

The Civil Rights Project



Proyecto Derechos Civiles

Charting the Future of College Affirmative Action:

**Legal Victories, Continuing Attacks,
and New Research**

Edited by
Gary Orfield, Patricia Marin, Stella M. Flores, and Liliana M. Garces

Foreword by Gary Orfield

© 2007 The Regents of the University of California

This report should be cited as:

Orfield, G., Marin, P., Flores, S. M., & Garces, L. M. (Eds.). (2007). Charting the future of college affirmative action: Legal victories, continuing attacks, and new research. Los Angeles, CA: The Civil Rights Project at UCLA.

Produced with generous support from The Ford Foundation.

TABLE OF CONTENTS

v	ACKNOWLEDGEMENTS
vii	LIST OF TABLES
ix	LIST OF FIGURES
xi	FOREWORD <i>GARY ORFIELD</i>
	CHAPTER 1
15	ANTIDISCRIMINATION LAW AND RACE-CONSCIOUS RECRUITMENT, RETENTION, AND FINANCIAL AID POLICIES IN HIGHER EDUCATION <i>ANGELO N. ANCHETA</i>
	CHAPTER 2
35	RACE-CONSCIOUS AFFIRMATIVE ACTION AND RACE-NEUTRAL POLICIES IN THE AFTERMATH OF THE MICHIGAN CASES <i>R. RICHARD BANKS</i>
	CHAPTER 3
57	STAND YOUR GROUND: LEGAL AND POLICY JUSTIFICATIONS FOR RACE-CONSCIOUS PROGRAMMING <i>KAREN MIKSCH</i>
	CHAPTER 4
79	LOSING GROUND? EXPLORING RACIAL/ETHNIC ENROLLMENT SHIFTS IN FRESHMAN ACCESS TO SELECTIVE INSTITUTIONS <i>VICTOR B. SAENZ, LETICIA OSEGUERA, & SYLVIA HURTADO</i>
	CHAPTER 5
105	FALLING SKY: TRENDS IN MINORITY ACCESS TO LAW SCHOOLS, PRE- AND POST-GRATZ AND GRUTTER <i>HELEN HYUN</i>
125	CHAPTER 6 OPENING AN AFRICAN AMERICAN STEM PROGRAM TO TALENTED STUDENTS OF ALL RACES: EVALUATION OF THE MEYERHOFF SCHOLARS PROGRAM, 1991-2005 <i>KENNETH I. MATON, FREEMAN A. HRABOWSKI, III, & METIN ÖZDEMİR</i>
	CHAPTER 7
157	IS ANYTHING RACE NEUTRAL? COMPARING “RACE-NEUTRAL” ADMISSIONS POLICIES AT THE UNIVERSITY OF TEXAS AND THE UNIVERSITY OF CALIFORNIA <i>JORGE CHAPA & CATHERINE L. HORN</i>

	CHAPTER 8
173	RACE-CONSCIOUS STUDENT FINANCIAL AID: CONSTRUCTING AN AGENDA FOR RESEARCH, LITIGATION, AND POLICY DEVELOPMENT <i>EDWARD P. ST. JOHN, BRITANY AFFOLTER-CAINE, & ANNA S. CHUNG</i>
205	ABOUT THE CONTRIBUTORS

ACKNOWLEDGEMENTS

In 2003, The Civil Rights Project (CRP) at Harvard University released a series of reports addressing alternative admissions plans implemented in states prohibiting the use of race as a factor in college admissions, “*Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida*” and “*Percent Plans in College Admissions: A Comparative Analysis of Three States’ Experiences.*” This new report, a result of our 2006 roundtable, “Is Access to Higher Education Shrinking? Impacts of Shifts in Race-Conscious Policies & Their Alternatives,” builds on CRP’s previous research and addresses the aftermath of the 2003 U.S. Supreme Court cases that upheld the use of race in college admissions. This volume could not have been produced without the dedicated researchers who contributed its chapters, as well as roundtable attendees who offered their feedback. We are grateful to our roundtable collaborators, the UCLA Graduate School of Education & Information Studies (especially Mitchell Chang and Sylvia Hurtado) and The Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity, University of California, Berkeley, School of Law, as well as our colleagues at the NAACP-LDF who provided legal consultation. We thank the staff at The Civil Rights Project at Harvard University and UCLA and John T. Yun at the University of California, Santa Barbara for their assistance in completing this project. In addition, we gratefully acknowledge Carolyn Peelle, Jannet Kim, and Lori Kelley who provided editorial review for the report. Finally, we are indebted to The Ford Foundation for its generous support.

