

# **Reframing the History of Affirmative Action: A Feminist and Critical Race Theory Perspective**

Zackary Harris  
New York University

The current debate on affirmative action has persisted across multiple political and social arenas in the United States for over half a century now. In general, affirmative action is any form of law, policy, or procedure that “grant[s] a more or less flexible kind of preferential treatment in the allocation of scarce resources” to groups of people who have been historically underrepresented and legally discriminated against in society (Sabbagh, 2007 p. 2). The primary focus of affirmative action is attempting to correct unjust discrimination that has occurred over an extended period of history. These policies are cognizant of social identities such as gender, race, and class, and the limited access marginalized groups have in areas such as the economy, education, and employment. The implementation of affirmative action in each of these social sectors, and the impact across individual social identities, deserve individual inquiry. However, for the sake of this research, the focus will primarily be on affirmative action in higher education. The primary method of implementation has been through admissions practices that utilize racial identity as a factor in their overall formula for acceptance to the university. These practices have been in place at universities for almost as long as the debate on affirmative action has been occurring, and shifted over time along with the entire debate on affirmative action. Unfortunately, discussions and debates about the history and implementation of race-conscious admissions have lost touch with the main foundation of affirmative action, improving equity in a higher education system with barriers for communities that were historically marginalized. This paper will bring the current debate back to this focus through an argument in favor of affirmative action. First, this article will contextualize the political and social foundation and trace the legal history of affirmative action through significant court cases. From this historical foundation, a proposed directive grounded in feminist and critical race theory will assert the importance of affirmative action in higher education and emphasize the founding concepts of redistribution and equity.

## **Foundational History of Affirmative Action**

When discussing topics related to race-conscious admissions practices, it is important to understand where modern ideas of affirmative action first began. All present-day policies have derived from the political and social setting of the 1960’s. This era for the United States was a time of great unrest, primarily across racial identity. The largest social movement of that time was the Civil Rights Movement (Garrow, 2010), which is widely known for its effort to fight for racial equality in the United States, especially for Blacks and African Americans. Leaders of this movement put immense pressure on a system that was designed to keep white privilege and racial inequality intact, and their efforts resulted in the birth of modern-day forms of affirmative action through new federal and state policies. As it relates to race-conscious policies, the phrase “affirmative action,” is widely considered to have been coined in President John F. Kennedy’s Executive Order 10925 which helped to establish what is known today as the EEOC, or Equal Employment Opportunity Commission (Dorsey et al., 2014; Spann, 2000; Graves, 2014). Under

this executive order, federally funded contractors were required to “take affirmative action to ensure that” future and current employees were treated “without regard to [their] race, creed, color or national origin” (Executive Order No. 10925, 1961, section 301). This piece of legislation was released at a time when the Civil Rights Movement pressured elected officials to codify forms of employment protection that align with the Fourteenth Amendment (Garrow, 2010). The term affirmative action eventually solidified itself as a key phrase for discussing any form of identity-conscious policies that relate to anti-discrimination of minority groups. Three years later, affirmative action practices became essential to the passage and enforcement of the Civil Rights Act of 1964 (Dorsey et al., 2014; Spann, 2000; Graves, 2014). Under this act, provisions prohibited discrimination based on race, sex, national origin, and religion across areas such as education (Title VI) and employment (Title VII). Moving forward, the Civil Rights Act of 1964 was crucial in establishing race-conscious affirmative action policies “as a necessary means to address entrenched racial inequalities in American society” (Dorsey et al., 2014, p. 59). Affirmative action practices took up many forms depending on the sector, policy, or program in which they were implemented. However, they are all connected together by their relationship to the immense policy reform and the sociopolitical impact of the Civil Rights Movement.

