Racial Preferences and the debate over “Affirmative Action”

Before even the end of the Civil War there was debate over what if anything ought to be done to rectify past discrimination for former slaves. Following the end of the war the United States federal government established amongst the first program whose goal was to aid a minority in order to attempt to rectify past injustice, the Freedman Bureau. Debate upon the notion of resolving past discrimination through positive remedies has been controversial since the end of the Civil War, almost a century before the term “Affirmative Action” came into common use.

In 1896 the Supreme Court case of Plessy versus Ferguson unofficially began the fight to role back de jure discrimination. Despite Plessy being only one eighth black the Supreme Court ruled that the de jure discrimination banning him from riding in a “white” railcar was constitutional because it was legal to have “separate, but equal” accommodations for different races. From that point forward through lawsuits and later in the 1940s, 1950s and 1960s various from of de jure discrimination against racial minorities were eliminated. While eliminating official barriers to racial integration this didn't instantly integrate communities or schools. Many racial minorities due to a lifetime of de jure discrimination lacked the educational achievement to enter colleges and universities and hence to enter into jobs that require an educated job force. While in theory if all discrimination were eliminated one would merely have to wait to fill “the pipeline” until the pipeline is filled not all people agreed with this approach.

On March 6, 1961 the modern term of “Affirmative Action” came into use with a reference in Executive Order 10925, which would create the Committee on Equal Employment Opportunity and mandate that any project federal funds finance should "take affirmative action" to ensure that hiring and employment practices are free of racial bias. This reference in Section 301 actually requires federal contractors to treat employees, “ during employment, without regard to their race, creed, color, or national origin.” This initial reference to “Affirmative Action” muddles the modern definition, which often includes later “Affirmative Action” that uses positive racial preferences for historically underrepresented minorities. This initial definition and the later broader definition including more far more controversial programs towards eliminating inequities causes common disagreements when people debate “Affirmative Action” because the two can't agree upon what “Affirmative Action” even is. This is why many conservatives such as Ward Connerly tend to prefer to use the term racial preferences

In 1965 Lyndon Baines Johnson argued for positive force to use the government to rectify past discrimination. He noted in a speech at Howard University, a historically black college, that, "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line in a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair." This argument that racial preferences are needed to solve past racial discrimination by using racial preferences in favor of the historically disadvantaged group has became one of the more popular arguments in favor of the retention of racial preferences for rectifying past discrimination. This quotation was questioned in Ward Connerly's autobiographical book *Creating Equal*.

Following this justification Johnson issued U.S Executive Order 11246, which would later be amended by Executive Order 11375. The order, as amended, aims "to correct the effects of past and present discrimination." It prohibits both federal

contractors and subcontractors from “discriminating against any employee or applicant for employment because of race, skin color, religion, gender, or national origin.” The Order requires that contractors take “affirmative action” to ensure that "protected class, underutilized applicants" are employed when available, and that employees are treated without negative discriminatory regard to their protected class status. This

The Order specifically requires certain organizations accepting federal funds to take affirmative action to increase employment of members of preferred racial or ethnic groups and women. Any organization with fifty or more employees and an aggregate revenue exceeding $50,000 from federal contracts during a twelve month-period must have a written affirmative action plan. This plan must include goals and timetables for achieving full utilization of women and members of racial minorities, in quotas based on an analysis of the current workforce compared to the availability in the general labor pool of women and members of racial minorities.

This use of racial preferences quickly expanded to state and local government. Many private corporations even adopted racial preference programs. Racial preferences and to a lesser degree gender preferences grew to become commonplace over the following 10 years. The issue of racial preferences finally came to apex with the important *Regents of the University of California versus Bakke* (1978). Allan Bakke was a rocket engineer whom decided to apply to the medical school at UC Davis in 1973 so that he could become a medical doctor. Despite having an MCAT score that put him in the 90th percentile Bakke was rejected.

Later he discovered that there was an alternative admissions program for sixteen applicants whom all had lower MCAT scores than he did. In fact they were all lower than every applicant accepted from the general admissions program. Under this alternative admissions program Patrick Chavis, a biology graduate of Albion College in Michigan, gained admission in 1973.

The GPA of those admitted in 1973 under regular standards was 3.49, while that of the special admits was 2.88. The regulars scored an average science GPA of 3.51 while the special admits turned in 2.62. On the Medical College Admissions Test (MCAT), the regulars scored an average of 81 and the specials 46. On the quantitative section the regulars scored 76, the special admits 24. In science the regulars logged 83 and the specials 35. And in the category of general information the regulars scored 69 to the specials’ 33.

In 1974 Bakke again applied to the medical school and again his application was rejected. Bakke then filed a lawsuit in the Superior Court of California charging that his rights under the State and US Constitution (under the 14th amendment). The Superior Court of Yolo County, California found that the special admissions program did violate the federal and state constitutions, as well as Title VI, and was therefore illegal. Nevertheless Bakke was not admitted to UC Davis because he did not prove to the court that the special admissions program caused him to be denied admission to the university.

