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## Affirmative action challenges keep on keeping on: responding to shifting federal and state policy

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### ABSTRACT

In response to disparities in postsecondary access, governments have enacted policies to facilitate the admission of traditionally underrepresented students. Known as affirmative action in the United States, the legal justification of this approach has varied. This article describes the legal and political history of affirmative action, the social justice and then diversity rationales, and the importance of state policies and institutions. The article focuses attention on the responses of three highly diverse US states – Texas, California, and Florida – to postsecondary affirmative action bans affecting their public flagship institutions. Each developed race-neutral achievement-oriented percentage plans intended to promote socioeconomic and racial diversity in their states' institutions; these approaches did not meet their intended aims. While inequality shows no sign of shrinking, US institutions and administrators must continue to adapt to a shifting landscape of state and federal policies poised to further curtail these diversity and social justice efforts.

### KEYWORDS

Affirmative action; higher education; diversity; education policy; public universities

### Introduction

Policies supporting college access for historically disenfranchised groups vary but exist in many countries, in response to widespread disparity in access to higher education around the globe (OECD 2015). In response, some nations have established affirmative action policies aimed at enhancing and preserving the participation of underrepresented ethnic, religious, linguistic, and other groups; these countries include – Brazil, India, Israel, and South Africa (Moses 2010; Peria and Bailey 2014; Rudolph and Rudolph 2002). Affirmative action remains contested in the United States (Holzer and Neumark 2006), with more Supreme Court cases likely in the coming years.

Is affirmative action over in the US? Numerous research studies have found diverse environments benefit universities and their students' learning (e.g. Antonio et al. 2004; Gurin et al. 2002). Still, some current and prospective students have voiced resentment about race-conscious affirmative action, arguing about unfairness and reverse racism. The United States seems poised to abolish affirmative action at the executive and judiciary levels, even as campuses continue to struggle with race and equity. *Brown vs. Board of Education* abolished separate but equal schooling in 1954, and race-conscious affirmative action was forecast to be no longer necessary by 2028 (*Grutter v. Bollinger*, 2003). Instead, students of colour presently experience both microaggressions and more overt discrimination on campus (Yosso 2005). In fact, a visually-rich *New York Times* review

shows Black and Latino students are less represented at top colleges than they were in the early 1980s (Ashkenas, Park, and Pearce 2017).

University degree attainment remains a priority for the United States' increasingly diverse and persistently stratified labour force (Baum, Ma, and Payea 2013). US universities have decreased their use of race-conscious affirmative action strategies since the early 1990s (Grotsky and Kalogrides 2008). Perhaps in part because of this shift, historically underrepresented minority groups continue to be under-enrolled in the US's public universities (Long 2007; Perna et al. 2006). This manuscript aims to offer clarity and context around the complex and shifting legal landscape of affirmative action and diversity policies in higher education.

### Affirmative action policy in the United States

#### *Rationale: the case for racial diversity*

Under Executive Order 11246 in 1965, US federal affirmative action policy was established, permitting race-conscious efforts to diversify institutions and labour sectors, in order to remedy past injustices and social inequity. This policy has had a contested history (Chun and Evans 2015). Globally, the rationale for affirmative action varies, and can include remediation, economics, social justice, and diversity (Moses 2010). The legal justification for affirmative action shifted decidedly in the 1990s. While remedying past discrimination – social justice – had been permitted

as a rationale in the first decades of US affirmative action policy, the US Fifth District Court ruled in the 1996 *Hopwood v. Texas* decision that race could not be used in university admissions, whether to achieve diversity or remedy past discrimination. This ruling motivated some states to adopt 'race-neutral' policies, to pursue a diverse student body.

By contrast, remediation and social justice rationales were central to the early decades of US affirmative action policy and its legal precedents. Nearly a century after 1896s *Plessy vs. Ferguson* 'separate but equal' case, 1978s *Regents of Univ. of California v. Bakke* decision established diversity as a legitimate end in university admissions, albeit with only a plurality and no majority opinion. One of the minority opinions argues: 'we cannot [let] color blindness become myopia which masks the reality that many "created equal" have been treated within our lifetimes as inferior both by the law and by their fellow citizens.' Justice Marshall's decision argued for the urgency of race-conscious affirmative action: 'Bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.' These tensions are still with us as a society, and indeed as a system of higher education, 40 years later.