### **History of Affirmative Action in Higher Education Admissions**

The push to establish affirmative action practices in higher education came primarily in the form of race-conscious admissions policies. These policies were not founded overnight, and each had individual influences and social movements behind their creation. By 1960, colleges and universities had enrolled no more than ten percent of the United States population and only “four percent of black men and women” in the United States had completed their college degree (Graves, 2014, p. 200). These statistics changed with the passage of the Civil Rights Act of 1964 and the Higher Education Act of 1965. The Civil Rights Act ban on identity-based discrimination in education along with the newly established streams of grants and federal aid from the Higher Education Act of 1965 created the conditions necessary for postsecondary institutions to reexamine their admissions practices, diversify their pool of student admits, and expand overall enrollment (Paguyo & Moses, 2011). Although these two Acts were significant in expanding race-conscious admissions, universities such as Harvard College in 1961 or Columbia University and the University of Pennsylvania in 1963 were at the forefront of implementation (Stulberg & Chen, 2013). While some university race-conscious admissions practices preceded the Civil Rights and Higher Education acts, they all of these policies were influenced by the Civil Rights Movement and the need to end racial inequality in the United States (Stulberg & Chen, 2013). Although there were opposing forces that inhibited some universities from adopting policies early on, such as stakeholders’ interests or lack of shared liberal values across institutions (Stulberg & Chen, 2013), the push to create affirmative action policies was widespread. Eventually, race-conscious affirmative action became a permanent standard in higher education admissions in the immediately following decades. Overall, this conglomerate of legal and educational reform was attributed to the increase of enrollment and graduation rates for students of color, especially for black students during this time. Enrollment for black students rose significantly from 1964 to 1974, increasing from 234,000 to 814,000 students across the country. By 1978, the percentage of black men and women in the country to graduate with a four-year degree was 7.3 and 7.1 percent respectively (Graves, 2014). The integration, expansion, and success of affirmative action in the

1960's and 1970's played a crucial role in changing the entire landscape and student demographic of U.S. higher education. While the success of these affirmative action continues to this day, it has not gone unchallenged over the years. The legal history of affirmative action in university admissions will help to establish how these policies have shifted over time based on the decisions of the judicial system.

## Legal History

Another complex component of the history of affirmative action in higher education admissions policies is its prevalence in the U.S. judicial system. Court cases on affirmative action shared a connection, which involved discrimination claims made by white students who felt that they had been “negatively” impacted by these policies. Most affirmative action cases claimed a plaintiff’s rights under the Equal Protection Clause of the Fourteenth Amendment and/or Title VI of the Civil Rights Act of 1964 had been violated (*Defunis v. Odegaard*, 1974; *Hopwood v. Texas*, 1996). Under the Equal Protection Clause of the Fourteenth Amendment, states cannot “make or enforce any law which shall abridge the privilege and immunities of citizens” and they may not “deny to any person within its jurisdiction the equal protection of the laws” (U.S. Const. Amend. XIV). Under Title VI of the Civil Rights Act of 1964, one cannot be excluded, denied benefits, or discriminated against because of their race or ethnicity for any “program or activity receiving Federal financial assistance” (Civil Rights Act of 1964, Title VI). Higher education institutions were under the purview for these laws because they receive federal funding and are regulated by the constitutional laws of the United States. These two clauses constituted the grounds for a plaintiff’s argument, stating that race-conscious admission decisions had undermined their rights to access higher education. In order to determine the constitutionality of these legal claims, courts were required to use the legal procedure of strict scrutiny (Spann, 2000). In order to pass this process of review, the admissions policies should be narrowly tailored to maintain consistency across all student populations and could not negatively impact some students over others (Leiter & Leiter, 2002). These policies must also serve a compelling state interest that the university must prove exists or the plaintiff must disprove in its entirety (Leiter & Leiter 2002). While strict scrutiny may be a standard of review, each court interpreted this standard differently based on the verdicts of the subsequent cases.

The first case to significantly impact race-conscious admissions policies came from the Supreme Court’s decision in *Regents of the University of California v. Bakke* (1978). In this case, Allan Bakke brought a lawsuit against University of California, Davis School of Medicine because they denied him admissions in 1973 and 1974. He claimed that the university’s separate admissions protocol for self-identified “minority groups” and the reserved 16 seats for this admissions process prevented him from gaining an acceptance to the university, and denied him his rights under the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 (*Regents of the University of California v. Bakke*, 1978). Ultimately, the Supreme Court determined that the university’s usage of racial quotas did not pass the strict scrutiny standard, and ruled in favor of Bakke, granting him admissions to the university. The majority opinion delivered by Justice Lewis Powell was essential in establishing the precedents that affirmative action policies cannot use racial quotas of any kind. Additionally, it emphasized that although pure quota system is unconstitutional, the pursuit of a diverse student body was a potential compelling state interest for admissions practices, which included the considerations of racial and ethnic identity to be a ‘plus’

factor in an admissions decision (*Regents of the University of California v. Bakke*, 1978; Spann, 2000).

