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Affirmative Action

Is it time to end racial preferences?

Since the 1970s, affirmative action has played a key role in helping minorities get ahead. But many Americans say school and job candidates should be chosen on merit, not race. This November, ballot initiatives in Colorado and Nebraska would eliminate race as a selection criterion for job or school candidates but would allow preferences for those trying to struggle out of poverty, regardless of their race. It's an approach endorsed by foes of racial affirmative action. Big states, meanwhile, including California and Texas, are still struggling to reconcile restrictions on the use of race in college admissions designed to promote diversity. Progress toward that goal has been slowed by a major obstacle: Affirmative action hasn't lessened the stunning racial disparities in academic performance plaguing elementary and high school education. Still, the once open hostility to affirmative action of decades ago has faded. Even some race-preference critics don't want to eliminate it entirely but seek ways to keep diversity without eroding admission and hiring standards.

University of Nebraska student Jakari Griffith, who opposes an anti-affirmative action initiative on the ballot in Nebraska in November, speaks on campus last Feb. 26. Critics of the proposal say it targets programs benefiting blacks, women and American Indians.

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AFFIRMATIVE ACTION

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Affirmative Action

BY PETER KATEL

THE ISSUES

No white politician could have gotten the question George Stephanopoulos of ABC News asked Sen. Barack Obama. "You said . . . that affluent African-Americans, like your daughters, should probably be treated as pretty advantaged when they apply to college," he began. "How specifically would you recommend changing affirmative action policies so that affluent African-Americans are not given advantages and poor, less affluent whites are?" [1]

The Democratic presidential nominee, speaking during a primary election debate in April, said his daughters' advantages should weigh more than their skin color. "You know, Malia and Sasha, they've had a pretty good deal." [2]

But a white applicant who has overcome big odds to pursue an education should have those circumstances taken into account, Obama said. "I still believe in affirmative action as a means of overcoming both historic and potentially current discrimination," Obama said, "but I think that it can't be a quota system and it can't be something that is simply applied without looking at the whole person, whether that person is black, or white or Hispanic, male or female." [3]

Supporting affirmative action on the one hand, objecting to quotas on the other — Obama seemed to know he was threading his way through a minefield. Decades after it began, affirmative action is seen by many whites as nothing but a fancy term for racial quotas designed to give minorities an unfair break. Majority black opinion remains strongly pro-affirmative action, on the grounds that the legacy of racial discrimination lives on. Whites and blacks are 30 percentage points apart on the issue, according to a 2007 national survey by the nonpartisan Pew Research Center. [4]

Now, with the candidacy of Columbia University and Harvard Law School graduate Obama turning up the volume on the debate, voters in two states will be deciding in November whether preferences should remain in effect in state government hiring and state college admissions.

TV screenshot courtesy "DemocracyNow"

Law student Jessica Peck Corry, executive director of the Colorado Civil Rights Initiative, supports Constitutional Amendment 46, which would prohibit all government entities in Colorado from discriminating for or against anyone because of race, ethnicity or gender. Attorney Melissa Hart counters that the amendment would end programs designed to reach minority groups.

Originally, conflict over affirmative action focused on hiring. But during the past two decades, the debate has shifted to whether preference should be given in admissions to top-tier state schools, such as the University of California at Los Angeles (UCLA) based on race, gender or ethnic background. Graduating from such schools is seen as an affordable ticket to the good life, but there aren't enough places at these schools for all applicants, so many qualified applicants are rejected.

Resentment over the notion that some applicants got an advantage because of their ancestry led California voters in 1996 to ban affirmative action in college admissions. Four years later, the Florida legislature, at the urging of then-Gov. Jeb Bush, effectively eliminated using race as an admission standard for colleges and universities. And initiatives similar to the California referendum were later passed in Washington state and then in Michigan, in 2006.

Race is central to the affirmative action debate because the doctrine grew out of the civil rights movement and the Civil Rights Act of 1964, which outlawed discrimination based on race, ethnicity or gender. The loosely defined term generally is used as a synonym for advantages — "preferences" — that employers and schools extend to members of a particular race, national origin or gender.

"The time has come to pull the plug on race-based decision-making," says Ward Connerly, a Sacramento, Calif.-based businessman who is the lead organizer of the Colorado and Nebraska ballot initiative campaigns,

Americans Support Boost for Disadvantaged

A majority of Americans believe that individuals born into poverty can overcome their disadvantages and that society should be giving them special help (top poll). Fewer, however, endorse race-based affirmative action as the way to help (bottom).

	Agree	Disagree
We should help people who are working hard to overcome disadvantages and succeed in life.	93%	6
People who start out with little and work their way up are the real success stories.	91	7
Some people are born poor, and there's nothing we can do about that.	26	72
We shouldn't give special help at all, even to those who started out with more disadvantages than most.	16	81

If there is only one seat available, which student would you admit to college, the high-income student or the low-income student?

	Percentage selecting:	
	Low-income student	High-income student
If both students get the same admissions test score?	63%	3%
If low-income student gets a slightly lower test score?	33	54
If the low-income student is also black, and the high-income student is white?	36	39
If the low-income student is also Hispanic, and the high-income student is not Hispanic?	33	45

Source: Anthony P. Carnevale and Stephen J. Rose, "Socioeconomic Status, Race/Ethnicity, and Selective College Admissions," The Century Foundation, March 2003

as well as earlier ones elsewhere. "The Civil Rights Act of 1964 talks about treating people equally without regard to race, color or national origin. When you talk about civil rights, they don't just belong to black people."

Connerly, who is black, supports extending preferences of some kind to low-income applicants for jobs — as long as the beneficiaries aren't classified by race or gender.

But affirmative action supporters say that approach ignores reality. "If there are any preferences in operation in our society, they're preferences given to people with white skin and who are men and who have financial and other advantages that come with that," says Nicole Kief, New York-based state strategist for the American Civil Liberties Union's racial justice program, which is opposing the Connerly-organized ballot initiative campaigns.

Yet, of the 38 million Americans classified as poor, whites make up the biggest share: 17 million people. Blacks account for slightly more than 9 million and Hispanics slightly less. Some 576,000 Native Americans are considered poor. Looking beyond the simple numbers, however, reveals that far greater percentages of African-Americans and Hispanics are likely to be poor: 25 percent of African-Americans and 20 percent of Hispanics live below the poverty line, but only 10 percent of whites are poor. [5]

In 2000, according to statistics compiled by *Chronicle of Higher Education* Deputy Editor Peter Schmidt, the average white elementary school student attended a school that was 78 percent white, 9 percent black, 8 percent Hispanic, 3 percent Asian and 30 percent poor. Black or Hispanic children attended a school in which 57 percent of the student body shared their race or ethnicity and about two-thirds of the students were poor. [6]

These conditions directly affect college admissions, according to The Century Foundation. The liberal think tank reported in 2003 that white students account for 77 percent of the students at high schools in which the greatest majority of students go on to college. Black students account for only 11 percent of the population at these schools, and Hispanics 7 percent. [7]

A comprehensive 2004 study by the Urban Institute, a nonpartisan think tank, found that only about half of black and Hispanic high school students graduate, compared to 75 and 77 percent, respectively, of whites and Asians. [8]

Politically conservative affirmative action critics cite these statistics to argue that focusing on college admissions and hiring practices rather than school reform was a big mistake. The critics get some support from liberals who

want to keep affirmative action — as long as it's based on socioeconomic status instead of race. "Affirmative action based on race was always kind of a cheap and quick fix that bypassed the hard work of trying to develop the talents of low-income minority students generally," says Richard D. Kahlenberg, a senior fellow at The Century Foundation.

Basing affirmative action on class instead of race wouldn't exclude racial and ethnic minorities, Kahlenberg argues, because race and class are so closely intertwined.

President Lyndon B. Johnson noted that connection in a major speech that laid the philosophical foundations for affirmative action programs. These weren't set up for another five years, a reflection of how big a change they represented in traditional hiring and promotion practices, where affirmative action began. "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," Johnson said in "To Fulfill These Rights," his 1965 commencement speech at Howard University in Washington, D.C., one of the country's top historically black institutions. [9]

By the late 1970s, a long string of U.S. Supreme Court decisions began setting boundaries on affirmative action, partly in response to white job and school applicants who sued over "reverse discrimination." The court's bottom line: Schools and employers could take race into account, but not as a sole criterion. Setting quotas based on race, ethnicity or gender was prohibited. (The prohibition of gender discrimination effectively ended the chances for passage of the proposed Equal Rights Amendment [ERA], which feminist organizations had been promoting since 1923. The Civil Rights Act, along with other legislation and court decisions, made many supporters of women's rights "lukewarm" about the proposed amendment, Roberta W. Francis, then chair of the National Council of Women's Organizations' ERA task force, wrote in 2001). [10]

The high court's support for affirmative action has been weakening through the years. Since 1991 the court has included Justice Clarence Thomas, the lone black member and a bitter foe of affirmative action. In his 2007 autobiography, Thomas wrote that his Yale Law School degree set him up for rejection by major law firm interviewers. "Many asked pointed questions unsubtly suggesting that they doubted I was as smart as my grades indicated," he wrote. "Now I knew what a law degree from Yale was worth when it bore the taint of racial preference." [11]

Some of Thomas' black classmates dispute his view of a Yale diploma's worth. "Had he not gone to a school like Yale, he would not be sitting on the Supreme Court," said William Coleman III, a Philadelphia attorney who was general counsel to the U.S. Army in the Clinton administration. [12]

But that argument does not seem to impress Thomas, who was in a 5-4 minority in the high court's most recent affirmative action ruling, in which the justices upheld the use of race in law-school admissions at the University of Michigan. But even Justice Sandra Day O'Connor, who wrote the majority opinion, signaled unease with her position. In 25 years, she wrote, affirmative action would "no longer be necessary." [13]

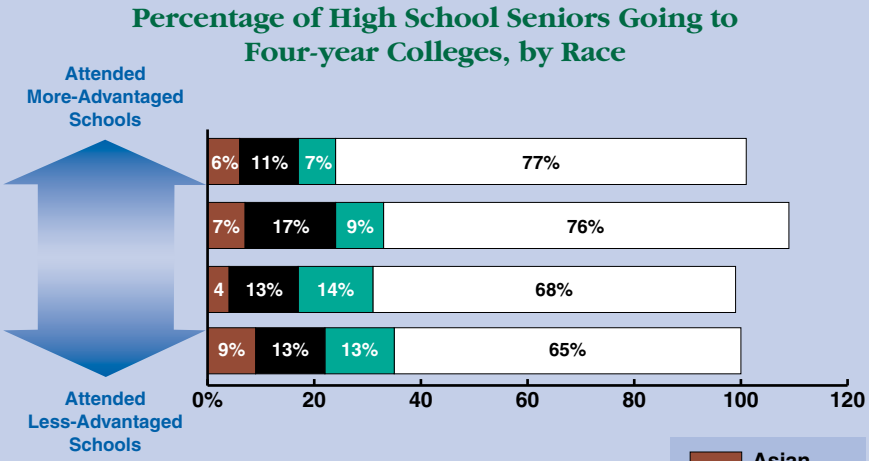
Paradoxically, an Obama victory on Nov. 4 might be the most effective anti-affirmative action event of all.

"The primary rationale for affirmative action is that America is institutionally racist and institutionally sexist," Connerly, an Obama foe, told The Associated Press. "That rationale is undercut in a major way when you look at the success of Sen. [Hillary Rodham] Clinton and Sen. Obama."