Gary Orfield
Patricia Marin
Stella M. Flores
Liliana M. Garces

2007

LIST OF TABLES

CHAPTER 3: STAND YOUR GROUND: LEGAL AND POLICY JUSTIFICATIONS FOR RACE-CONSCIOUS PROGRAMMING

- 72 Table 3-1: Years Race-Conscious Programs Changed
72 Table 3-2: Why Programs Were Changed
73 Table 3-3: How Programs Were Changed
73 Table 3-4: Breakdown of “Opened to All” Category

CHAPTER 4: LOSING GROUND? EXPLORING RACIAL/ETHNIC ENROLLMENT SHIFTS IN FRESHMAN ACCESS TO SELECTIVE INSTITUTIONS

- 87 Table 4-1: Enrollment at Selective Institutions (N=316) by Race (1994-2004)
89 Table 4-2: Enrollment at Very High, High, and Medium Selectivity Institutions by Race (1994-2004)
91 Table 4-3: Enrollment at Selective Institutions Per 1,000 High School Graduates Within Each Racial/Ethnic Group (1994, 1999, 2004)
92 Table 4-4: Enrollment at Very High, High, and Medium Selectivity Institutions Per 1,000 High School Graduates Within Each Racial/Ethnic Group (1994, 1999, 2004)
94 Table 4-5: Percentage of Students Entering Selective Four-Year Institutions by Parental Income
97 Table 4A-1: Percentage of White Freshmen Entering Four-Year Institutions by Parental Income
98 Table 4A-2: Percentage of Black Freshmen Entering Four-Year Institutions by Parental Income
99 Table 4A-3: Percentage of Hispanic Freshmen Entering Four-Year Institutions by Parental Income
100 Table 4A-4: Percentage of Asian/Pacific Islander Freshmen Entering Four-Year Institutions by Parental Income

CHAPTER 5: FALLING SKY: TRENDS IN MINORITY ACCESS TO LAW SCHOOLS, PRE- AND POST-GRATZ AND GRUTTER

- 121 Table 5A-1: National Law School Application Rates by Race/Ethnicity
121 Table 5A-2: National Law School Matriculation Rates by Race/Ethnicity

CHAPTER 6: OPENING AN AFRICAN AMERICAN STEM PROGRAM TO TALENTED STUDENTS OF ALL RACES: EVALUATION OF THE MEYERHOFF SCHOLARS PROGRAM, 1991-2005

- 135 Table 6-1: Number and Percent of Entering Students by Year of Entry and Ethnicity
136 Table 6-2: High School GPA, SAT Scores, and Gender by Year of Entry and Ethnicity
138 Table 6-3: Program Components by Year of Entry and Ethnicity
145 Table 6-4: Post-College Outcome by Year of Entry and Ethnicity for Meyerhoff and Comparison Students
151 Table 6A-1: Meyerhoff and Declined Comparison Sample: High School GPA, SAT Scores, and Gender by Year of Entry and Ethnicity
152 Table 6B-1: Number of Students Completing Process Evaluation Item by Survey and Entering Class

- 153 Table 6B-2: Process Evaluation Surveys: Item Wording and Rating Scale Over Time (summer bridge as sample item)

CHAPTER 8: RACE-CONSCIOUS STUDENT FINANCIAL AID: CONSTRUCTING AN AGENDA FOR RESEARCH, LITIGATION, AND POLICY DEVELOPMENT

- 187 Table 8-1: Number of States with at Least One Publicly Funded Financial Aid Program that was Race-, Sex-, or Disability-Conscious, 1984-2003
- 188 Table 8-2: Number of Publicly Funded Financial Aid Programs that are Race-, Sex-, or Disability-Exclusive or Sensitive, 1984-2003
- 189 Table 8-3: Actual Composition of Scholarship Qualification by Racial/Ethnic Group
- 189 Table 8-4: Simulation of Racial/Ethnic Composition of Awardees, with Top 25% within Individual Schools (using at least one MEAP test)
- 190 Table 8-5: MEAP Qualification by Ethnicity, Using Traditional Award Criteria
- 190 Table 8-6: Top 25% of GPA by Ethnicity Using GPA-Merit Index
- 195 Table 8-7: Simulations of the Effects of Grant Award Amounts on the Probability of Enrollment by Admitted Students by LSAT, Race, and Gender at the Law School