The next significant case to reach the courts did not come until 1996 with *Hopwood v. Texas*. While this case never made it to the Supreme Court, it did have a significant impact on the state level. This case questioned the admissions policy at the University of Texas's School of Law which utilized race as a factor and created a separate review process for Black and Mexican American students with lower admission requirements (*Hopwood v. Texas* 1996). The 5<sup>th</sup> Circuit Court of Appeals critically examined the *Bakke* case as a potential precedent but ultimately determined that the university's goal to create a more diverse student body with this policy did not hold under strict scrutiny, and their entire separate admissions process violated the Fourteenth amendment (*Hopwood v. Texas*, 1996). This case was the first state specific case that denounced the usage of race in a university's admissions policy and prompted some states to replace their race-conscious policies in education with race-neutral standards. In 1997, Texas implemented a race-neutral policy called the Top 10% Program, which guaranteed admission for the top 10% of public high school graduates in the University of Texas system. Other states abolished affirmative action practices entirely, such as California's Proposition 209 in 1996 (Alhaddab, 2015; Dorsey et. al., 2014; Kauffman, 2007).

Following the aftermath of the *Hopwood v. Texas* (1996) case, the Supreme Court was met in 2003 with two cases from the University of Michigan, *Gratz v. Bollinger* and *Grutter v. Bollinger*. The first case, *Gratz v. Bollinger* (2003), involved the university's undergraduate admissions procedures that utilized race as an additional scoring factor that put minority students significantly close to the threshold of admissions. Their procedure also included a separate, express review process for racial minority students. The Supreme Court struck down their admissions procedure under the Equal Protection Clause and Title VI because it did not allow all students to be considered along the same playing field and created a quota-like system that goes against the decision of *Bakke* (1978) (*Gratz v. Bollinger*, 2003). While this case was a potential criticism to affirmative action at the federal level, the case of *Grutter v. Bollinger* (2003) had the opposite result. *Grutter v. Bollinger* (2003) brought into question the University of Michigan's law school admissions process that utilized race as only an additional factor in a holistic student profile and was highly focused on reaching a "critical mass" of racial minority students (*Grutter v. Bollinger*, 2003). The court determined that this policy passed strict scrutiny because the university's focus on critical mass was not a quota system and fell under a compelling state interest of diversity. This was narrowly tailored because all candidates were considered under the same procedures even with race as a plus factor (*Grutter v. Bollinger*, 2003). While these two cases had different outcomes, they reaffirmed the validity of race-conscious admissions policies as long as race remained a plus factor, every candidate was reviewed under the same procedures, and no racial quotas could be established (Kaufmann, 2007). They renewed the importance of diversity in higher education and allowed these policies to be a primary method to attain a level of "critical mass" of diversity (Kaufmann, 2007).

Since these four cases, the state of affirmative action has remained relatively intact even after the most recent case, *Fisher v. University of Texas at Austin* (2015). This set of court cases ultimately established a narrative for the legal and structural evolution of affirmative action policies and showcased the adjustments universities make due to the implications of the ruling court system. In order to understand the future of these policies, the present debate on affirmative

action admission practices must remain grounded in its founding values and theories that exemplify the importance of these principles.