The University of California appealed the decision to the California Supreme Court, which reaffirmed the lower court ruling on the unconstitutional status of the admissions program and further ordered that Bakke be admitted to the University because the University of California failed to demonstrate that that he should be denied admission without the special admissions program. The case was certainly controversial drawing a

record 120 organizations filed briefs, 83 for the university, 32 for Bakke, and five urging the Court not to decide the case.

The UC Regents appealed the decision to the US Supreme Court. In Regents of the University of California versus Bakke (1978) the Regents wrote a fractured opinion that allowed for Universities to use race as a "factor amongst factors," but that Allan Bakke should be admitted to the University's Medical School. Considering that the Supreme Court of the United States allowed race preferences it is ironic that Bakke was admitted. The vague language of a factor amongst factors created one of most controversial decisions in history. When does do race preferences become the factor as opposed to merely a factor amongst factors? Beyond declaring a hard quota system unconstitutional the decision didn't answer a lot of questions for the constitutionality of the racial preferences in the United States.

Chavis who was the symbolic student that was admitted instead of Bakke was lauded by liberals as being the model student for "Affirmative Action" as opposed to the selfish Bakke. In the long run the comparison between Bakke and Chavis turned out to be a boondoggle. Chavis ultimately saw his medical license revoked after a botched liposuction and he was shot and killed in Los Angeles in 2002 at the age of 50. Bakke went on to practice medicine in Minnesota. There are no complaints against his medical license and he retired uneventfully in 2003.

California Governor Pete Wilson through executive order and support of SP-1 and SP-2 aided in the elimination of racial preferences while governor. Elimination of such programs, which are unpopular with conservatives, was even mentioned along with his support for Proposition 187, which would have banned illegal immigrants from receiving certain state services in a brochure for the Wilson's ill-fated 1996 Presidential campaign.[1]

For most of the next 20 years the issue of racial preferences went to the political backburner. Few seriously considered the repeal of racial preferences. Even notable Republicans such as former California Governor and Senator Pete Wilson supported racial preferences while Mayor of San Diego, albeit Wilson would later reverse himself on this issue. Except for a US Supreme Court case in 1989 the issue was largely unimportant. That all changed in 1996 when Glynn Custred & Tom Wood authored the California Civil Rights Initiative, which would later become better known by its' ballot number, Proposition 209. (It is a common myth that Ward Connerly was an author of Proposition 209. He was the chairman for the California Civil Rights Initiative, but not the author.)

Even before the Initiative had qualified for the ballot there was opposition to the measure. A group of student activists calling themselves the Coalition to Defend Affirmative Action By Any Means Necessary (BAMN). The group of students intimidated the petition collectors and encouraged storeowners to ask petition collectors to leave because they were harassing customers even when the collectors weren't harassing customers. The campaign rhetoric for and against the Initiative was sometimes controversial. While some of the criticisms of opponents were accurate, others were not. Opponents cited the legislative analyst whom claimed that it would, "Imperil women's centers and rape crisis centers on college campuses;" even though women's centers continue to exist in college campuses across California.

The NOW and other groups claimed that it legalized discrimination of women because of section c which allowed for bona fide discrimination to be exempted from

1 See: http://www.4president.org/brochures/petewilson96.pdf

section a.[2] The official rebuttal to the argument against Proposition 209 notes that the Civil Rights Act of 1964 provides an exemption for "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise," (Section 703(e)) and therefore as the ballot statement notes if you are against Proposition 209 for section c then you are against the Civil Rights Act of 1964. There was no previous prohibition against racial or gender discrimination in the California Constitution ironically.

Opponents included the NAAC, ACLU, and Jesse Jackson's Rainbow Coalition. High school students in Los Angeles led walkouts against the possible passage of voter initiative. Jesse Jackson led a protest across the Golden Gate Bridge amongst other notable actions to bring attention to the vociferous opposition. Despite the opposition of Rosa Parks in the official ballot statement against the Initiative Proposition 209 garnered 54% of the nine million votes cast.

Even after the passage of Proposition 209 the opponents of the Initiative denied that voters understood the initiative.[3] Critics charged that the title California Civil Rights Initiative caused voters to inadvertently support it thinking they were voting for "Affirmative Action." The Field poll results seem to contradict this notion in that the overwhelming majority of those voting for the initiative understood what they were voting in favor. Furthermore, those voting in favor of the Initiative were actually more likely to understand the Initiative than those opposing it.[4] This is hardly surprising since voting no on an Initiative is supporting the status quo, hence if those who don't understand what changes an Initiative will make will tend to vote against the change.