Asked to respond to Connerly's remarks, Obama appeared to draw

Elite Schools Graduate Fewest Minorities

Among college-bound blacks and Hispanics, larger percentages graduated from "less advantaged" high schools than from the "most advantaged" schools.



Source: Anthony P. Carnevale and Stephen J. Rose, "Socioeconomic Status, Race/Ethnicity, and Selective College Admissions," Century Foundation, March 2003

some limits of his own on affirmative action. "Affirmative action is not going to be the long-term solution to the problems of race in America," he told a July convention of minority journalists, "because, frankly, if you've got 50 percent of African-American or Latino kids dropping out of high school, it doesn't really matter what you do in terms of affirmative action; those kids are not getting into college." [14]

As critics and supporters discuss the future of affirmative action, here are some of the questions being debated:

Has affirmative action outlived its usefulness?

In the United States of the late 1960s and '70s, even some outright opponents of race-based affirmative action conceded that it represented an attempt to deal with the consequences of longstanding, systematic racial discrimination, which had legally ended only shortly before.

But ever since opposition to affirmative action began growing in the 1980s, its opponents themselves have invoked the very principles that the civil rights movement had embraced in its fight to end discrimination. Taking a job or school applicant's race or ethnicity into account is immoral, opponents argue, even for supposedly benign purposes. And a policy of racial/ethnic preferences, by definition, cannot lead to equality.

In today's United States, critics say, minority applicants don't face any danger that their skin color or ethnic heritage will hold them back. Instead, affirmative-action beneficiaries face continuing skepticism from others — and even from themselves, that they somehow were given an advantage that their academic work didn't entitle them to receive.

Meanwhile, opponents and supporters readily acknowledge that a disproportionate share of black and Latino students receive substandard educations, starting in and lasting through high school. Affirmative action hasn't eliminated the link between race/ethnicity and poverty and academic deprivation, they agree.

Liasion/Lara Joe Regan

Asian-American enrollment at the University of California at Berkeley rose dramatically after California voters in 1996 approved Proposition 209, a ballot initiative that banned affirmative action at all state institutions. Enrollment of African-American, Hispanic and Native American students, however, plunged.

Critics of race preferences, however, say they haven't narrowed the divide that helped to trigger affirmative action in the first place. Affirmative action advocates favor significantly reforming K-12 education while simultaneously giving a leg up to minorities who managed to overcome their odds at inadequate public schools.

And some supporters say affirmative action is important for other reasons, which transcend America's racial history. Affirmative action helps to ensure continuation of a democratic political culture, says James E. Coleman Jr., a professor at Duke University Law School.

"It's not just about discrimination or past discrimination," says Coleman, who attended all-black schools when growing up and then graduated from Harvard College and Columbia Law School in the early 1970s, during the early days of affirmative action. "It's in our self-interest. We want leaders of all different backgrounds, all different races; we ought to educate them together."

But Connerly, the California businessman behind anti-affirmative action ballot initiatives, says that race and gender preferences are the wrong tool with which to promote diversity, because they effectively erode academic standards. "Excellence can be achieved by any group of people," says Connerly, a former member of the University of California Board of Regents. "So we will keep the standards where they ought to be, and we will expect people to meet those standards."

But legislators interested in a "quick fix" have found it simpler to mandate diversity than to devise ways to improve schools. "There are times when someone has to say, 'This isn't right. We're going to do something about it,' " Connerly says. "But in the legislative process, I can find no evidence of leadership anywhere."

Like others, Connerly also cites the extraordinary academic achievements of Asian-American students — who haven't benefited from affirmative action. Affirmative action supporters don't try to dispute that point. "At the University of California at Berkeley, 40 percent of the students are Asian," says Terry H. Anderson, a history professor at Texas A&M University in College Station. "What does that say about

family structure? It makes a big statement. Family structure is so important, and it's something that affirmative action can't help at all."

But if encouraging minority-group enrollment at universities doesn't serve as a social and educational cure-all, says Anderson, who has written a history of affirmative action, the policy still serves a valuable purpose. "It's become part of our culture. On this campus, it's been 'out' to be racist for years and years. I'm looking at kids born in 1990; they just don't feel self-conscious about race or gender, they just expect to be treated equally."

Standing between the supporters and the enemies of affirmative action's racial/ethnic preferences are the affirmative action reformers. "I don't think it's time to completely abolish all forms of affirmative action," says the Century Foundation's Kahlenberg. "But it's clear there are strong legal, moral and political problems with relying solely on race."

And at the practical level, race isn't the only gauge of hardship that some students must overcome, even to be capable of competing for admission to a top-tier school. "There are students from low-income backgrounds," Kahlenberg says, "who aren't given the same opportunities as wealthier students are given, and they deserve a leg up in admissions. Someone's test scores and grades are a reflection not only of how hard they work and how talented they are, but what sorts of opportunities they've had."

Does race-based affirmative action still face powerful public opposition?

At the state and federal level, affirmative action has generated enormous conflict over the decades, played out in a long chain of lawsuits and Supreme Court decisions, as well as the hard-fought ballot initiatives this year in Arizona, Missouri and Oklahoma — all three of which ended in defeat for race, ethnic and gender preferences.

But today's political agenda — dominated by the global financial crisis, the continuing downward slide of real estate prices, the continuing conflict in Iraq and escalated combat in Afghanistan — would seem to leave little space for a reignited affirmative action conflict.

Nevertheless, supporters and opponents of affirmative action fought hard in five states over proposed ballot initiatives, two of which will go before voters in November.

Nationally, the nonpartisan Pew Research Center reported last year that black and white Americans are divided by a considerable margin on whether minority group members should get preferential treatment. Among blacks, 57 answered yes, but only 27 percent of whites agreed. That gap was somewhat bigger in 1991, when 68 percent of blacks and only 17 percent of whites favored preferences. [15]

Obama's statement to ABC News' Stephanopoulos that his daughters shouldn't benefit from affirmative action reflected awareness of majority sentiment against race preference. [16]

Still, the exchange led to some predictions that it would resurface. "The issue of affirmative action is likely to dog Sen. Obama on the campaign trail as he seeks to win over white, blue-collar voters in battleground states like Michigan," *The Wall Street Journal* predicted in June. [17]

Just two and a half weeks before the election, that forecast hadn't come to pass. However, earlier in the year interest remained strong enough that campaigners for state ballot initiatives were able to gather 136,589 signatures in Nebraska and about 130,000 in Colorado to require that the issue be put before voters in those states.

Meanwhile, the initiative efforts in Arizona, Missouri and Oklahoma were doomed after the validity of petition signatures was challenged in those states. Connerly, the chief organizer of the initiatives, blames opponents' tactics and, in Oklahoma, an unusually

Few Poor Students Attend Top Schools

Nearly three-quarters of students entering tier 1 colleges and universities come from the wealthiest families, but only 3 percent of students from the bottom quartile enter top schools. Far more students from poorer backgrounds enroll in less prestigious schools, and even more in community colleges.

Socioeconomic Status of Entering College Classes

School prestige level	First quartile (lowest)	Second quartile	Third quartile	Fourth quartile (highest)
Tier 1	3%	6%	17%	74%
Tier 2	7	18	29	46
Tier 3	10	19	36	35
Tier 4	16	21	28	35
Community Colleges	21	30	27	22

Source: Anthony P. Carnevale and Stephen J. Rose, "Socioeconomic Status, Race/Ethnicity, and Selective College Admissions," The Century Foundation, March 2003

Few Poor Students Score High on SAT

Two-thirds of students who scored at least 1300 on the SAT came from families ranking in the highest quartile of socioeconomic status, compared with only 3 percent of students from the lowest-income group. Moreover, more than one-fifth of those scoring under 1000 — and 37 percent of non-test-takers — come from the poorest families.

SAT Scores by Family Socioeconomic Status*

Score	First Quartile (lowest)	Second Quartile	Third Quartile	Fourth Quartile (highest)
>1300	3%	10%	22%	66%
1200-1300	4	14	23	58
1100-1200	6	17	29	47
1000-1100	8	24	32	36
<1000	21	25	30	24
Non-taker	37	30	22	10

** The maximum score is 1600*

Note: Percentages do not add to 100 due to rounding.

Source: Anthony P. Carnevale and Stephen J. Rose, "Socioeconomic Status, Race/Ethnicity, and Selective College Admissions," The Century Foundation, March 2003

short, 90-day window during which signatures must be collected. But once initiatives get on ballots, he says, voters approve them. "There is something about the principle of fairness that most people understand."

Without congressional legislation prohibiting preferences, Connerly says, the initiatives are designed to force state governments "to abide by the moral principle that racial discrimination — whether against a white or black or Latino or Native American — is just wrong."

But reality can present immoral circumstances as well, affirmative action defenders argue. "Racial discrimination and gender discrimination continue to present obstacles to people of color and women," says the American Civil Liberties Union's (ACLU) Kief. "Affirmative action is a way to chip away at some of these obstacles."

Kief says the fact that Connerly has played a central role in all of the initiatives indicates that true grassroots opposition to affirmative action is weak in states where initiatives have passed or are about to be voted on.

However, The Century Foundation's Kahlenberg points out that pro-affirmative action forces work hard to block ballot initiatives, because when such initiatives have gone before voters they have been approved. And the most recent successful ballot initiative, in Michigan in 2006, passed by a slightly bigger margin — 57 percent to 43 percent — than its California counterpart in 1996, which was approved by 54-46. [18]

Further evidence that anti-affirmative action initiatives are hard to fight surfaced this year in Colorado, where the group Coloradans for Equal Opportunity failed to round up enough signatures to put a pro-affirmative action initiative on the ballot.

Kahlenberg acknowledges that affirmative action politics can be tricky. Despite abiding public opposition to preferences, support among blacks is so strong that Republican presidential campaigns tend to downplay affirmative action, for fear of triggering a huge turnout among black voters, who vote overwhelmingly Democratic. In 1999, then-Florida Gov. Jeb Bush kept a Connerly-sponsored initiative out of that state largely in order to lessen the chances of a major black Democratic mobilization in the 2000 presidential election, in which his brother would be running. [19]

"When you have an initiative on the ballot," Kahlenberg says, "some Republicans think that it increases minority turnout, so they're not sure whether these initiatives play to their party or not." Republican opposition to affirmative action goes back to the Reagan administration. Reagan, however, passed up a chance to ban affirmative action programs throughout the federal government, displaying a degree of GOP ambivalence. However, Connerly is an outspoken Republican. [20]

Nevertheless, an all-out Republican push against affirmative action during the past decade failed to catch on at the national level. In 1996, former Republican Senate Majority Leader Bob Dole of Kansas was running for president, and the affirmative action initiative was on the same ballot in California. "The initiative passed, but there was no trickle-down help for Bob Dole," says Daniel A. Smith, a political scientist at the University of Florida who has written on affirmative action politics.

This year, to be sure, anxieties growing out of the financial crisis and economic slowdown could rekindle passions over preferences. But Smith argues the economic environment makes finger-pointing at minorities less likely. "Whites are not losing jobs to African-Americans," he says. "Whites and African-Americans are losing jobs to the

Asian subcontinent — they're going to Bangalore. The global economy makes it more difficult to have a convenient domestic scapegoat for lost jobs."

Has affirmative action diverted attention from the poor quality of K-12 education in low-income communities?

If there's one point on which everyone involved in the affirmative action debate agrees, it's that public schools attended by most low-income students are worsening.

