing and dissatisfying to those on either side of each of the issues, but especially to the proponents of affirmative action. Supporters of diversity obtained little satisfaction from the two rulings particularly since, unlike post-Bakke, very little guidance emerged from the U.S. Department of Education’s Office of Civil Rights on how to apply “race neutral alternatives” in making admissions decisions. That which was received was, at best, ambiguous. Opponents of affirmative action failed to get the clear victory they had hoped for but were provided a window of opportunity to continue their assault against racial preferences in university decision making. Absent an unequivocal set of judgments by the Court and clear and concise guidance from the Administration, the stage was set for anti-affirmative action groups to engage in a pattern of intimidation and threats of loss of federal funds for those institutions that persisted in maintaining race-, and in some cases,

gender-specific policies, practices, and programs. Because countless academic institutions have felt forced to pursue a risk-averse strategy and have been unable to “stand their ground” as was encouraged by the AAAS-NACME document, *Standing Our Ground*, many have voluntarily scrapped programs designed to serve under-represented minority students for fear that they would become targets, a behavior that an article in the *College and University Journal* (Chubin and Malcom, 2006), referred to as not just disappointing but “scandalous.”

Jennifer Gratz, who had been denied admission as an undergraduate at Michigan and who had brought suit against the University, joined with Ward Connerly to create the ballot initiative, Proposal 2, which was approved by 58 percent of Michigan voters on November 7, 2006. The measure was packaged as a civil rights initiative designed to “help reduce racism, discrimination and inequality in the state of Michigan.” The website containing these words went on to make the following promise to voters. “Proposal 2, as a civil rights initiative, will help promote racial harmony. By prohibiting state and local governments from discriminating

on the basis of skin color or gender in public employment and university admissions, it will allow all Michigan citizens to be treated fairly and equally by eliminating the possibility that their race or gender may interfere with the hiring process, promotion or admission to a public university or college. And as racial discrimination decreases, so will racial tensions.” Few people, today, could be opposed to any effort to promote racial harmony, reduce racism, discrimination and inequality and decrease racial tensions. By invoking the words of Dr. Martin Luther King, Jr. and other leaders of the civil rights era of the 1960s, Proposal 2 appealed to many who had little or no understanding of its potential implications for diversity and efforts to level the playing field in public education and employment. Emboldened by his success, “Connerly talks enthusiastically of an ‘anti-affirmative action wave washing over America’ that will wipe out the race-based preferences used for decades to help African Americans, Latinos and other disadvantaged ethnic groups,” according to Richard C. Paddock in the *Los Angeles Times* on November 26, 2006. The same article stated that Connerly opined, “I think the end is at hand for affirmative action as we

know it." Now that he has succeeded in Michigan, he has announced that he is considering the introduction of similar ballot propositions in Colorado, Oregon, Illinois, Missouri,

Nevada, Arizona, and South Dakota. Paddock reported that Connerly said, "We don't have to go to every state if we can get a critical mass of seven or eight states."

The Potential Impact on Public Higher Education

While it is too early to gauge the impact of the passage of Michigan Proposal 2 on the admission and support of underrepresented minority students at the public universities of the state, it is safe to say, based on the experiences of other states, some of which have been described above, that it will be negative. Although President Mary Sue Coleman of the University of Michigan made a strong and impassioned post-election re-affirmation of the institution's commitment to diversity and vowed to seek ways to continue to enhance it, it will be difficult to do so in light of the legal climate in the state that was introduced by the campaign for Proposal 2.

Although California may represent the most extreme situation with respect to the effects of the successful passage of an anti-affirmative action initiative, it is instructive to study the impact that Proposition 209 has had at the University of California and

several of its campuses. In terms of undergraduate admissions, UCLA has been the hardest hit by the measure. With 47,315 applicants, the largest applicant pool of any university in the nation, UCLA accepted 12,219 students in 2006. In this group were 244 black students (2 percent), which yielded 99 enrollees, again, 2 percent of the ultimate class of 4,800 freshmen. Admittance of African American freshmen in 1997, the year before Proposition 209 took effect for undergraduates, accounted for 5.4 percent of the admitted pool. Worse still, the 2006 figure represents a decline of 17 percent from the previous year and yielded the lowest number of black freshmen since 1973. (UCLA, of course, is located in Los Angeles, a city with more than one million African American residents and 10,000 black high school graduates, annually.)

At UC Berkeley, which saw a drop in black freshmen enrollment of 57 percent the first year that Proposition

209 was in effect, blacks constituted 305 members of an acceptance pool of 9,913 in 2006; 140 of them ultimately enrolled. UC San Diego with 52 black enrollees and UC Merced, the newest campus of the University of California, with 35, were the lowest achievers of African American freshmen enrollment. The 10-campus UC System admitted 55,242 students of which 1,880 students were African Americans. The number of under-represented minorities admitted, system-wide, totaled 11,974 or 22 percent of the admitted pool. This figure indicates that Latinos, while negatively impacted by Proposition 209 also, have not been as severely affected by it. At UCLA, for example, Latinos admitted represented 15.4 percent of the pool in 1997; they were 13.6 percent of the total in 2006.