Critics of the law were not stopped by their failure at the ballot box and took the issue to the courts. In *the Coalition for Economic Equity v. Wilson* the opponents of the successful Initiative asked for a preliminary injunction to prevent the law from going into effect. On December 23, the district court granted a preliminary injunction, which prevented Proposition 209 from going into effect until the constitutionality of the law was formally resolved.[5] After the district court judge Thelton Henderson ruled in favor of the plaintiffs the case moved to the 9th circuit court of appeals where in April 1997 Henderson's ruling was unanimously overturned. The author of the opinion, 9th circuit Judge Diarmuid F. O'Scannlain rebuked Henderson's decision by arguing that, "a system which permits one judge to block with the stroke of a pen what 4,736,180 residents voted to enact as law tests the integrity of our constitutional democracy." The opponents of Proposition 209 led by the ACLU asked for an en banc review of the issue. On August 21, 1997 the ACLU's en banc petition was rejected leaving only the Supreme Court of the United States as the last court of appeal.

The constitutionality of the initiative was finally unofficially resolved on November 3, 1997 when the Supreme Court of the United States rejected hearing the case, which caused the lower appeals court's ruling to stand. Some supporters of racial preferences including some members of BAMN have considered introducing an initiative to repeal Proposition 209, but no serious campaign has ever been attempted.[6]

Ward Connerly who gained national attention from Proposition 209, particularly

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2 See: http://www.publicaffairsweb.com/ccri/text.htm
3 See: http://aad.english.ucsb.edu/docs/grad-responses.html
4 See: http://field.com/fieldpollonline/subscribers/Release1826.pdf
5 See: http://www.yale.edu/ypq/articles/oct97/oct97a.html
6 See: http://www.rightonrace.org/ExpressionEnginePB2/index.php/cadap/synopsis/

amongst conservatives who lauded his support for Proposition 209 didn't quit his opposition of racial preferences with California. He next took his opposition to racial preferences north to Washington State in 1998's November general election. Connerly aided to craft the Washington State Civil Rights Initiative, better known as Initiative 200, which heavily borrowed language from the successful California Civil Rights Initiative AKA Proposition 209. Connerly once again trounced his opponents. On November 3, 1998 Initiative 200 was approved by 58% of the voters of Washington.[7]

Connerly made an attempt to put an Initiative on the 2000 ballot in Florida, but ironically faced opposition to his proposed Initiative from Republican Governor Jeb Bush. Instead of supporting Connerly as California Governor Pete Wilson did in California, Bush decided to embark upon his own supposedly more moderate alternative called *One Florida*. While Bush thought that his plan would appease Connerly while not alienating voters that he might need to be re-elected in 2002 his hopes of taking a middle path failed and opponents descended in protest.[8] Connerly eventually gave up on the Florida Civil Rights Initiative for the 2000 election citing the Byzantine elections code, which made it impossible for the Initiative to be in one Initiative, but rather would require three separate initiatives. Connerly promised to attempt again in 2002, but ultimately didn't seek another attempt. Connerly is currently working on another initiative banning racial preferences in Michigan called the Michigan Civil Rights Initiative, which should be on the ballot in 2006.[9]

In 2003 the issue of racial preferences returned to the Supreme Court of the United States in two cases filed against the University of Michigan, Ann Arbor. One was against the undergraduate admissions system, Gratz vs. Bollinger, and the other was against the business school, Grutter vs. Bollinger. In the Gratz case Jennifer Gratz a white woman was waitlisted for the University of Michigan, Ann Arbor in 1995. Having not gained admission to the Ann Arbor campus Gratz went to the Dearborn campus. Gratz noted that African Americans and Latinos with similar academic qualifications were accepted while she was not. At issue was the 150-point admissions system to determine undergraduate admission. In order to be admitted a student needed 100 points of which 20 points could be under represented minority status. The additional 20 points is the equivalent of a full additional grade point (moving an underrepresented minority's application from being the equivalent of a B average to the same number of points for an application with an A average.) Gratz contended that the bonus added factor was significant enough for it to be the factor that admitted these minority applicants over her application.

Meanwhile the Grutter case challenged a more nebulous admissions program for the lawsuit at the University of Michigan, Ann Arbor. Racial preferences could be used as a factor, but there was no objective “points” bonus.

The lower courts rejected their appeals, but the Supreme Court of the United States decided to hear the case. In the Gratz case the court ruled 6-3 that the undergraduate admissions system that used an explicit points bonus equivalent to a full grade point was unconstitutional because it was the deciding factor for an overwhelming percentage of the candidates admitted due to the points bonus. The more vague subjective bonus in the graduate admissions in the Grutter case was upheld by a 5-4

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7 See: http://www.washingtonpolicy.org/ECP/PNKeepingFaithWithVoters99-06.html
8 See: http://www.pbs.org/newshour/bb/education/jan-june00/florida_6-2.html
9 See: http://www.michigancivilrights.org/

margin. This once again leaves racial preferences almost as ambiguous as the Bakke case did twenty five years earlier. With a hair thin 5-4 majority on the Supreme Court of the United States liberals emphasized this decision as demonstrating that the next president could overturn “Affirmative Action” in the United States of America albeit was unclear which justice would retire first. With the retirement of Sandra Day O'Connor the issue of racial preferences in the United States will once again become an issue for the next nominee to the SCOTUS.