### **A Future Grounded in Feminist and Critical Race Theory**

Feminist and Critical Race Theory (CRT) are two bodies of theory and methods of inquiry that place their emphasis on the social, political, and structural systems of our society. These two structures of knowledge exist in tandem with one another because their primary purpose is to address historical and present-day inequalities. Feminist theory is primarily focused around issues of gender, but a critical principle of feminist scholarship is intersectionality. According to this framework, identities do not stand alone, but instead, come together to produce our unique experience as it relates to historically structured forms of power, privilege, and oppression (Steinbugler et al., 2006). Under intersectionality, oppression is “not hierarchical nor additive” and one group is not more oppressed than another. People’s particular position in the world is constructed holistically from all of our identities, privileged or oppressed (Hurtado, 2005, p. 280). Intersectionality is crucial for affirmative action debates because it recognizes the influence of different identities on controversial issues. When placed in the context of higher education, it reaffirms the presence of historical injustices across multiple marginalized identities attempting to gain access to an already rigged institution. Combined with the identity focus of intersectionality, the tenets of Critical Race Theory establish an influential relationship with race and racial hierarchy in our society.

CRT operates on the “fundamental premise that racism is ordinary, not aberrational, and a common everyday experience of most people of color in this country”, as well as the prevalence of discrete forms of everyday racism that are never addressed by the larger society (Dorsey et al., 2014, p. 60). CRT directly challenges many oppressive social and political structures and reaffirm laws such as affirmative action that are designed to establish racial equity (Jimenez Morfin, Perez, Parker, Lynn, Arona et. al, 2006). CRT is critical of how white supremacy, privilege, and entitlement have been upheld throughout history, the law, and other sectors of society (Savas, 2014). Overall, CRT is one of the most widely used lenses to view issues in our society as they relate to our construction of race, racial difference and racial hierarchy. Combined with the necessary foundation of intersectionality, CRT establishes a basis to critically engage with and rebut arguments against affirmative action. Additionally, it aids in the reconceptualization of the overall history of race-conscious admissions practices.

### **Reframing Affirmative Action with Theory**

Within the debate of affirmative action in higher education admissions, there are opposing sides that argue the impact these policies have on student communities. Primary proponent focuses on the necessity to remedy past forms of discrimination, the need for greater access to higher education for previously underrepresented populations, the enhancement of diversity in the student body and its improvement on greater educational experience (Alhaddab, 2015; Hurtado, 2005). On the other side, opponents often argue that these policies are unconstitutional because they are not race neutral, a form of reverse discrimination that disadvantages and limits the access of white applicants. Opponents see these policies allowing for potentially underprepared or underqualified students to be admitted to universities and assert that other race neutral

systems could produce the same levels of diversity on campus (Alhaddab, 2015; Hodgman, 2013; Kaufmann, 2007; Plaguy et al. 2011).

While data showing decreased enrollment and percentages of racial diversity after the elimination of race-conscious practices provides rebuttal against opponents' arguments (Alhaddab, 2015), tenets of feminist and critical race theory also offer insight on why affirmative actions are beneficial and needed. In addressing issues of constitutionality and reverse discrimination led by affirmative action practice, one can use CRT to explain why the latter cannot exist because of the immense amount of structural power and access that is upheld for white people even when proactive practices like affirmative action are in place (Savas, 2014). The impossibility to discriminate against those in power is not always the most palatable logic, especially to white people. It is crucial to a CRT based argument because white people do more to maintain systems of racism and white supremacy through their cries of reverse discrimination (Dorsey et al., 2014). These claims of reverse racism are most easily demonstrated in the actions of the plaintiffs in the previously mentioned Supreme Court cases. By challenging the race-conscious admissions decisions and asserting them as a form of white discrimination, the plaintiffs refuse to acknowledge the limited access students of color have to higher education and continue to promote their exclusion.

The next assumption that feminist theory and CRT challenge is the idea that affirmative action policies admit unprepared college students, which is perpetuated by stereotypes about students of color and their inability to succeed academically compared to white students (Steinbugler, Press, and Dias, 2006). The inability to see academic competence in students of color is a byproduct of a larger system of power where people of color are not meant to achieve success. Through a framework like CRT, the underlying racism in our assumptions about success in higher education becomes clearer and allows for greater change to occur in order to achieve racial justice and promote the implementation of more affirmative action policies that grant greater access for marginalized students.