There are several concerns raised by these numbers. First, there is a glaring difference in the acceptance rates between under-represented minority (URM) and non-URM applicants at both UCLA (11.3 percent vs. 25.8 percent) and at UC Berkeley (16.5 percent vs. 23.8 percent). (The gap at Berkeley is smaller due to a more holistic admission evaluation process used there. UCLA is considering a change in this direction for the future.) Second, and more important,

far too few black, California students graduate from high school with the academic preparation that stamps them as UC eligible. This makes it difficult, if not impossible, for many of them to compete successfully in an applicant pool in which one-half of the students have 4.0 or higher grade-point averages, as was the case at UCLA this year. Of 24,000 black California high school graduates, only 3,000 were UC eligible and fewer than 2,000 were in the top quartile of the eligibility pool from which the University of California draws. Clearly, a top focus must be placed on improving the elementary and secondary educational experiences for all children, particularly for those most at risk—the poor and the under-represented who are disproportionately found in the lowest performing schools. Third, in California in particular, the publicity about the actions of the UC Regents (especially, but not limited to, Ward Connerly), Proposition 209, and the often contentious debates and confrontations over illegal immigration have caused many minorities in the state to feel disenfranchised and disempowered and, for many, unwilling to attempt to enter an environment in which they feel unwanted. Consequently, although eligible, many do not

even apply for admission, a large percentage of those who are accepted do not enroll and the numbers who leave or transfer because they feel unwelcome is of major concern to those who believe diversity on a college campus is important. And finally, the steep rise in tuition and the reduction in need-based financial aid in favor of more merit-based aid has had a disproportionately negative impact on the ability of disadvantaged and minority students to attend institutions such as the University of California.

In their quest for prestige, measured in part by low acceptance rates and high student SAT scores, universities are turning away high-performing, deserving but needy students in favor of those from high-income and more advantaged circumstances by offering them financial incentives to enroll. This practice, on top of all the other disadvantages poor and under-represented students encounter, make it difficult to create a college enrollment picture that is diverse and inclusive. According to the National Center for Education Statistics of the U.S. Department of Education, during the period 2004-2015, enrollment in degree-granting institutions is expected to grow 42 percent for Hispanic or Latino

students, 30 percent for American Indian or Alaska Native students, 28 percent for African American students, 34 percent for non-resident-alien students and only 6 percent for white, non-Hispanic students. The enrollment of women is expected to rise 18 percent from 2004-2015 compared with 10 percent for men over the same period. Given these statistics, it is counterproductive for universities and, in the long run, for the society at large to devise means to make it more difficult for those who have been historically under-represented to receive a high quality education.

The conditions in Michigan are not the same as those in California, to be sure, although some similarities do exist. Like the University of California, the University of Michigan is regarded as one of the nation's preeminent public universities. For the fall of 2006, the University of Michigan received 25,806 applications and accepted 12,246 of the applicants. Of the 5,400 freshmen enrollees, black students accounted for 330 of them (6.1 percent). The effects of Proposal 2 on minority enrollment in years to come are yet to be learned.

Proposition 209 has had one other important effect on California

higher education that should not be overlooked. The ban against the use of affirmative action in employment has affected the hiring of minority faculty at public institutions throughout the state. Over the twenty-year period from 1984-2005, black faculty appointments accounted for 3.4 percent of hires at the University of California but slightly less than 3.0 percent since the enactment of Proposition 209. The paucity of minority faculty in our nation's colleges and universities is a blemish on the record of higher education in America. According to the July 12, 2002, issue of the *Chronicle of Higher Education*, "Taken together, African American, Hispanic and American Indian scholars represent only 8 percent of the full-time faculty nationwide. And while 5 percent of the faculty is African American, about half of them work at historically black institutions. The proportion of black faculty members at predominantly white universities—2.3 percent—is virtually the same as it was 20 years ago." The picture has not improved much since this was written. In STEM disciplines, one percent or fewer of faculty members are either black or Latino in flagship and research universities. The absence of minority faculty members robs

minority students of much needed mentors and role models and equally important, in my view, deprives non-minority students of exposure to and contact with well-educated minority professionals. This is a problem that is particularly true in science and engineering where minority contributions are often overlooked and minority faculty are most scarce. The situation in chemistry is a glaring example of this. During the ten-year period between 1993 and 2003, not one of the 50 top-ranked university chemistry departments hired an African American, Latino or American Indian as an assistant professor; despite the fact that data from the Commission on Professionals in Science and Technology (CPST) shows that a sizable number of them received Ph.D.s in chemistry during that time span. Under-represented minorities accounted for 43 of the 1,637 tenured and tenured-track faculty members (slightly over 2.6 percent) in 2003. To a large extent, the under-representation of minorities on colleges' and universities' faculty applies also to women although the disparity is not quite so stark.

Conclusion

What can be done to reverse the trends and avoid the outcome that Ward Connerly so boldly predicts? It is my view that those who believe in the importance of diversity and inclusion in universities and society need to change their language. The word, diversity, has lost its cachet and no longer serves to unite. In spite of the fact that innumerable surveys have shown that Americans believe in the principle of diversity, the elections in California, Washington and, now, Michigan raise questions about the validity of those polls. It is difficult to come to this conclusion since I have spoken and written about the importance of diversity and how to achieve it in higher education for more than thirty years.

Similarly, I do not believe that an argument can be made for the continued use of the words justice and fairness as rationales for affirmative action. These words have been cleverly confiscated and appropriated by the anti-affirmative action crowd and their use has served to seduce the unwary into supporting their aims.

Instead, I believe strongly that we need to develop a new terminology, one founded on the principles most important to Americans and their institutions -- competitiveness and winning. For our nation to succeed in the global warfare of technological superiority and economic strength and to ensure societal stability in the years to come, we must recognize the demographic changes that are occurring and respond to them positively. We need to develop and employ all of our human and capital resources in a concerted and unified manner if we are to retain our position as a world leader in science, engineering and commerce. We must provide ample and affordable opportunities for the disadvantaged and the under-represented to become full participants in education and employment at all levels. We must recognize that outsourcing and offshoring are not permanent and sustainable solutions to the present-day shortfall in native-born talent. To do otherwise is to leave us weakened and fractionated at a time when cohesiveness and purpose are required.



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