"The educational achievement gap between racial groups began growing again in the 1990s," Gary Orfield, a professor of education and social policy at Harvard University, wrote. "Our public schools are becoming increasingly segregated by race and income, and the segregated schools are, on average, strikingly inferior in many important ways, including the quality and experience of teachers and the level of competition from other students. . . . It is clear that students of different races do not receive an equal chance for college." [21]

The decline in education quality has occurred at the same time various race-preference policies have governed admission to the nation's best colleges and universities. The policies were designed to provide an incentive for schools and students alike to do their best, by ensuring that a college education remains a possibility for all students who perform well academically.

But the results have not been encouraging. In California alone, only 36 percent of all high school students in 2001 had taken all the courses required for admission to the state university system, according to a study by the Civil Rights Project at Harvard University. Among black students, only 26 percent had taken the prerequisites, and only 24 percent of Hispanics. Meanwhile, 41 percent of white students and 54 percent of Asians had taken the necessary courses. [22]

AFP/Getty Images/Emmanuel Dunand

Democratic presidential candidate Sen. Barack Obama, speaking in Philadelphia on Oct. 11, 2008, represents the new face of affirmative action in the demographically changing United States: His father was Kenyan and a half-sister is half-Indonesian.

In large part as a result of deficient K-12 education, decades of race-preference affirmative action at top-tier colleges and universities have yielded only small percentages of black and Hispanic students. In 1995, according to an exhaustive 2003 study by The Century Foundation, these students accounted for 6 percent of admissions to the 146 top-tier institutions. [23]

Socioeconomically, the picture is even less diverse. Seventy-four percent of students came from families in the wealthiest quarter of the socioeconomic scale; 3 percent came from families in the bottom quarter. [24]

For race-preference opponents, the picture demonstrates that efforts at ensuring racial and ethnic diversity in higher education would have been better aimed at improving K-12 schools across the country.

"If you've tried to use race for 40-some years, and you still have this profound gap," Connerly says, "yet cling to the notion that you have given some affirmative action to black and Latino and American Indian students — though Asians, without it, are outstripping everybody — maybe the way we've been doing it wasn't the right way to do it."

Meanwhile, he says, making a point that echoes through black, conservative circles, "Historically black colleges and universities (HBCUs) — if you look at doctors and pharmacists across our nation, you'll find them coming from schools that are 90 percent black. These schools are not very diverse, but they put a premium on quality."

But not all HBCUs are in that class, affirmative action supporters point out. "A lot of people who come out with a degree in computer science from minority-serving institutions know absolutely no mathematics," says Richard Tapia, a mathematics professor at Rice University and director of the university's Center for Equity and Excellence in Education. "I once went to a historically black university and had lunch with a top student who was going to do graduate work at Purdue, but when I talked to her I realized that her knowledge of math was on a par with that of a Rice freshman. The gap is huge."

Tapia, who advocates better mentoring for promising minority students at top-flight institutions, argues that the effect of relegating minority students to a certain defined group of colleges and universities, including historically black institutions, limits their chances of

advancement in society at large. "From the elite schools you're going to get leadership."

Still, a question remains as to whether focusing on preferential admissions has helped perpetuate the very conditions that give rise to preferences in the first place.

"At the K-12 level you could argue that affirmative action has led to stagnation," says Richard Sander, a professor of law at UCLA Law School. "There's very little forward movement, very little closing of the black-white gap of the past 20 to 30 years."

Coleman of Duke University agrees that public education for most low-income students needs help. But that issue has nothing to do with admissions to top-drawer universities and professional schools, he says. "Look at minority students who get into places like that," he says. "For the most part, they haven't gone to the weakest high schools; they've often gone to the best."

Yet the affirmative action conflict focuses on black students, who are assumed to be academically underqualified, Coleman says, while white students' place at the best schools isn't questioned. The classroom reality differs, he says. "We have a whole range of students with different abilities. All of the weak students are not minority students; all of the strong students are not white students." ■

BACKGROUND

Righting Wrongs

The civil rights revolution of the 1950s and '60s forced a new look at the policies that had locked one set of Americans out of most higher-education institutions and higher-paying jobs.

As early as 1962, the Congress of Racial Equality (CORE), one of the most active civil-rights organizations, advocated hiring practices that would make up for discrimination against black applicants. "We are approaching employers with the proposition that they have effectively excluded Negroes from their work force a long time, and they now have a responsibility and obligation to make up for their past sins," the organization said in a statement from its New York headquarters. [25]

Facing CORE-organized boycotts, a handful of companies in New York, Denver, Detroit, Seattle and Baltimore changed their hiring procedures to favor black applicants.

In July 1964, President Lyndon B. Johnson pushed Congress to pass the landmark Civil Rights Act, which had been championed by President John F. Kennedy since his 1960 presidential election campaign.

The law's Title VII, which prohibits racial, religious or sexual discrimination in hiring, said judges enforcing the law could order "such affirmative action as may be appropriate" to correct violations. [26]

Title VII didn't specify what kind of affirmative action could be decreed. But racial preferences were openly discussed in the political arena as a tool to equalize opportunities. Official working definitions of affirmative action didn't emerge until the end of the 1960s, under President Richard M. Nixon.

In 1969, the administration approved the "Philadelphia Plan," which set numerical goals for black and other minority employment on federally financed construction jobs. One year later, the plan was expanded to cover all businesses with 50 or more employees and federal contracts of at least $50,000. The contracts were to set hiring goals and timetables designed to match up a firm's minority representation with the workforce demographics in its area. The specified minorities were: "Negro, Oriental, American Indian and Spanish Surnamed Americans." [27]

The sudden change in the workplace environment prompted a wave of lawsuits. In the lead, a legal challenge by 13 black electric utility workers in North Carolina led to one of the most influential U.S. Supreme Court decisions on affirmative action, the 1971 *Griggs v. Duke Power Co.* case. [28]

In a unanimous decision, the high court concluded that an aptitude test that was a condition of promotion for the workers violated the Civil Rights Act. Duke Power may not have intended the test to weed out black applicants, Chief Justice Warren E. Burger wrote in the decision. But, he added, "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." [29]

If the point of the Civil Rights Act was to ensure that the consequences of institutions' decisions yielded balanced workforces, then goals and timetables to lead to that outcome were consistent with the law as well. In other words, eliminating racial discrimination could mean paying attention to race in hiring and promotions.

That effort would produce a term that captured the frustration and anger among white males who were competing with minority-group members for jobs, promotions or school admissions: "reverse discrimination."

The issue went national with a challenge by Allan Bakke, a white, medical school applicant, to the University of California. He'd been rejected two years in a row while minority-group members — for whom 16 slots in the 100-member class had been set aside — were admitted with lower qualifying scores.

After the case reached the Supreme Court, the justices in a 5-4 decision in

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Chronology

1960s *Enactment of civil rights law opens national debate on discrimination.*

1964
Civil Rights Act of 1964 bars discrimination in employment and at federally funded colleges.

1965
President Lyndon B. Johnson calls for a massive national effort to create social and economic equality.

1969
Nixon administration approves "Philadelphia Plan" setting numerical goals for minority employment on all federally financed building projects.

1970s-1980s *Affirmative action expands throughout the country, prompting legal challenges and growing voter discontent, leading to new federal policy.*

1971
The U.S. Supreme Court's landmark *Griggs v. Duke Power Co.* decision, growing out of a challenge by 13 black electric utility workers in North Carolina, is seen as authorizing companies and institutions to set out goals and timetables for minority hiring.

1978
Supreme Court's decision in *University of California Regents v. Bakke*, arising from a medical-school admission case, rules out racial quotas but allows race to be considered with other factors.

1980
Ronald W. Reagan is elected president with strong support from white males who see affirmative action as a threat.

1981-1983
Reagan administration reduces affirmative action enforcement.

1985
Attorney General Edwin Meese III drafts executive order outlawing affirmative action in federal government; Reagan never signs it.

1987
Supreme Court upholds job promotion of a woman whose advancement was challenged by a male colleague claiming higher qualifications.

1990s *Ballot initiatives banning race and gender preferences prompt President Bill Clinton to acknowledge faults in affirmative action.*

1994
White voter discontent energizes the "Republican revolution" that topples Democrats from control of Congress.

1995
Supreme Court rules in *Adarand Constructors v. Peña* that affirmative action programs must be "narrowly tailored" for cases of extreme discrimination. . . . Clinton concedes that affirmative action foes have some valid points but concludes, "Mend it, but don't end it." . . . Senate votes down anti-affirmative action bill.

1996
California voters pass nation's first ballot initiative outlawing racial, ethnic and gender preferences. . . . 5th U.S. Circuit Court of Appeals rules that universities can't take race into account in evaluating applicants.

1998
Washington state voters pass ballot initiative identical to California's.

2000s *Affirmative action in university admissions stays on national agenda, leading to major Supreme Court ruling; Sen. Barack Obama's presidential candidacy focuses more attention on the issue.*

2003
Supreme Court's *Gratz v. Bollinger* ruling rejects University of Michigan undergraduate admission system for awarding extra points to minority applicants, but simultaneous *Grutter v. Bollinger* decision upholds UM law school admissions policy, which includes race as one factor among many. . . . Justice Sandra Day O'Connor writes in 5-4 majority opinion in *Grutter* that affirmative action won't be necessary in 25 years. . . . Century Foundation study finds strong linkage between socioeconomic status, race and chances of going to college.

2006
Michigan passes nation's third ballot initiative outlawing racial, ethnic and gender preferences.

2008
Opponents of affirmative action in Arizona, Missouri and Oklahoma fail to place anti-affirmative action initiatives on ballot, but similar campaigns succeed in Colorado and Nebraska. . . . U.S. Civil Rights Commission opens study of minority students majoring in science and math. . . . Saying his daughters are affluent and shouldn't benefit from race preferences, Obama endorses affirmative action for struggling, white college applicants.

'Percent Plans' Offer Alternative to Race-Based Preferences

But critics say approach fails to level playing field.

In recent years, voters and judges have blocked race and ethnicity preferences in university admissions in three big states with booming minority populations — California, Florida and Texas. Nonetheless, lawmakers devised a way to ensure that public universities remain open to black and Latino students.

The so-called "percent plans" promise guaranteed admission based on a student's high school class standing, not on skin tone. That, at least is the principle.

But the man who helped end racial affirmative action preferences in two of the states involved argues affirmative action is alive and well, simply under another name. Moreover, says Ward Connerly, a black businessman in Sacramento, Calif., who has been a leader in organizing anti-affirmative action referendums, the real issue — the decline in urban K-12 schools — is being ignored.

"Legislatures and college administrators lack the spine to say, 'Let's find the problem at its core,' " says Connerly, a former member of the University of California Board of Regents. "Instead, they go for a quick fix they believe will yield the same number of blacks and Latinos as before."

Even Connerly's opponents agree "percent plans" alone don't put high schools in inner cities and prosperous suburbs on an equal footing. "In some school districts in Texas, 50 percent of the graduates could make it here easily," says Terry H. Anderson, a history professor at Texas A&M University in College Station. "Some school districts are so awful that not one kid could graduate here, I don't care what race you're talking about."

All the plans — except at selective schools — ignore SAT or ACT scores (though students do have to present their scores). The policy troubles Richard D. Kahlenberg, a senior fellow at The Century Foundation, who champions "class-based" affirmation action. "The grade of A in one high school is very different from the grade of A in another," he says.