LIST OF FIGURES

CHAPTER 5: FALLING SKY: TRENDS IN MINORITY ACCESS TO LAW SCHOOLS, PRE- AND POST-GRATZ AND GRUTTER

- 109 Figure 5-1: URM Law School Enrollment, 1993-2005
110 Figure 5-2: National Law School Application Rates, 1995-2004
111 Figure 5-3: Percentage Increase in Applications, 1995-2004
112 Figure 5-4: National Law School Admissions Rates, 1995-2004
113 Figure 5-5: Percent Change in Matriculation Rates, 1994-2004
117 Figure 5-6: Law School Annual Tuition, 1994-2003

CHAPTER 7: IS ANYTHING RACE NEUTRAL? COMPARING “RACE-NEUTRAL” ADMISSIONS POLICIES AT THE UNIVERSITY OF TEXAS AND THE UNIVERSITY OF CALIFORNIA

- 162 Figure 7-1: Texas System-Wide 10 Percent Plan Summer/Fall Freshman Admissions, by Race/Ethnicity, 1998-2004
163 Figure 7-2: UT Austin 10 Percent Plan Summer/Fall Freshman Admissions, by Race/Ethnicity, 1998-2004

CHAPTER 8: RACE-CONSCIOUS STUDENT FINANCIAL AID: CONSTRUCTING AN AGENDA FOR RESEARCH, LITIGATION, AND POLICY DEVELOPMENT

- 176 Figure 8-1: Differentials in College Enrollment Rates for Hispanic and African American Compared to White 18- to 24-Year-Old High School Graduates
177 Figure 8-2: The Gap Between the Actual Maximum Pell Award and University Attendance Costs (Tuition, Fees, Room and Board)
179 Figure 8-3: Federal Grant Aid for Postsecondary Education
181 Figure 8-4: National Trends in Continuation Rate and Grant/Tuition Ratio

FOREWORD BY GARY ORFIELD

The right of universities to take race-conscious action to diversify their student bodies rested for a quarter century on a U.S. Supreme Court decision in the 1978 *Bakke* case, which left almost no one satisfied and many conservatives convinced that an increasingly conservative Supreme Court would outlaw affirmative action. After a huge national mobilization over two crucial cases against the University of Michigan which were decided in 2003, *Grutter v. Bollinger* and *Gratz v. Bollinger*, it seemed likely that the surprisingly positive decision from the Court's majority in *Grutter* would set a relatively clear path for the next quarter century. In that decision, from a Court much more conservative than the *Bakke* Court, Justice O'Connor, writing for the majority, solidified the rationale for affirmative action and expanded on its justifications. This seemed to produce a clear guideline in place of the *Bakke* decision, which lacked a clear majority rationale. In *Bakke* the Court had rested the continuation of affirmative action on a single rationale articulated by Justice Powell—that diversity produced better education for all students—which relied primarily on a report by a Harvard University faculty committee. In the *Grutter* decision, the Court took a much broader view of the justifications for affirmative action, citing the critical importance of training leaders from all racial and ethnic groups, as well as the importance of diversity for the functioning of major institutions such as the military. The decision also considered and rejected the idea that colleges must exhaust non-race-based strategies to obtain and maintain racial and ethnic diversity, and it showed deference to educators in making decisions about admissions policies. Overall, *Grutter* seemed to be a sweeping victory for supporters of affirmative action.

No sooner was the ink dry on the decision, however, that opponents of affirmative action, who happened to control the U.S. Departments of Education and Justice as well as the federal civil rights enforcement offices, began to narrow the interpretation of *Grutter*. Across the country conservative legal action groups wrote letters to leaders of higher education institutions threatening to sue them unless they stopped affirmative action measures. Federal civil rights officials strongly suggested that colleges were obliged to try non-racial strategies and claimed that such strategies were workable. In other words, the opponents of affirmative action attempted to interpret the law as if they had won the case.