The last assumption opponents make against affirmative action is the idea that race-neutral policies produce the same desired effects as those that are race-conscious. Understanding affirmative action policies through the lens of CRT requires us to recognize the daily and perpetual existence of race, racism, and racial hierarchies in society (Jimenez Morfin et al, 2006). By choosing the route of race-neutral policies, admissions offices in effect ignore how race has influenced students' access to higher education, and further perpetuate a cycle of discrimination.

This feminist and CRT centric rebuttal toward the opposing arguments against affirmative action has highlighted how claims of reverse discrimination, the inability to see success in students of color, and race-blind practices further perpetrate of the systems of oppression and power that exist today in society. In order to work towards racial justice, there must be some level of commitment to race-conscious practices that are designed to directly combat historically limited access to higher education.

Along with these rebuttals, feminist and critical race theory possess a unique perspective in regard to viewing the overall history and implementation of affirmative action policies. Under CRT, the mass expansion of federal laws that allowed for the development of race-conscious admissions policies was not just due to the work of the Civil Rights Movement. This time of social movement also falls under what Derrick Bell terms as a period of "interest convergence," a time

when a “temporary alignment of the self-interests of elite white and the interests of black” exists to allow for the passage of laws and legislation that help to remedy the present tensions between racial justice and white supremacy (Dorsey & Chambers, 2014, p. 61). This viewpoint opens up the understanding of how bills like the Civil Rights Act of 1964 are able to get passed at a time of such social unrest. They also point to the lengths in which systems of power are maintained in events that are progressive towards justice.

Along with these foundational concepts of legislation, feminist and critical race theory also focus on the legal cases that impact the policies designed to remedy racial inequality. From the CRT scholar Cheryl Harris, we comprehend that the identity of “Whiteness is associated with status and power, thereby connected to property rights of ownership” as historically prescribed by the law (Jimenez Morfin et al. 2006, p. 253). Harris’s theory points out that access to higher education became a type of property that has been claimed and reclaimed by white people over a long period of time (Dorsey et al, 2014; Jimenez Morfin et al. 2006). One way this right has been reclaimed is through the legal challenges previously mentioned. In these cases, white students filed suit against a university when they were “disadvantaged” by race-conscious policies and their rejection was perceived as a loss to their property rights to higher education (Dorsey et al. 2014). Critical race theory helps to understand the perpetual nature of this cycle by showing how systems of power have historically and legally maintained and reasserted their interests in access of higher education. The insights offered by feminists and critical race theory provide a glimpse into the complexities that exist when discussing a history that has always been entangled with issues of racism, white supremacy, and power. Without these theoretical frameworks, this complexity may not be realized and our ability to engage with the history would be limited.

## **Conclusion**

This paper traced through the social, political, and legal history that has led to what we know of today as race-conscious affirmative action policies in higher education admissions. These policies were the result of a complex set of legislation, social movements, legal cases, and systems of power, that continue to influence affirmative actions in higher education spaces today. In order to truly comprehend this complex history and set of actions, a framework feminism and critical race theory are needed to explain the ways in which the challenges of affirmative action continue to uphold exclusion within higher education, particularly for students of color. These theories engage across identities and recognize their interconnectedness. Although, this paper focuses primarily on race-conscious admissions, there is still more work to be done in order to address other marginalized students who have been excluded from higher education. These theories’ primary emphasis on racial identity, oppression, and power produces an enriched intellectual perspective on practices within higher education and the need to address historical inequities within the field. These theoretical frameworks set up a potential future in the fight to maintain race-conscious admissions practices in higher education, as they highlight the importance of proactive measures to correct racial injustices that limit students of color from accessing higher education. Moving forward, feminist and critical race theory should be the primary viewpoints when making determinations about policies and legal decisions. Our society must recognize the ever-present forms of racial injustice and question reassertions of privilege and power over those who have historically been discriminated against. Lastly, higher education must always be ready to address its deep history with systems of power and oppressions. The

frameworks provided by feminist and critical race theory allow our system to have an expansive level of engagement. However, the time is now to start thinking deeper about how this method of thought can be implemented and made the standard for producing equity in higher education and other areas of society that have historically limited access to certain social identities.

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