Texas lawmakers originated the percent plan concept after a 5th U.S. Circuit Court of Appeals decision in 1996 (*Hopwood v. Texas*) prohibited consideration of race in college admissions. Legislators proposed guaranteeing state university admissions to the top 10 percent of graduates of the state's public and private high schools. Then-Gov. George W. Bush signed the bill, which includes automatic admission to the flagship campuses, the University of Texas at Austin and Texas A&M. [1]

In California, the impetus was the 1996 voter approval of Proposition 209, which prohibited racial and ethnic preferences by all state entities. Borrowing the Texas idea, California lawmakers devised a system in which California high school students in the top 4 percent of their classes are eligible for the California system, but not necessarily to attend the two star institutions, UC Berkeley and UCLA. (Students in the top 4 percent-12.5 percent range are admitted to community colleges and can transfer to four-year institutions if they maintain 2.4 grade-point averages.) [2]

Connerly was active in the Proposition 209 campaign and was the key player — but involuntarily — in Florida's adoption of a percent plan. In 1999, Connerly was preparing to mount an anti-affirmative action initiative in Florida. Then-Gov. Jeb Bush worried it could hurt his party's standing with black voters — with possible repercussions on his brother George's presidential campaign. Instead Gov. Bush launched "One Florida," a percent plan approved by the legislature.

In Florida, the top 20 percent of high school graduates are guaranteed admission to the state system. To attend the flagship University of Florida at Gainesville they must meet tougher standards. All three states also require students to have completed a set of required courses.

Percent plan states also have helped shape admissions policies by experimenting with ways to simultaneously keep

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1978 ordered Bakke admitted and prohibited the use of racial quotas. But they allowed race to be considered along with other criteria. Representing the University of California was former Solicitor General Archibald Cox, the Watergate special prosecutor who was fired on orders of President Nixon in 1973. Cox's granddaughter, Melissa Hart, helps lead the opposition to an anti-affirmative action ballot initiative in Colorado (*see p. 855*). [30]

In 1979 and 1980, the court upheld worker training and public contracting policies that included so-called set-asides for minority-group employees or minority-owned companies. But in the latter case, the deciding opinion specified that only companies that actually had suffered discrimination would be eligible for those contracts. [31]

Divisions within the Supreme Court reflected growing tensions in the country as a whole. A number of white people saw affirmative action as injuring the educational and career advancement of people who hadn't themselves caused the historical crimes that gave rise to affirmative action.

Reversing Course

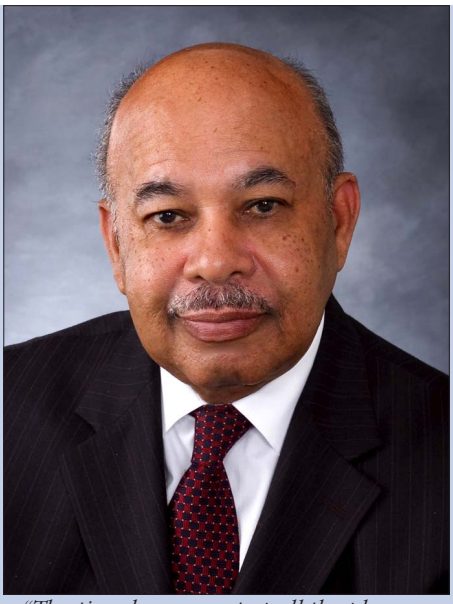
President Ronald W. Reagan took office in 1981 with strong support from so-called "Reagan Democrats" — white, blue-collar workers who had turned against their former party on issues including affirmative action. [32]

Initially, Reagan seemed poised to fulfill the hopes of those who wanted him to ban all preferences based on race, ethnicity and gender. The latter category followed an upsurge of women fighting to abolish limits

academic standards high, while ensuring at least the possibility that promising students of all socioeconomic circumstances have a shot at college.

In Florida, the consequences of maintaining high admissions standards at UF were softened by another program, "Bright Futures," which offers tuition reductions of 75 percent — or completely free tuition — depending on completion of AP courses and on SAT or ACT scores.

The effect, says University of Florida political scientist Daniel A. Smith, is to ensure a plentiful supply of top students of all races and ethnicities. "We have really talented minorities — blacks, Latinos, Asian-Americans — because 'One Florida' in combination with 'Bright Futures' has kept a lot of our talented students in the state. We have students who turned down [partial] scholarships to Duke and Harvard because here they're going for free."



"The time has come to pull the plug on race-based decision-making," says Ward Connerly, a Sacramento, Calif., businessman who spearheaded anti-affirmative action ballot initiatives in Colorado, Nebraska and other states.

At UCLA, which also has maintained rigorous admission criteria, recruiters spread out to high schools in low-income areas in an effort to ensure that the school doesn't become an oasis of privilege. The realities of race and class mean that some of that recruiting work takes place in mostly black or Latino high schools.

"It's the fallacy of [Proposition] 209 that you can immediately move to a system that doesn't take account of race and that treats everybody fairly," said Tom Lifka, a UCLA assistant vice chancellor in charge of admissions. He said the new system meets legal standards. [3]

Consciously or not, Lifka was echoing the conclusion of the most thorough analysis of the plans' operations in the three states. The 2003 study, sponsored by Harvard University's Civil Rights Project, concluded that the states had largely succeeded in maintaining racial and ethnic diversity on their campuses.

But the report added that aggressive recruitment, academic aid to high schools in low-income areas and similar measures played a major role.

"Without such support," wrote Catherine L. Horn, an education professor at the University of Houston, and Stella M. Flores, professor of public policy and higher education at Vanderbilt, "the plans are more like empty shells, appearing to promise eligibility, admission and enrollment for previously excluded groups but actually doing very little." [4]

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[1] Catherine L. Horn and Stella M. Flores, "Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences," Civil Rights Project, Harvard University, 2003, pp. 20-23, www.civilrightsproject.ucla.edu/research/affirmativeaction/tristate.pdf.

[2] *Ibid.*

[3] Quoted in David Leonhardt, "The New Affirmative Action," *The New York Times Magazine*, Sept. 30, 2007, p. 76.

[4] Horn and Flores, *op. cit.*, pp. 59-60.

on their education and career possibilities.

Yet Reagan's appointees were divided on the issue, and the president himself never formalized his rejection of quotas and related measures. Because no law required the setting of goals and timetables, Reagan could have banned them by executive order. During Reagan's second term, Attorney General Edwin Meese III drafted such an order. But Reagan never signed it.

Nevertheless, the Reagan administration did systematically weaken enforcement of affirmative action. In Reagan's first term he cut the budgets of the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance — the two front-line agencies on the issue — by 12 and 34 percent, respectively, between 1981 and 1983. As a result, the compliance office blocked only two contractors during Reagan's two terms, compared with 13 that were barred during President Jimmy Carter's term.

The Justice Department also began opposing some affirmative action plans. In 1983, Justice won a partial court reversal of an affirmative action plan for the New Orleans Police Department. In a police force nearly devoid of black supervisors, the plan was designed to expand the number — a move considered vital in a city whose population was nearly one-half black.

Affirmative action cases kept moving through the Supreme Court. In 1984-1986, the court overturned plans that would have required companies doing layoffs to disregard the customary "first hired, last fired" rule, because that custom endangered most black employees, given their typically short times on the job.

And in 1987, a 5-4 Supreme Court decision upheld an Alabama state police plan requiring that 50 percent of promotions go to black officers. The same year, the court upheld 6-3 the promotion of a woman employee of Santa Clara County, Calif., who got promoted over a male candidate who had scored slightly higher on an assessment. The decision marked the first court endorsement of affirmative action for women.

Getty Images/Bill Pugliano

Supporters of affirmative action in Lansing, Mich., rally against a proposed statewide anti-affirmative action ballot initiative in September 2006; voters approved the proposal that November. The initiative followed a 2003 U.S. Supreme Court ruling upholding the use of race in law-school admissions at the University of Michigan. Justice Sandra Day O'Connor, who wrote the majority 5-4 opinion, predicted, however, that in 25 years affirmative action would "no longer be necessary."

In the executive branch, divided views persisted in the administration of Reagan's Republican successor, George H. W. Bush. In 1990 Bush vetoed a pro-affirmative action bill designed to reverse recent Supreme Court rulings, one of which effectively eased the way for white men to sue for reverse discrimination.

The legislation would have required "quotas," Bush said, explaining his veto. But the following year, he signed a compromise, the Civil Rights Act of 1991. [33] Supported by the civil rights lobby, the bill wrote into law the *Griggs v. Duke Power* requirement that an employer prove that a job practice — a test, say — is required for the work in question. A practice that failed that test could be shown to result in discrimination, even if that hadn't been the intention.

Bush also reversed a directive by his White House counsel that would have outlawed all quotas, set-asides and related measures. The administration's ambivalence reflected divided views in American society. Local government and corporate officials had grown appreciative of affirmative action for calming racial tensions. In 1985, the white Republican mayor of Indianapolis refused a Justice Department request to end affirmative action in the police department. Mayor William Hudnut said that the "white majority has accepted the fact that we're making a special effort for minorities and women." [34]

Yet among white males, affirmative action remained a very hot-button issue. "When we hold focus groups," a Democratic pollster said in 1990, "if the issue of affirmative action comes up, you can forget the rest of the session. That's all . . . that's talked about." [35]

Mending It

From the early 1990s to 2003 race-based affirmative action suffered damage in the political arena and the courts.

In 1994, white male outrage at preferences for minority groups and women was a key factor in congressional elections that toppled Democrats from control of both houses. As soon as the Congress changed hands, its new leaders targeted affirmative action. "Sometimes the best-qualified person does not get the job because he or she may be one color," Majority Leader Dole said in a television interview. "That may not be the way it should be in America." [36]

The following year, the U.S. Supreme Court imposed limits on the use of preferences, ruling on a white, male contractor's challenge to a federal program that encouraged general contractors to favor minority subcontractors. Justice O'Connor wrote in the 5-4 majority opinion in *Adarand Constructors v. Peña* that any racial or ethnic preferences had to be "narrowly tailored" to apply only to "pervasive, systematic and obstinate discriminatory conduct." [37]

Some justices had wanted all preferences overturned. Though that position failed to win a majority, the clear unease that O'Connor expressed added to the pressure on politicians who supported affirmative action.

In that climate, President Bill Clinton gave a 1995 speech at the National Archives in Washington in which he acknowledged that critics had a point. He said he didn't favor "the unjustified preference of the unqualified over the qualified of any race or gender." But affirmative action was still needed because discrimination persisted, Clinton added. His bottom line: "Mend it, but don't end it." [38]

The slogan seemed to match national politicians' mood. One day after Clinton's speech, the Senate voted down

a bill to abolish all preferences, with 19 Republicans siding with Democrats in a 61-36 vote.

But in California, one of the country's major affirmative action laboratories, the "end it" argument proved more popular. Racial/ethnic preferences had become a major issue in a state whose minority population was booming. California's higher-education system also included two of the nation's top public institutions: the University of California at Berkeley (UCB) and UCLA.

Among many white, Anglo Californians, affirmative action had come to be seen as a system under which black and Latino applicants were getting into those two schools at the expense of whites or Asians with higher grades and SAT scores.

By 1996, the statewide university system's majority-Republican Board of Regents voted to end all race, ethnic and gender preferences in admissions. The board did allow universities to take applicants' socioeconomic circumstances into account.

And in the same year, California voters approved Proposition 209, which outlawed all race, ethnicity and gender preferences by all state entities. Connerly helped organize that referendum and followed up with successful campaigns in Washington state in 1998 and in Michigan in 2003.