While diversity – an amorphous term – was not the initial motivation for considering race and other non-academic factors in university admissions, in the US, it is the only remaining justification continuing to withstand decades of legal challenges, perhaps because of the vast compilation of education and social science evidence supporting its merits. The majority opinions in 2003's US Supreme Court cases ruled that diversity is a 'compelling governmental interest' and upheld the validity of race-conscious approaches if narrowly tailored, employing strict scrutiny, and not employing quotas to achieve this end (Horn and Flores 2003; Levine and Ancheta 2013). Current and future university programmes which remain in the wake of this decision have needed to broaden beyond race, even among many of those programmes which serve and support students who have already been admitted to university, such as competitive scholarships and fellowships to support undergraduate research and other opportunities to facilitate student success.

Scholars continue to find clear evidence on the positive effects of compositional racial diversity in college – having a critical mass even in the absence of true integration (Bowen, Bok, and Loury 1998; Kane 1998). In fact, research suggests that race-conscious affirmative action programmes have been instrumental in upholding diversity in colleges and universities across the nation, as well as increasing graduation rates among those students who benefit (Alon and Tienda 2005). States have experienced greater diversity in college

classes following implementation of such policies (Edley et al. 2010). Indeed, numerous studies following the 2003 decisions have shown considerable institutional- and student-level benefits of affirmative action, the latter of which generally seem to benefit White students even more than their Black and Latino peers, who are the presumptive beneficiaries of diversity efforts (Levine and Ancheta 2013).

### **Alternative policies: 'race-neutral' affirmative action**

Some have argued that socioeconomic status would be a more equitable mechanism for the use of affirmative action to achieve more diverse and representative cohorts of university students. Recent research has studied the efficacy of such approaches. Kidder and Gándara (2015) examined two decades of race-neutral efforts including (a) pre-collegiate efforts such as outreach, academic preparation programmes, and partnerships with secondary schools serving underrepresented students; and (b) admissions programmes to increase socioeconomic diversity, including attention to economic hardship and financial need-blind application review. Reardon et al. (2015) examined the degree to which socioeconomic status could serve as an effective proxy for race when aiming to admit racially diverse undergraduate students.

Findings from these studies are consistent with the conclusions of prior large-scale studies of social class as an alternative affirmative action mechanism, by Cancian (1998), Kane (1998), and Carnevale and Rose (2003). Each of these studies concluded socioeconomic status was an insufficient proxy for race. Moreover, Fryer, Loury, and Yuret (2007) found color-blind admissions processes to be less efficient than intentional, race-conscious procedures at enrolling underrepresented students. In the late 1990s, four states discontinued their race-conscious affirmative action policies and subsequently employed high school achievement-oriented plans. Of the four, three had comparably diverse college-age populations: California, Florida, and Texas.

### **Texas, California, and Florida high school percentage plans**

These policies were intended to achieve diversity within the constraints of a shifting policy environment, while avoiding the explicit use of race. Table 1 shows these state policy changes shared some key attributes, but were also distinct in notable ways. Politically, California, Florida, and Texas – three of the most diverse states in the country (Humes, Jones, and Ramirez 2011) – banned the use of race in public university admissions through distinct processes, between 1996 and 1999. In 1997, these policies went into effect in California and Texas, followed by Florida in 2000.

**Table 1.** Affirmative action policy changes, by state.

Policy Changes	Texas		California		Florida	
	Passed	Effective*	Passed	Effective*	Passed	Effective*
Race-Conscious Admissions Ban Means	1996	1996	1996	1998	1999	2000
Race-Neutral % Plan	Court Decision		Ballot Measure		Executive Order	
Political Agents	1997	1998	2001	2001	1999	2000
Policy Name	State Legislature		Board of Regents		Governor	
% Level (Initial)	Uniform Admission Policy		Eligibility in Local Context		One Florida	
	10%		4%		20%	

\*Effective refers to the admissions cycle. More precisely, the year listed indicates the first year that an entering class would be admitted based on this new policy. See: Uniform admission policy, HB 588, Texas Legislature (2007); University of California, Office of the President. (2002). University of California Eligibility in the Local Context programme evaluation report. Oakland, CA: University of California. Retrieved from <http://www.ucop.edu/news/cr/report02.pdf>; Bush, J. (1999). One Florida. Office of the Governor, State of Florida. Executive Order 99-281.

Interestingly, each state also developed alternative affirmative action plans using high school rank as a response to this tension between the compelling interest in diversity and an aversion to the explicit use of race in pursuing diversity. Together, these achievement-oriented percentage plans intended to promote socioeconomic and racial diversity in their state's institutions, using less direct means (Alba et al. 2002; Horn and Flores 2003). They granted automatic state university admission to a certain percentage of the top of each high school class.