Concern over the future of race-conscious policy was intensified in 2006 when Justice O'Connor, the author and the deciding vote on *Grutter*, resigned from the Court and was replaced by Justice Alito, whose record was strikingly conservative. Concern increased when the Supreme Court accepted for review two cases about voluntary integration policies in public K-12 schools in which the lower federal courts had relied on the *Grutter* decision to uphold race-conscious student assignment plans.

On June 28, 2007, the Supreme Court issued its ruling in the voluntary school integration cases (*Parents v. Seattle School District No. 1* and *Meredith v. Jefferson County*). Although the Court struck down the integration policies in these two cases, it acknowledged once again that universities have a compelling interest in a diverse student body—an important part of which is racial diversity—and that they may consider race as a factor in their individualized, multi-dimensional admissions decisions to further that interest. The Court's reaffirmation of the ruling

in *Grutter* spoke directly to and repudiated the efforts of conservative groups that had urged the Court to adopt a sweeping race-blind policy that would undermine *Grutter*.

Even with this recognition of the use of affirmative action in higher education admission policies from a more conservative Court than *Grutter*, we can expect ongoing controversy. It is unreasonable to expect a deeply divided country to come up with a clear and simple, lasting answer. It is obvious, however, from the national mobilization of university, business, and military leaders over the University of Michigan cases that there is a strong desire in universities and other major institutions to find ways to keep our campuses open to the increasingly diverse pool of high school graduates in a country in the midst of a rapid and profound racial transition. The lesson in those states where affirmative action has been outlawed is that institutions will try to find ways to pursue this goal and that it will be very difficult.

College officials, faculty members, program directors, and others must make decisions and take action in these difficult circumstances. Since their decisions will have important consequences for their campuses and institutions, and the sum of these decisions across the country will have major consequences for underrepresented minority opportunity and for realizing the goals that the Supreme Court recognized in 2003, it is important to have the most open and informed discussion of the issues and the situation. It is vital that these decisions not be framed by threats and fears and that the leaders of institutions of higher education not be forced into situations in which each institution is secretly limiting its actions and refusing to communicate with others in the educational community or with representatives of minority communities about probable outcomes.

This volume presents the views of leading scholars across the country on a variety of topics directly linked to the present situation, existing challenges, and the future of race-conscious policies in educational institutions across the country. As is our consistent practice, we have not sought and do not present a single position, but offer the interpretations of researchers who have discussed their work in a roundtable and have responded to questions raised in a peer review process. What we present is not a cookbook for college authorities but important perspectives for all engaged in this discussion to consider.

The volume begins with interpretations of the current state of the law from scholars from Santa Clara University School of Law and Stanford Law School. Both Angelo Ancheta, who authored one of the key briefs in the *Grutter* case, and R. Richard Banks, of Stanford University, present interpretations suggesting that the Supreme Court decision is much clearer in outlining the basic rules of admissions for selective institutions, that much is left undecided on other issues, but that reasonable inferences can often be made. These interpretations should be very helpful for college officials who are pursuing what they have been authorized to pursue yet face legal threats based on claims that the decision does not mean what it says. The chapters also deal with what is not known, which includes the exact legal status of many of the support and outreach programs and targeted financial aid that have been so strongly challenged by opponents of affirmative action. The chapters suggest that these programs are surely legal when participation is decided in a way that parallels admissions actions, but that because of key differences, especially between admissions and support or preparation programs, it may be significantly more permissible to operate race-conscious programs under some circumstances.

Much of the confusion about the *Grutter* decision and many of the more recent policy changes on college campuses are the direct result of a campaign of threats and intimidation and resulting decisions by some college administrators to make retreats not long after they joined in national alliances to urge the Supreme Court to uphold affirmative action policies. This campaign and its results, including the threats from federal civil rights officials of the Bush Administration and the ensuing secrecy of the campuses, are clearly presented in the chapter by Karen Miksch of the University of Minnesota. This original research, together with the chapters on the state of the law, should encourage leaders of higher education to consider whether it would be more effective to develop coordinated positions on these issues within the leadership of higher education rather than face challenges separately without support.

Victor Saenz, Leticia Oseguera, and Sylvia Hurtado take on the question of whether or not minority access to higher education has already been seriously declining. This would seem to be a straightforward issue, but very different claims often enter the public discussion, with one side claiming a serious loss of access and the other pointing out how some institutions have come back to something like the numbers or percentages of historically excluded groups that existed in affirmative action days. This chapter argues that when one takes into account the rapidly shifting demography of high school graduates, it is quite clear that blacks and Latinos are falling behind in access and that Asians are increasing their relative representation. The results for whites are uncertain, in part because of the increasing number of students—most likely white and multiracial students—who don't report their race or ethnicity. This analysis suggests that we are already seeing significant backward movement for underrepresented students even when all but a few states are maintaining affirmative action.