Meanwhile, the "reverse discrimination" issue that had been decided in the *Bakke* case flared up in Texas, where Cheryl Hopwood and two other white applicants to the University of Texas law school challenged their rejections, pointing to the admissions of minority students with lower grades and test scores. In 1996, the 5th U.S. Circuit Court of Appeals decided for the plaintiffs, ruling that universities couldn't take race into account when assessing applicants.

The appeals judges had overruled the *Bakke* decision, at least in their jurisdiction of Texas, Mississippi and Louisiana, yet the Supreme Court refused to consider the case.

But in 2003, the justices ruled on two separate cases, both centering on admissions to another top-ranked public higher education system: the University of Michigan. One case arose from admissions procedures for the undergraduate college, the other from the system for evaluating applicants to the university's law school. [39]

The Supreme Court decided against the undergraduate admissions policy because it automatically awarded 20 extra points on the university's 150-point evaluation scale to blacks, Latinos and American Indians. By contrast, the law school took race into account in what Justice O'Connor, in the majority opinion in the 5-4 decision, called a "highly individualized, holistic review" of each candidate aimed at producing a diverse student population. [40] ■

CURRENT SITUATION

'Formal Equality'

In the midst of war and the Wall Street meltdown, affirmative action may not generate as many headlines as it used to. But the issue still packs enough punch to have put anti-affirmative action legislation up for popular vote in Colorado and Nebraska this year.

"This is a progressive approach," said Jessica Peck Corry, executive director of the Colorado Civil Rights Initiative, which is campaigning for proposed Constitutional Amendment 46. The amendement would prohibit all state government entities from discriminating for or against anyone because of race, ethnicity or gender. "America is too diverse to put into stagnant race boxes," she says.

Melissa Hart, a co-chair of "No On 46," counters that the amendment would require "formal equality" that shouldn't be confused with the real thing. She likens the proposal to "a law that says both the beggar and the king may sleep under a bridge." In the real world, she says, only one of them will spend his nights in a bedroom.

Unlike California, Michigan and Washington — the states where voters have approved initiatives of this type over the past 12 years — the Colorado campaign doesn't follow a major controversy over competition for university admissions.

To be sure, Corry — a libertarian Republican law student, blogger and past failed candidate for state Senate — has publicly opposed affirmative action for several years. [41] But Corry, who is also a policy analyst at the Denver-based Independence Institute, a libertarian think tank, acknowledges that the referendum campaign in Colorado owes its start to Connerly. He began taking the ballot initiative route in the 1990s, after concluding that neither state legislatures nor Congress would ever touch the subject.

"They just seem to lack the stomach to do what I and the majority of Americans believe should be done," Connerly says. "Clearly, there's a disconnect between elected officials and the people themselves."

Connerly's confidence grows out of his success with the three previous initiatives. But this year, his attempts to get his proposal before voters in Arizona, Missouri and Oklahoma all failed because his campaign workers didn't gather enough valid signatures to get the initiatives on the ballot.

Connerly blames what he calls an overly restrictive initiative process in Oklahoma, as well as organized opposition by what he calls "blockers," who shadowed signature-gatherers and disputed their explanations of the amendments.

Opponents had a different name for themselves. "Our voter educators were simply that — voter educators,"

The Preference Program Nobody Talks About

How "legacies" get breaks at top colleges.

Many critics say race-based affirmative action gives minority college applicants an unfair advantage. But reporter Peter Schmidt found an even more favored population — rich, white kids who apply to top-tier schools.

"These institutions feel very dependent on these preferences," Schmidt writes in his 2007 book, *Color and Money: How Rich White Kids Are Winning the War Over College Affirmative Action*. "They throw up their hands and say, 'There's no other way we can raise the money we need.' "

Colleges admit these students — "legacies," in college-admission lingo — because their parents are donation-making graduates. Offspring of professors, administrators or (in the case of top state universities) politically influential figures get open-door treatment as well.

"Several public college lobbyists, working in both state capitals and with the federal government in and around Washington, have told me that they spend a significant portion of their time lobbying their own colleges' admissions offices to accept certain applicants at the behest of public officials," Schmidt writes. [1]

Especially in regard to legacies and the families' donations, Schmidt says, "There is a utilitarian argument that the money enables colleges to serve students in need. But there isn't a correlation between how much money they're bringing in and helping low-income students."

As deputy editor of the *Chronicle of Higher Education*, Schmidt has been covering affirmative action conflicts since his days as an Associated Press reporter writing about protests over racial tensions at the University of Michigan in the mid-1990s.

His book doesn't deal exclusively with applicants from privileged families — who, by the nature of American society, are almost all white and academically well-prepared. But Schmidt's examination of privileged applicants frames his reporting on the more familiar issues of preferences based on race, ethnicity and gender.

According to Schmidt, Harvard as of 2004 accepted about 40 percent of the legacies who applied, compared to about 11 percent of applicants overall. In the Ivy League in general, children of graduates made up 10-15 percent of the undergraduates.

Though the issue is sensitive for college administrators, Schmidt found some members of the higher-education establishment happy to see it aired.

"Admissions officers are the ones who are finding the promising kids — diamonds in the rough — and getting emotionally invested in getting them admitted, then sitting down with the development officer or the coach and finding that these kids are knocked out of the running," he says.

Some education experts dispute that conclusion. Abigail Thernstrom, a senior fellow at the conservative Manhattan Institute and vice-chair of the U.S. Commission on Civil Rights, opposes "class-based" affirmative action (as well as racial/ethnic preferences), calling it unneccessary. She says that when top-tier schools look at an applicant from a disadvantaged background "who is getting a poor education — a diamond in the rough but showing real academic progress — and compare that student to someone from Exeter born with a silver spoon in his mouth, there's no question that these schools are going to take that diamond in the rough, if they think he or she will be able to keep up."

But some of Schmidt's findings echo what affirmative action supporters have observed. James E. Coleman Jr., a law professor at Duke University, argues against the tendency to focus all affirmative action attention on blacks and Latinos. "The idea is that any white student who gets here deserves to be here. They're not questioned. This has always been true."

At the same time, Coleman, who is black, agrees with Schmidt that those who start out near the top of the socioeconomic ladder have access to first-class educations before they even get to college. Coleman himself, who graduated from Harvard and from Columbia Law School, says he never had a single white classmate in his Charlotte, N.C., schools until he got accepted to a post-high school preparatory program at Exeter, one of the nation's most prestigious prep schools. "I could tell that my educational background and preparation were woefully inadequate compared to students who had been there since ninth grade," he recalls. "I had to run faster."

Schmidt says the politics of affirmative action can give rise to tactical agreements between groups whose interests might seem to conflict. In one dispute, he says, "Civil rights groups and higher-education groups had a kind of uneasy alliance: The civil rights groups would not challenge the admissions process and go after legacies as long as affirmative action remained intact."

But, he adds, "There are people not at the table when a deal like that is struck. If you're not a beneficiary of one or the other side of preferences, you don't gain from that agreement."

[1] Peter Schmidt, *Color and Money: How Rich White Kids Are Winning the War Over College Affirmative Action* (2007), p. 32.

said Brandon Davis, political director of the Service Employees International Union in Missouri. "Ward Connerly should accept what Missourians said, and he should stop with the sore-loser talk." [42]

The opposition began deploying street activists to counter what they call the deliberately misleading wording of the proposed initiatives. In Colorado, Proposition 46 is officially described as a "prohibition against discrimination by the state" and goes on to ban "preferential treatment to any individual or group on the basis of race, sex, color, ethnicity or national origin." [43]

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Would many black and Latino science and math majors be better off at lesser-ranked universities?

ROGERS ELLIOTT
PROFESSOR EMERITUS, DEPARTMENT OF PSYCHOLOGY AND BRAIN SCIENCES, DARTMOUTH COLLEGE

FROM TESTIMONY BEFORE U.S. CIVIL RIGHTS COMMISSION, SEPT. 12, 2008

Yes

race preferences in admissions in the service of affirmative action are harming the aspirations, particularly, of blacks seeking to be scientists.

The most elite universities have very high levels in their admission standards, levels which minorities — especially blacks — don't come close to meeting.

[Thus], affirmative action in elite schools, which they pursue vigorously and successfully, leaves a huge gap, probably bigger than it would be for affirmative action at an average school. That is what constitutes the problem.

At elite schools, 90 percent of science majors [got] 650 or above on the SAT math score. About 80 percent of the white/Asian group are 650 or above, but only 25 percent of the black group have that score or better. The gaps that are illustrated in these data have not gotten any better. They have, in fact, gotten a little bit worse: The gap in the SAT scores between blacks and whites, which got to its smallest extent in about 1991 — 194 points — is back to 209.

The higher the standard at the institution, the more science they tend to do. But the [lower-ranking schools] still do science, and your chances of becoming a scientist are better. Now, obviously, there are differences. The higher institutions have eliteness going for them. They have prestige going for them, and maybe getting a degree from Dartmouth when you want to be a doctor will leave you better off in this world even though you're not doing the thing you started with as your aspiration.

Seventeen of the top 20 PhD-granting institutions for blacks in this country, are HBCUs [historically black colleges and universities].

Elite institutions are very performance-oriented. They deliberately take people at a very high level to begin with — with a few exceptions — and then they make them perform, and they do a pretty good job of it. If you're not ready for the first science course, you might as well forget it. Some of these minority students had mostly A's . . . enough to get to Dartmouth or Brown or Cornell or Yale. They take their first course, let's say, in chemistry; at least 90 percent of the students in that course are bright, motivated, often pre-med, highly competitive whites and Asians. And these [minority] kids aren't as well-prepared. They may get their first C- or D in a course like that because the grading standards are rigorous, and you have to start getting it from day one.

PROF. RICHARD A. TAPIA
DIRECTOR, CENTER ON EXCELLENCE AND EQUITY, RICE UNIVERSITY

FROM TESTIMONY BEFORE U.S. CIVIL RIGHTS COMMISSION, SEPT. 12, 2008

No

the nation selects leaders from graduates and faculty of U.S. universities with world-class science, technology, engineering and math (STEM) research programs. If we, the underrepresented minorities, are to be an effective component in STEM leadership, then we must have an equitable presence as students and faculty at the very top-level research universities.

Pedigree, unfortunately, is an incredible issue. Top research universities choose faculty from PhDs produced at top research universities. PhDs produced at minority-serving schools or less-prestigious schools will not become faculty at top research universities. Indeed, it's unlikely they'll become faculty at minority-serving institutions. A student from a research school with a lesser transcript is stronger than a student from a minority-serving institution with all A's.

So are the students who come from these minority-serving institutions incompetent? No. There's a level of them that are incredibly good and will succeed wherever they go. And usually Stanford and Berkeley and Cornell will get those. Then there's a level below that you can work with. I produced many PhDs who came from minority-serving institutions. Is there a gap in training? Absolutely.

We do not know how to measure what we really value: Creativity. Underrepresented minorities can be quite creative. For example, the Carl Hayden High School Robotic Team — five Mexican-American students from West Phoenix — beat MIT in the final in underwater robotics. They were not star students, but they were incredibly creative.

Treating everyone the same is not good enough. Sink or swim has not worked and will not work. It pays heed to privilege, not to talent. Isolation, not academics, is often the problem. We must promote success and retention with support programs. We must combat isolation through community-building and mentoring.