In response to *Hopwood v. Texas*, Texas developed its '10 Percent Plan.' As a state law, the Texas higher education system is required to admit all students who finish in the top ten percent of their high school graduating class to the public institution of their choice (Flores and Oseguera 2013). The efficacy of this policy arose from well-established racial segregation at the high school level (Orfield and Eaton 1996). To address school-level disparities in the wake of *Hopwood*, some state- and university-led initiatives enhanced college preparation and recruitment from underserved secondary schools (Domina 2007). Following the 2003 Supreme Court rulings, UT-Austin, the most prestigious public state institution, revised its admissions procedure to allow for the consideration of race as part of a 'holistic' review process, in intended compliance with the Court ruling; a law passed in 2009 further limiting those accepted under the plan to 75% percent of the incoming freshman class (Flores and Horn 2015; Grodsky and Kurlaender 2010; Tienda, Alon, and Niu 2008).

Two other highly diverse states enacted similar policies during the same period, albeit through differing political means: California and Florida. Initiated through a voter referendum, California's 'Four Percent Plan' was like that of Texas, but considerably more limited. This policy secures admission to the top four percent of California's high school classes, most of which arguably would have been admitted to these institutions anyway, as the top four percent of high school classes are an academically elite group (Grodsky and Kurlaender 2010).

California's diversity-minded policy shifts away from race-conscious admissions toward a secondary

school meritocracy system had considerable effects on students, and on student diversity. Students were mandated to meet testing and subject requirements and could only be guaranteed admission to one of the state's colleges. Students were not allowed their first choice in institution. The programme was extended in 2012 to include the top nine percent of California's high school students (Blume and Long 2014).

Initiated by the state's Governor in 1999, Florida's policy also prohibited the use of race-based admission in state universities – a limitation that did not however affect recruitment, support, or scholarship funds pertaining to racial diversity. 'One Florida' guaranteed admission into one of the state's eleven public universities for the top twenty percent of the state's high school classes (Horn and Flores 2003; Long, Saenz, and Tienda 2010; Orfield and Kurlaender 2001). Since the mid-1990s, several states have now enacted bans on the use of race in university admission (see Blume and Long 2014 for a detailed account), the consequences of which are not entirely straightforward.

Generally, these studies and this author's own analysis (Snead, Perez-Felkner, and Park 2013) indicate trends in minority student enrolment at state flagship universities after affirmative action bans have largely been tempered by the introduction of percent plans, but still show modest negative consequences for minority students, particularly in California and Texas. Notably, state percentage plans can only function as a proxy mechanism to achieve diversity in the wake of race-conscious admissions bans if US high schools continue to be intensely segregated by socioeconomic status and race (Adams 2001; Mickelson 2001; Orfield and Lee 2005), a disconcerting prescription for public policy.

### Policy to practice, on campus

Current students and even many staff may be unfamiliar with the long and circuitous history of these legal debates as well as their continued relevance for present-day college students and campus leaders. Given the often ideological nature of such debates, it helps to be armed with information. For example, a

case initiated by the US Justice Department alleges affirmative action discriminates against Asian and White students. Rather, California's 'race-neutral' policy has seemed to benefit Asian students at the expense of Black and Latino students (Grotsky and Kurlaender 2010).

How can campuses anticipate and proactively prepare for change while honouring their values and commitments? Better informed student affairs practitioners and campus leaders may enhance the nature and civility of these discussions. Recall above, research focused on the consequences of diverse college campuses indicate positive gains for students, as well as for the institutions. In a metrics-focused accountability environment, institutions can track the relationship between racial diversity in enrolments and the retention and completion rates of their students, by demographic characteristics. Globally, states and institutions vary in the degree to which diversity is measured and assessed, including its effects. Many US universities include 'diversity and inclusion' language in their institutional mission statements and strategic plans. Institutions may continue to promote and facilitate access to students from diverse backgrounds, even when needing to shift strategies in response to external pressures and policies. At selective institutions, campus diversity policies have benefitted all students, including students of colour and students from low-income and/or first-generation backgrounds. Less well known are the effects of race-neutral access policies at less selective institutions, and across nations.

Overall, the studies reviewed indicate affirmative action policies have real effects, to whatever degree race is explicitly considered as a factor. There remains a disconnect between proponents of color-blind diversity policies and social justice-oriented proponents of these policies to promote equity, even among new higher education professionals (Croom and Kortegast 2018). As these debates continue to rage, higher education practitioners and scholars would benefit from continued dialogue on how to align diversity and inclusion aims with the policy climate.

### Disclosure statement

No potential conflict of interest was reported by the author.

### Notes on contributors



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