The chapter by Helen Hyun and the chapter by Kenneth Maton, Freeman Hrabowski, and Metin Ozdemir look at some of the worst and best results recorded after affirmative action policies were eliminated. The statistics for leading law schools have been particularly negative, even when they have made very vigorous efforts to admit students on other dimensions of disadvantage or to increase the pool through changes in academic content and programs. In one remarkable program at the University of Maryland, Baltimore County, a high prestige outreach effort for black students in science, technology, engineering, and mathematics (STEM) has been transformed into an integrated program while keeping a high black enrollment and doing very well in terms of student achievement. It turns out that this program has had very generous funding, including funds to considerably expand the program to accommodate other students; a very strong network and image in the African American community; and the active involvement of the college president, who is a nationally famous African American educator. In spite of all this, the program has had a significant loss in black participation. The Hyun chapter suggests that there are very severe limits to non-racial admissions policies in extremely competitive settings, particularly where standardized tests have a very heavy role in admissions. The Maton et al. chapter suggests that even under very favorable conditions, maintaining access with a non-racial policy is a very demanding goal.

Jorge Chapa and Catherine Horn remind us that there has been an important and somewhat successful effort to recover from an affirmative action ban on one campus in Texas, the University of Texas at Austin, where the Texas Ten Percent Plan for admissions has been combined with highly targeted outreach, scholarship, and transition plans for new students. (This

has not worked in the other state flagship campus, Texas A&M). They suggest that if California would adopt similar plans, it could help the recovery from the state ban on affirmative action, which has had a devastating effect on the far more competitive campuses in the UC system—Berkeley and UCLA.

Edward St. John, Britany Affolter-Caine, and Anna S. Chung of the University of Michigan add a vital element to the discussion, highlighting the issues of affordability and aid. It has been known for some time that cost and available aid are very important influences in college access and choice, particularly for minority and low-income students, yet many institutions and state governments have recently been following practices that make it less rather than more likely that minority students will enroll at their campuses. The law on racially targeted financial aid is very limited—one major federal court decision in the nation’s most conservative Court of Appeals—but the issues are of great importance. As colleges and policy makers consider their strategies for pursuing diversity in an era in which college costs are rising far more rapidly than family incomes and serious gaps have opened up between aid packages and the cost of college, decisions about priorities in distributing aid are decisions about who is going to come to your campus. Policy makers need to seriously consider whether or not aid strategies aimed at increasing prestige and selectivity must be balanced with policies of aid that make access a real and possible choice.

These chapters will not answer all of the questions of those who must make policy in the higher education community and interpret the actions of the nation’s colleges, but they do provide a richly informed public discussion of issues that have been too often glossed over in incremental decisions, often taken without adequate discussion, and sometimes under threat. Decision makers must realize that simple slogans like “admission by merit” contain highly uncertain assumptions and serious social and educational consequences. Ultimately, there is no real alternative to a much deeper multidimensional discussion if higher education is to realize its goal of serving all segments of American society and preparing educated people and leaders who can make a profoundly multiracial democracy and economy function effectively in a rapidly changing nation. Colleges and state policy makers have much more discretion than they are led to believe by those trying to roll back civil rights policy. In fact, they have a responsibility to consider the consequences of their action in terms of realizing vital goals outlined in the *Grutter* decision, all of which were cited with approval in the Court’s most recent voluntary integration decision.

American higher education has struggled now for nearly a half century to find ways to better serve and reflect the diversity of American society and to train leaders who can cross over the social divisions that have limited the American dream since its beginnings. We have learned that it can be done, that there are major benefits to the educational and research missions of our campuses, and that we know how to do it better. It is very important that our university faculties and leaders not give up on what has been a notable success but find the best ways to preserve it in a time of polarization and help to build a successful multiracial America. In the words of Justice Kennedy’s concurring opinion in *Parents v. Seattle School District No.1*, “This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all its children.” We will continue to work with scholars, educators and civil rights organizations from across the country to help make that happen.