Ten percent of the students in public education in Texas are accepted into the University of Texas, automatically — the top 10 percent. They could have said look, these students are not prepared well. They're dumped at our doorstep, let's leave them. They didn't. The Math Department at the University of Texas at Austin built support programs where minorities are retained and succeed. It took a realization that here they are, let's do something with them.

Race and ethnicity should not dictate educational destiny. Our current path will lead to a permanent underclass that follows racial and ethnic lines.

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"We want an acknowledgement that disadvantage cannot be specifically determined based on looking at some race data or gender data," Corry says. But tutoring, counseling and other activities should be extended to all who need help because of their socioeconomic circumstances, she contends.

Likewise, a project to interest girls in science and math, for instance, would have to admit boys. "In a time when America is losing its scientific advantage by the second, why are you excluding potential Nobel prize winners because they're born with the wrong biology?" she asks rhetorically.

Hart says that many tutoring and similar programs tailored to low-income students in Colorado already welcome all comers, regardless of race or ethnicity. But she questions why a math and science program tailored for girls should have to change its orientation. Likewise, Denver's specialized public schools for American Indian students would have to change their orientation entirely. "Class-based equal opportunity programs are not substitutes for outreach, training and mentoring on the basis of race and gender," she says.

The issue of class comes up in personal terms as well. Corry portrays herself as the product of a troubled home who had to work her way through college and graduate school. Though her father was a lawyer, her mother abandoned the family and wound up living on the streets. And Corry depicts Hart as a member of the privileged class, a granddaughter of former Solicitor General Cox and a graduate of Harvard University and Harvard Law School. "People like Melissa, I believe, are well-intentioned but misguided," Corry says. "The worst thing you can do to someone without connections is to suggest that they can't make it without preferences."

Hart, rapping Corry for bringing up personal history rather than debating ideas, adds that her father and his part of the family are potato farmers from Idaho.

"I am proudly the granddaughter of Archibald Cox, proud of the fact that he argued the *Bakke* case for the University of California, and proud to be continuing a tradition of standing up for opportunity in this country," she says.

The Nebraska campaign, taking place in a smaller state with little history of racial or ethnic tension and a university where competition for admission isn't an issue, has generated somewhat less heat. But as in Colorado, college-preparation and other programs of various kinds that target young women and American Indians would be threatened by the amendment, says Laurel Marsh, executive director of the Nebraska ACLU.

AP Photo/Nati Harnik

TV cameramen in Lincoln, Neb., shoot boxes of signed voter petitions that qualified a proposed initiative to be put on the ballot in Nebraska this coming November calling for a ban on most types of affirmative action.

Over Their Heads?

The U.S. Civil Rights Commission is examining one of the most explosive issues in the affirmative action debate: whether students admitted to top universities due to racial preferences are up to the academic demands they face at those institutions.

Math and the hard sciences present the most obvious case, affirmative action critics — and some supporters — say. Those fields are at the center of the commission's inquiry because students from high schools in low-income areas — typically minority students — tend to do poorly in science and math, in part because they require considerable math preparation in elementary and high school.

Sander of UCLA, who has been studying the topic, testified to the commission that for students of all races who had scored under 660 on the math SAT, only 5 percent of blacks and 3.5 percent of whites obtained science degrees. But of students who scored 820 or above on the SAT, 44 percent of blacks graduated with science or engineering degrees. Among whites, 35 percent graduated with those degrees — illustrating Sander's point that that issue is one of academic preparation, not race.

Abigail Thernstrom, the commission's vice-chair, says that most graduates of run-of-the-mill urban schools labor under a major handicap in pursuing math or science degrees. "By the time they get to college they're in bad shape in a discipline like math, where all knowledge is cumulative," she says. "The colleges are inheriting a problem that, in effect, we sweep under the rug."

Thernstrom, a longtime affirmative action critic, bases her views both on her 11 years of service on the Massachusetts state Board of Education and on data assembled by academics, including Sander. "Test scores do predict a lot, high school grades predict a lot," Sander says in an interview, disputing critics of his work who say students from deficient high schools can make up in college what they missed earlier.

Testifying to the commission on Sept. 12, Sander presented data showing that black and Hispanic high school graduates tend to be more interested than their white counterparts in pursuing science and math careers, but less successful in holding on to majors in those fields in college. Lower high school grades and test scores seem to account for as much as 75 percent of the tendency to drop out of those fields, he says.

Sander added that a student's possibilities can't be predicted from skin color and that the key factor associated with inadequate academic preparation is socioeconomic status. "We ought to view that as good news, because that means there's no intrinsic or genetic gap," he testified.

Rogers Elliott, an emeritus psychology and brain sciences professor at Dartmouth College, told the commission that the best option for many black and Hispanic students who want to pursue science or math careers is to attend lower-rated universities. Among institutions that grant the most PhDs to blacks, 17 of the top 20 are HBCUs, Elliott said, "and none of them is a prestige university."

Richard Tapia, a Rice University mathematician, countered that consigning minority-group students who aren't stars to lower-ranking universities would be disastrous. Only top-tier universities, he argued, provide their graduates with the credibility that allows them to assert leadership. "Research universities must be responsible for providing programs that promote success," he said, "rather than be let off the hook by saying that minority students should go to minority-serving institutions or less prestigious schools."

Tapia directs such a program — one of a handful around the country — that he says has helped Rice students overcome their inadequate earlier schooling. But he accepts Sander's and Elliott's data and says students with combined SAT scores below 800 would not be capable of pursuing math or science majors at Rice.

Tapia, the son of Mexican immigrants who didn't attend college, worked at a muffler factory after graduating from a low-achieving Los Angeles high school. Pushed by a co-worker to continue his education, he enrolled in community college and went on to UCLA, where he earned a doctorate. He attributes his success to a big dose of self-confidence — something that many people from his background might not have but that mentors can nurture.

A commission member sounded another practical note. Ashley L. Taylor Jr., a Republican lawyer from Richmond, Va., who is black, argued that colleges have a moral obligation to tell applicants if their SAT scores fall within the range of students who have a shot of completing their studies. "If I'm outside that range, no additional support is going to help me," he said.

Sander agrees. "African-American students and any other minority ought to know going into college the ultimate outcomes for students at that college who have their profile."

Tapia agreed as well. "I had a student that I was recruiting in San Antonio who had a 940 SAT and was going to Princeton. I said, 'Do you know what the average at Princeton is?' He said, "Well, my teachers told me it was about 950.' I said, 'Well, I think you'd better check it out.' "

In fact, the average combined math and verbal SAT score of students admitted to Princeton is 1442. [44] ■

OUTLOOK

End of the Line?

Social programs don't come with an immortality guarantee. Some supporters as well as critics of affirmative action sense that affirmative action, as the term is generally understood, may be nearing the end of the line.

"I expect affirmative action to die," says Tapia. "People are tired of it. And if we had to depend on affirmative action forever, then there was something wrong. If you need a jump-start on your battery, and you get it jumped, fine. If you start needing it everywhere you go, you'd better get another battery."

Tapia's tone is not triumphant. He says the decline in public school quality is evidence that "it didn't work, and we didn't do a good job." But he adds that the disparities between the schooling for low-income and well-off students is what makes affirmative action necessary. "Sure, in an ideal world, you wouldn't have to do these things, but that's not the world we live in."

UCLA's Sander, who favors reorienting affirmative action — in part by determining an academic threshold below which students admitted by preference likely will fail — sees major change on the horizon. For one thing, he says, quantities of data are now accessible concerning admission standards, grades and other quantifiable effects of affirmative action programs.

In addition, he says, today's reconfigured Supreme Court likely would rule differently than it did on the 2003 University of Michigan cases that represent its most recent affirmative action rulings.

Justice O'Connor, who wrote the majority decision in the 5-4 ruling that upheld the use of race in law-school admissions, has retired, replaced by

conservative Justice Samuel A. Alito. "The Supreme Court as it stands now has a majority that's probably ready to overrule" that decision, Sander says. A decision that turned on the newly available data "could lead to a major Supreme Court decision that could send shockwaves through the system."

For now, says Kahlenberg of The Century Foundation, affirmative action has already changed form in states that have restricted use of racial and ethnic preferences. "It's not as if universities and colleges have simply thrown up their hands," he says. "They now look more aggressively at economic disadvantages that students face. The bigger picture is that the American public likes the idea of diversity but doesn't want to use racial preferences to get there."

Anderson of Texas A&M agrees that a vocabulary development marks the shift. "We've been changing affirmative action and quotas to diversity," he says. "Diversity is seen as good, and has become part of our mainstream culture."

In effect, diversity has come to mean hiring and admissions policies that focus on bringing people of different races and cultures on board — people like Obama, for example. "Obama's talking about merit, and keeping the doors open for all Americans, and strengthening the middle class," Anderson says.

Obama, whose father was Kenyan and whose half-sister is half-Indonesian, also represents another facet of the changing face of affirmative action. "Our society is becoming a lot more demographically complicated," says Schmidt, of *The Chronicle of Higher Education* and author of a recent book on affirmative action in college admissions. "All of these racial groups that benefit from affirmative action as a result of immigration — they're not groups that have experienced oppression and discrimination in the United States. And people are marrying people of other races and ethnicities. How do you sort that out? Which parent counts the most?"

All in all, Schmidt says, the prospects for affirmative action look dim. "In the long term, the political trends are against it," he says. "I don't see a force out there that's going to force the pendulum to swing the other way."

At the same time, many intended beneficiaries — African-Americans whose history set affirmative action in motion — remain untouched by it because of the deficient schools they attend.

The catastrophic state of public schools in low-income America remains — and seems likely to remain — a point on which all sides agree. Whether anything will be done about it is another story.

Top schools will continue to seek diverse student bodies, says Coleman of Duke law school. But the public schools continue to deteriorate. "I haven't seen any effort by people who oppose affirmative action, or people who support it, to do anything to improve the public school system. We ought to improve the quality of education because it's in the national interest to do that." ■

About the Author

Peter Katel is a *CQ Researcher* staff writer who previously reported on Haiti and Latin America for *Time* and *Newsweek* and covered the Southwest for newspapers in New Mexico. He has received several journalism awards, including the Bartolomé Mitre Award for coverage of drug trafficking, from the Inter-American Press Association. He holds an A.B. in university studies from the University of New Mexico. His recent reports include "Oil Jitters," "Race and Politics" and "Rise in Counterinsurgency."

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American Civil Liberties Union, 125 Broad St., 18th Floor, New York, NY 10004; www.aclu.org/racialjustice/aa/index.html. The organization's Racial Justice Program organizes legal and voter support for affirmative action programs.

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Affirmative Action

Here are key events, legislation and court rulings since publication of the CQ Researcher *report by Peter Katel, "Affirmative Action," Oct. 17, 2008.*

AFP/Getty Images/Jewel Samad

As the nation's first African-American president, Barack Obama has taken assertive steps to support affirmative action, including his appointment of Arne Duncan as Secretary of Education.

Aug. 5, 2010 Update

The Supreme Court's June 29, 2009, ruling in favor of white firefighters in New Haven, Conn., was perhaps the key event in affirmative action over the past two years. The firefighters had challenged the city's decision to discard a competency test for determining promotions after black firefighters taking the test had underperformed. The 5-4 decision in *Ricci v. DeStefano* prompted Fordham University law professor Sheila Foster to declare that it "will change the landscape of civil rights law." [45]

The court majority ruled against New Haven's action to discard the performance results. It did, however, say an employer can invoke fear of litigation — suits that might be brought by either the white or the black firefighters citing disparate impact — as a defense against the white firefighters' charge that discarding the competency test was unlawful discrimination. But the lead opinion, written by Justice Anthony Kennedy, said such a defense is available only where the employer has "strong . . . evidence" that it would be held liable, which the New Haven Fire Department did not have. [46]

In a dissent, Justice Ruth Bader Ginsburg wrote that the white firefighters "understandably attract this court's sympathy. But they had no vested right to promotion. Nor have other persons received promotion in preference to them." [47]

Notably, the ruling overturned an earlier appeals court ruling signed by then-federal Judge Sonia Sotomayor in the midst of the confirmation process for her elevation to the U.S. Supreme Court. Opinion polls just before the ruling showed some public skepticism toward affirmative action. American voters, by 55-36 percent, said that affirmative action should be abolished, and 71 percent disagreed with Sotomayor's ruling in the New Haven firefighters' case, according to a June 2009 Quinnipiac University poll.

Poll Results Differ

But The Associated Press, using different phrasing in poll questions, got a different result: 56 percent of Americans favor affirmative action, it reported, with 36 percent opposed. An NBC News-*Wall Street Journal* poll showed 63 percent agreeing that "affirmative action programs are still needed to counteract the effects of discrimination against minorities, and are a good idea as long as there are no rigid quotas."

The election of the first African-American president focused additional attention on Americans' attitudes about using affirmative action as a tool to ease racial disparities. President Barack Obama displayed his approach to such change in his Supreme Court

appointments of Sotomayor and Elena Kagan, in the naming of an assertive chief of civil rights at the Education Department, and his administration's switch away from Bush-era litigation priorities in the area of race-conscious legal remedies.

Congratulating Obama for his 2008 victory, ReNee Dunman, president of the Washington-based American Association for Affirmative Action, said, "Where there is inequality and exclusion, affirmative action remains essential in promoting equal opportunity in the workplace, higher education and contracting." She went on to blast what she called the "scorched-earth campaign to end equal opportunity in America" waged in several states by longtime affirmative action critic Ward Connerly. [48]

Connerly's Sacramento-based American Civil Rights Institute continued its efforts to enact state bans on race-conscious selection methods in employment and college admissions. In November 2008, voters in Colorado narrowly rejected a ballot initiative to that effect, and proposed bans were kept off the ballots by opponents in Arizona, Missouri and Oklahoma. That left Connerly's group with one victory, in Nebraska, to add to existing bans in California, Michigan and Washington State.

Obama Criticized

"Obama is hostile to my effort to end race-based preferences," Connerly said in a recent interview, recalling that Obama as a presidential candidate "mentioned me by name and called my efforts 'divisive.' That is what you say if you can't disagree on the merits of an issue." Connerly said Obama will rely on the "disparate-impact theory to argue ipso facto that if minorities" are shown to be in fewer numbers in universities and public employment, "then that is the same as discrimination, forgetting that the level of preparation is not where it needs to be."

A key player in Obama's handling of affirmative action is Education Secretary Arne Duncan. In March 2010 he journeyed to Selma, Ala., site of an historic civil rights march in 1965, and announced that his department was launching new desegregation-compliance investigations around the country. He also said the Education Department's Office for Civil Rights "has not been as vigilant as it should have been" in confronting discrimination over the past 10 years. [49]

On April 15, 2010, the Duncan-appointed assistant Education secretary for civil rights, Russlynn H. Ali, told *The Chronicle of Higher Education* she saw a more active civil rights office in the future. When she first arrived on the job, she said, "what we found [were] some tireless civil-rights pioneers that are hungry and eager, in their words, 'to do civil rights again.' " [50]

The government's muscular approach to litigation reflects a new emphasis on civil rights. On March 12, 2010, the Obama administration's departments of Education and Justice together filed a friend-of-the-court brief on behalf of the University of Texas at Austin, which is defending its race-conscious methods "to achieve the educational benefits of diversity." [51]

By contrast, George W. Bush administration policy sided with the Supreme Court's 2003 decision in *Gratz v. Bollinger* striking down a University of Michigan law school affirmative action plan as too mechanistic. The current Texas litigation was brought by white students Abigail Noel Fisher and Rachel Multer Michalewicz, who said the denial of their applications for admission as undergraduates violated the 14th Amendment's Equal Protection Clause.

The university permits the use of race as one factor in an index in applying efforts to use "top 10 percent" admission plans based on a 1996 Texas law that guarantees admission to state universities to all high-school seniors in the top 10 percent of their class. After that law was implemented, minority representation at the University of Texas dropped sharply. The case is pending in the Fifth U.S. Circuit Court of Appeals.

Universities and think tanks, meanwhile, published new studies on the impact of race-conscious methods and efforts at diversity in the workplace and on campus. According to a study by Columbia Law School Professor Conrad Johnson, from 1993 to 2008 the percentage of black and Mexican-American law students nationwide fell, despite the opening of 3,000 new places and clear improvements in the aggregate Law School Admission Test scores of the two groups. [52]

Research Claims Challenged

The study's results were challenged by scholars organized at the UCLA Law School under the banner of Project SEAPHE (Scale and Effects of Admissions Preferences in Higher Education). In a Feb. 16, 2010, critique, it said the claims by the researchers were not borne out by the data. "Using the same reference period as the article, (1993 to 2008), accurate statistics show that absolute numbers of black matriculants are up, and Hispanic matriculants are way up," SEAPHE wrote. "Meanwhile, improvements in the average credentials of minority law school applicants have been trivial or nonexistent over this same period." [53]

In preparation for elections in fall 2010, friends and foes of affirmative action studied lessons from the 2008 victory for the affirmative action ban in Nebraska and the defeat of the one in Colorado. Some 58 percent of largely white Nebraska voters backed the ban, even though the University of Nebraska Board of Regents had opposed it. Roger Clegg, president of the Center for Equal Opportunity, which opposes consideration of race in admissions, said that part of the

Chronology

2008

Nov. 4 — Colorado voters reject ballot initiative to enact state bans on race-conscious selection methods in employment and college admissions.

2009

June 29 — Supreme Court favors white firefighters in New Haven, Conn., reverse-discrimination case; 5-4 ruling limits government employers' ability to favor minorities in hiring, promotion to avoid discrimination claims.

2010

March 8 — Education Secretary Arne Duncan announces in Selma, Ala., that his department is launching new desegregation compliance investigations around the country.

Nov. 2 — Arizona voters approve measure to ban affirmative action in public education, public employment, government contracting.

2011

Jan. 18 — University of Texas admissions policy upheld by federal appeals court; rehearing denied (June 17).

July 1 — Michigan ban on affirmative action struck down by federal appeals court.

July 28 — White firefighters in New Haven, Conn., agree to accept $2 million in damages in reverse-discrimination suit after Supreme Court victory.

Sept. 30 — Jefferson County (Louisville), Ky., pupil assignment plan struck down by state court; school district appeals to state high court; arguments heard April 18, 2012.

Dec. 2 — Obama administration lists steps for colleges, universities to increase diversity.

2012

Feb. 21 — Supreme Court agrees to hear University of Texas case; arguments in fall 2012, decision by June 2013.

April 2 — California ban on affirmative action upheld by federal court.

June 11 — Supreme Court allows black New Haven firefighter to pursue discrimination claim against city over scoring of promotion test.

Nov. 6 — Oklahoma to vote on affirmative action ban.

legal defense of considering race involves public colleges saying that they have no alternative ways to promote diversity. As more states eliminate the consideration of race — and many of them find ways to still have diverse classes — how plausible is it to make that claim? he asked. [54]

In Colorado, opinion polls showed voters initially appeared to favor the proposal to amend the state constitution to ban preferential treatment to individuals based on race, color, sex, ethnicity or national origin. But a door-to-door campaign against it helped turn the tide (final tally 51 percent to 49 percent), and opponents, such as Democratic Gov. Bill Ritter, called the measure deceptive, saying it would jeopardize outreach programs for minority children. [55]

The chief organizer of Colorado's proposed ban, Jessica Corry, said voters were confused by too many items on the ballot and that the ban would have passed any other year.

Those seeking to outlaw affirmative action were cheered when the Arizona legislature in June 2009 approved a plan to put a proposed ban on the November 2010 ballot. It was the first time a state legislature had enacted a ballot referendum as opposed to citizens' groups gathering signatures, noted Connerly. His group has hopes for Utah taking up a ban next year.

Over the long term, Connerly says, he is working to get rid of race-based classifications as legal categories, such

as those on the 2010 census forms, by encouraging Americans to decline to fill out such information.

— Charles S. Clark

Getty Images/Supreme Court Pool/Ken Heinen

Justice Samuel A. Alito Jr. signs his oath of office card in the justices' conference room on Feb. 16, 2006, as Chief Justice John G. Roberts Jr. looks on. Roberts and Alito, both appointed by President George W. Bush, cast pivotal votes in two, closely divided affirmative action-related decisions in 2007 and 2009 that cheered critics of racial preferences but dismayed traditional civil rights groups.

JUNE 19, 2012 UPDATE

The Supreme Court is set to re-examine the contentious issue of whether colleges and universities can consider an applicant's race in a selective admission process.

The justices will hear arguments in fall 2012 in a challenge to admissions policies at the University of Texas' flagship campus in Austin brought by an unsuccessful white applicant. Nancy Fisher contends that the school's use of race as a factor in the admissions process violated her constitutional rights by disadvantaging her in comparison to minority applicants.

The case, *Fisher v. University of Texas*, will mark the first time the court under Chief Justice John G. Roberts Jr. revisits the issue since the 2003 decision in *Grutter v. University of Michigan* allowed universities to make limited use of racial preferences in admissions. [56]

The Roberts court's other race-related rulings on K-12 pupil-assignment systems and government hiring and promotion policies cheered critics of racial preferences and dismayed traditional civil rights groups. Roberts and Justice Samuel A. Alito Jr., both appointed by President George W. Bush, cast pivotal votes in the 5-4 rulings. Advocates and experts on both sides of the affirmative action debate expect the Texas case also to be closely divided, with Justice Anthony M. Kennedy viewed as likely to hold the decisive vote.

Under President Obama, the administration has cheered traditional civil rights groups by endorsing steps to promote racial diversity in K-12 and higher education and challenging use of standardized tests and other employment practices that may limit hiring of minorities. But critics of race-based policies say their views are advancing in lower-court rulings, local school board decisions and two new statewide bans on affirmative action in public education, public employment and government contracting.

College Admissions

The Texas case involves a challenge to changes adopted by the University of Texas Board of Regents after *Grutter* for the entering class of 2005 that allowed race to be considered as one factor in an applicant's Personal Achievement Index (PAI). Other factors include an applicant's essays, leadership experience and extracurricular activities. Applicants continued to be qualified for automatic admission to the flagship Austin campus if they graduated in the top 10 percent of their high school class.

Fisher, who failed to qualify under the top-10 percent rule, was denied admission to the Austin campus for the entering class of 2008. She contended that the rejection violated her right to equal protection because she had academic credentials superior to those of minority applicants who were admitted. The university countered that its admissions process conformed to the limited use of race allowed under *Grutter* and had resulted in a marked increase in African-American students needed for racial diversity.

A three-judge panel of the Fifth U.S. Circuit Court of Appeals upheld the admissions policies in a lengthy opinion on Jan. 18, 2011. "UT undoubtedly has a compelling interest in obtaining the educational benefits of diversity," Judge Patrick E. Higginbotham wrote for the court, "and its reasons for implementing race-conscious admissions . . . mirror those approved by the Supreme Court in *Grutter*." Five months later, the full court voted 7-5 against rehearing the case, but four of the dissenters joined an opinion by Judge Edith Jones that said the ruling went beyond *Grutter* and called on the Supreme Court to review the decision. [57]

The high court agreed to review the decision on Feb. 21, setting the stage

for arguments likely in October or November. Fisher, who went on to graduate from Louisiana State University in June 2012, said in a statement that she hoped the court would decide that future applicants "will be allowed to compete for admission without their race or ethnicity being a factor." UT-Austin President William Powers countered that the university needs "to weigh a multitude of factors when making admissions decisions about the balance of students who will make up each entering class." [58]

Meanwhile, two federal appeals courts have differed on the validity of statewide ballot measures banning racial preferences in university admissions as well as employment and government contracting. A Michigan measure approved by voters in 2006 was struck down by the Sixth U.S. Circuit Court of Appeals in July 2011. [59] In April 2012, however, the Ninth U.S. Circuit Court of Appeals reaffirmed an earlier decision upholding California's similar measure adopted by voters in 1996. [60] In related developments, similar measures were approved by Arizona voters in November 2010 and by the New Hampshire legislature in 2011. [61] Oklahoma voters will decide on a similar ballot measure on Nov. 6.

For its part, the Obama administration issued companion policy memos in December 2011 setting out steps that public schools, colleges and universities can take to promote racial diversity. The memos, issued jointly by the Education and Justice departments, differed from Bush administration directives that cautioned against race-conscious pupil assignment or admissions policies. [62]

The Texas case will be heard by only eight justices. Justice Elena Kagan recused herself; she was U.S. solicitor general when the government filed a brief supporting the university before the Fifth Circuit. A 4-4 vote would affirm the Fifth Circuit's decision, thus leaving the university's policy in place.

Public Schools

Local school systems are also evaluating pupil enrollment policies in light of the Roberts court's 2007 decision that generally prohibits the use of race as a determinative factor in assigning individual students to schools. The 5-4 ruling in *Parents Involved in Community Schools v. Seattle School District No. 1* struck down pupil-assignment policies in Seattle and Jefferson County, Ky., which includes Louisville. [63]

In the main opinion, Roberts appeared to condemn any use of race in pupil assignments or in other government policies. "The way to stop discrimination on the basis of race," Roberts wrote, "is to stop discriminating on the basis of race." In a pivotal concurring opinion, however, Kennedy called diversity a "compelling interest" for school systems and listed permissible "race-conscious mechanisms," including redrawing attendance zones and "strategic" site selection, to further the goal.

The Seattle school board had already suspended the use of its so-called racial tie breaker for pupil assignments during the litigation. Today, school spokeswoman Teresa Wippel says the system uses a neighborhood assignment system. "We don't base it on race at all anymore," Wippel says.

In Louisville, the school system is now in court defending the pupil-assignment system adopted after the court ruling. An intermediate state court of appeal ruled in October 2011 that the plan violated a state law allowing parents to enroll their children in the school closest to their home. In arguments in April on the school system's appeal, however, justices of the Kentucky Court of Appeal, the state's highest court, were reported to appear inclined toward upholding the policy. [64]

The Supreme Court's decision appears to have moved school systems away from explicit use of race in pupil assignments. Controversies continue to flare, however. The Wake County, N.C., school system, which includes the state capital of Raleigh, had an income-based plan for promoting diversity in place for several years until it was scrapped by a newly elected, majority Republican school board in 2010; civil rights groups protested the decision. [65] A suit currently under way in Nashville, Tenn., challenges a 2009 redistricting plan that African-American families allege zoned black children away from higher-achieving schools in predominantly white neighborhoods; the suit also seeks to bar the startup of new charter schools that are racially isolated. [66]

Employment, Contracting

The court's ruling in the New Haven firefighters case is creating problems for government personnel administrators and lawyers in determining what steps if any can be taken to avoid charges of discriminating against minorities without risking reverse-discrimination claims by white employees or applicants. "It's damned if you do and damned if you don't," says Roger Clegg, president of the Center for Equal Opportunity, a Washington area-based advocacy group that opposes racial preferences.

The subsequent developments in the New Haven case illustrate the problem. The city agreed in July 2011 to pay $2 million in damages to the plaintiffs — all of them white, including one Hispanic — who had been denied promotions. The city also was to pay $3 million in attorneys' fees and court costs. [67]

Meanwhile, however, some black firefighters were continuing to challenge the test-scoring system used in determining promotion as racially biased against minorities. A federal district court judge threw out the suit, but the Second U.S. Circuit Court of Appeals ruled in August 2011 that one of the plaintiffs could proceed with his suit. The appeals court said the high court's decision did not prevent Michael Briscoe from trying to prove

that the city's decision to give greater weight to the written instead of the oral portion of the promotion exam had a "disparate impact" on minority applicants in violation of federal civil rights law. [68]

The Obama administration has been "aggressive," according to Clegg, in using disparate-impact theories in civil rights litigation in employment, housing and lending. As one example, the Justice Department filed a suit on April 23, 2012, against the Jacksonville, Fla., Fire and Rescue Department challenging the use of a written promotion exam for supervisory positions as discriminatory against minority firefighters. [69]

Minority preferences in government contracting also appear to be drawing more critical scrutiny from courts, both federal and state. In one important case, the U.S. Court of Appeals for the Federal Circuit in 2008 struck down a Defense Department program that gave preferences to minority-owned contractors. The court said the program was unconstitutional without any evidence that it was needed to remedy past discrimination by the Pentagon. [70] ■

— Kenneth Jost

Notes

[45] Adam Liptak, "Supreme Court Finds Bias Against White Firefighters," *The New York Times*, June 30, 2009.

[46] Michael C. Dorf, "The Supreme Court Decides the New Haven Firefighter Case," July 1, 2009, *Findlaw*, http://writ.news.findlaw.com/dorf/20090701.html.

[47] Edmund H. Mahony and Josh Kovner, "U.S. Supreme Court Rules in Favor of New England Firefighters." *Hartford Courant*, June 30, 2009.

[48] Press release, Nov. 30, 2008, www.affirmativeaction.org/news.html.

[49] Paul Basken, "Education Department Promises Push on Civil-Rights Enforcement," *The Chronicle of Higher Education*, March 8, 2010.

[50] Libby Sander and Peter Schmidt, "Stepping Up the Pace at the Office of Civil Rights," *The Chronicle of Higher Education*, April 15, 2010.

[51] See the joint brief at www.justice.gov/crt/briefs/fisher_appellee_brief.pdf.

[52] Tamar Lewin, "Law School Admissions Lag Among Minorities," *The New York Times*, Jan. 6, 2010.

[53] See SEAPHE.org.

[54] Scott Jaschik, "Nebraska Bars Use of Race in Admissions," *Inside Higher Ed*, Nov. 5, 2008, www.insidehighered.com/news/2008/11/05/affirm.

[55] Colleen Slevin, "Colorado voters reject affirmative action ban," *Colorado Gazette*, Nov. 7, 2008.

[56] Materials on the case can be found on SCOTUSBlog, www.scotusblog.com/case-files/cases/fisher-v-university-of-texas-at-austin/?wpmp_switcher=desktop.

[57] See *Fisher v. University of Texas*, 631 F.3d 213 (5th Cir., 2011), www.ca5.uscourts.gov/opinions%5Cpub%5C09/09-50822-CV0.wpd.pdf (as revised Feb. 1, 2011). The denial of rehearing is found at www.ca5.uscourts.gov/opinions%5Cpub%5C09/09-50822-CV1.wpd.pdf. For coverage, see articles by Ralph K. M. Haurwit: "UT admission policy upheld," *Austin American-Statesman*, Jan. 19, 2011; "Court won't review UT admissions guidelines," *ibid*., June 22, 2011.

[58] Quoted in Monica Rhor, "Top court to take up UT policy on race," *The Houston Chronicle*, Feb. 22, 2012, p. A1. See also Adam Liptak, "Justices Take Up Race as a Factor in College Entry," *The New York Times*, Feb. 22, 2012, p. A1.

[59] The decision is *Coalition to Defend Affirmative Action v. University of Michigan* (6th Cir., July 1, 2011), www.ca6.uscourts.gov/opinions.pdf/11a0174p-06.pdf. See David Ashenfelter and Dawson Bell, "Michigan ban on race in college admissions is illegal," *Detroit Free Press*, July 1, 2011; Tamar Lewin, "Michigan Rule on Admission to University Is Overturned," *The New York Times*, July 2, 2011, p. A10.

[60] The decision is *Coalition to Defend Affirmative Action v. Brown* (9th Cir., April 2, 2012), www.ca9.uscourts.gov/datastore/opinions/2012/04/02/11-15100.pdf. See Carol J. Williams, "Racial policy ban is upheld," *Los Angeles Times*, p. AA4.

[61] See "Arizona approves anti-affirmative action measure," The Associated Press, Nov. 2, 2010; Peter Schmidt, "New Hampshire Ends Affirmative-Action Preferences at Colleges," *The Chronicle of Higher Education*, Jan. 4, 2012.

[62] See U.S. Departments of Education, Justice, "Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools," www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.html; "Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education," www.justice.gov/crt/about/edu/documents/guidancepost.pdf. The undated documents were released on Dec. 1, 2011.

[63] The citation is 551 U.S. 701 (2007). For coverage of background and ruling, see Kenneth Jost, *Supreme Court Yearbook 2006-2007*.

[64] See articles by Chris Kenning: "Court strikes down JCPS student-assignment plan," *The Courier-Journal* (Louisville), Oct. 1, 2011, p. A1; "Ky. Justices may favor JCPS," *ibid*., April 19, 2012, p. A1.

[65] See Stephanie McCrummen, "In N.C., a new battle on school integration," *The Washington Post*, Jan. 12, 2011, p. A1.

[66] See Julie Hubbard, "Metro Nashville schools rezoning lawsuit could echo far," *The Tennessean* (Nashville), April 30, 2012.

[67] See Abbe Smith, "Firefighters get $2 million," *New Haven Register*, July 29, 2011, p. A1.

[68] The decision is *Briscoe v. New Haven*, 10-1975-cv (2d Cir., Aug. 15, 2011), www.ca2.uscourts.gov/decisions/isysquery/2a558a1b-8e49-4693-80fe-73210ac25bd3/2/doc/10-1975_opn.pdf#xml=www.ca2.uscourts.gov/decisions/isysquery/2a558a1b-8e49-4693-80fe-73210ac25bd3/2/hilite/. For coverage, see Luther Turnelle, "Firefighter case is reinstated," *New Haven Register*, Aug. 16, 2011, p. A3. The Supreme Court declined to hear the city's appeal on June 11, 2012.

[69] Press release, April 23, 2012, www.justice.gov/opa/pr/2012/April/12-crt-517.html. For coverage, see Steve Patterson, "U.S. sues city over firefighter tests," *Florida Times-Union* (Jacksonville), April 24, 2012, p. B3.

[70] The case is *Rothe Development Corp. v. Department of Defense* (Fed. Cir., Nov. 4, 2008). For coverage, see Elise Castelli, "Court: DoD minority contracting program unconstitutional," *Federal Times*, Nov. 10, 2008, p. 6. See also Jody Feder and Kate M. Manuel, "Rothe Development Corporation v. Department of Defense: The Constitutionality of Federal Contracting Programs for Minority-Owned and Other Small Businesses," Congressional Research Service, March 16, 2009, www.fas.org/sgp/crs/misc/R40440.pdf.

Update