

## Introduction: Reflections on Latinas/os, Affirmative Action, and Education

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*“Neither we, nor the University, argue that affirmative action programs should continue forever; however, as long as these discriminatory consequences linger, as long as these consequences translate into a lack of adequate service for these segments of the society- segments which the University has a duty to serve-then the University and indeed all governmental agencies must be permitted to maintain programs such as these.”*

Brief of Amici Curiae Mexican American Legal Defense and Educational Fund, La Raza National Lawyers Assn., County of Santa Clara, Calif., League of United Latin American Citizens, G.I. Forum, National Council of La Raza, Los Angeles MEChA Central, Image, National Association for Equal Educational Opportunity, **Association of Mexican American Educators**, et al in Support of Petitioner, 1977.

*“We take the Law School at its word that it would “like nothing better than to find a race-neutral admissions formula” and will terminate its race-conscious admissions program as soon as practicable...It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased...We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”*

Associate Justice Sandra Day O'Connor, *Grutter v. Bollinger*, 2003, p. 343

*“The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection; we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society. It is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race does matter.”*

Associate Justice Sonia Sotomayor, dissenting in *Schuetz v. Coalition to Defend Affirmative Action* 2014, slip opinion p. 46.

### Introduction

In 1977 the Association of Mexican American Educators was one among many Latina/o affiliated organizations to add their name to an *amicus curiae*, or friend of the court, brief filed in support of race-conscious affirmative action in *Regents of the University of California v. Bakke* (1978). The brief spearheaded by the Mexican American Legal Defense and Education Fund (MALDEF) argued in part that Chicanos/Latinos, just like African Americans, encountered disadvantage in preparing for and seeking postsecondary opportunities. The brief also emphasized how persistent residential segregation, high poverty rates, disparate educational opportunities, high incarceration rates, and language issues, all worked together to complicate access to higher education for all students of color, but especially for Latina/o students. Close to four decades after *Bakke* many of the challenges identified in MALDEF's brief continue to impede Latina/o students from reaching their higher education aspirations.

Since *Bakke*, the legality of affirmative action has been challenged at the Supreme Court level multiple times. In the University of Michigan's undergraduate and law school cases, *Gratz v. Bollinger* (2003) and *Grutter v. Bollinger* (2003), the Supreme Court upheld the law school's holistic admissions practices while at the same time striking down the university's point-driven undergraduate admissions system. More recently in *Fisher v. University of Texas* (2013), the High Court upheld the University of Texas' limited use of race in university admissions but not before stipulating that institutions of higher education must exhaust all race-neutral alternatives before

relying on race-conscious practices.

In the wake of *Bakke* and its progeny, the argument has been made that the time has come to abandon *all* race-conscious practices. Indeed, guided by Justice O'Connor's "sunset clause" in *Grutter*, highlighted as an epigraph to this chapter, critics of race-conscious affirmative action contend that the time has come to cease all affirmative action policies and practices. And while up to now, affirmative action has managed to withstand legal scrutiny, opponents of the policy have been relentless in seeking to terminate race conscious practices. The Supreme Court's recent decision in *Schuette v. Coalition to Defend Affirmative Action* (2014), which grants states permission to overturn race-conscious practices via ballot initiative or state referenda, is set to radically alter the future of affirmative action, as well as impact the lives of countless under-represented students who have relied upon this policy to gain entry into the nation's top colleges and universities.

The conventional wisdom among educators is that during the past 40 years, affirmative action policies and practices have generally enhanced the educational attainment of Latinas/os<sup>1</sup>. There is clear evidence, for example, that among some highly selective elite universities, Latinas/os who qualify for admission have a greater likelihood of attaining their degree than Latinas/os who attend less prestigious public institutions, where the impact of affirmative action is muted and indirect (Bowen & Bok, 1998; Carnevale & Strohl, 2013). However, there is also evidence to suggest that the increase in enrollment rates among Latinas/os in public higher education is not necessarily due to the success of Latina/o-centered affirmative action practices, but rather to the demographic increase in the college-age Latina/o population who, despite tremendous odds, manage to enroll in college (Delgado-Bernal, 2002; Smith, 2009; Villalpando, 2010; Yosso, 2005). Irrespective of conclusive evidence, educational practitioners, researchers, and policymakers generally accept the notion that the loss of affirmative action practice has, and will continue to inhibit and erode Latinas/os' educational success.

Despite decades of scholarly work on affirmative action in higher education, little research exists that specifically addresses the role and impact of affirmative action on Latina/o educational attainment. As noted by Gándara (2010) Latinas/os experience "triple segregation"—racial, socioeconomic, and linguistic—all of which complicate their educational pathways into higher education (Gándara & Contreras, 2010; Solorzano & Yosso, 2000). Latinas/os remain underrepresented in selective and elite universities, and overrepresented in open-access two-year colleges, and four-year comprehensive colleges designated as Hispanic Serving Institutions (Chronicle of Higher Education Almanac, 2014; Carnevale & Strohl, 2013; Santiago, 2013). Racialized policies and practices, including academic tracking (Oakes 2005; Solorzano & Ornelas, 2002), continue to impair Latinas/os educational progress by funneling Latina/o students away from college preparatory curricula. And, despite Latina/o students' resiliency in overcoming a host of inequitable educational practices, we still find only a dismal and disproportionate number of Latina/o students attaining their educational dreams and aspirations (Solorzano, Villalpando, & Oseguera, 2005; Solorzano & Yosso, 2002).

Some have argued that affirmative action has yet to fulfill its intended purpose because, since its inception, the policy has been co-opted and consistently redefined by the courts, politicians, and educational policymakers seeking to ameliorate, or at least placate, future challenges (Brent & Oshige, 1995). Others contend that affirmative action's original purpose and intent was only meant to address the needs and unique experiences of African Americans (O'Neill, 1985; Patterson, 2005). For example, Brent and Oshige (1995) have suggested that affirmative action in education was initially conceptualized and enacted with a narrow focus on African Americans, and was never intended to address the educational exclusion of any of the other "equally marginalized" racial and ethnic communities. Consequently, the argument goes, most of the benefit of affirmative action has been diluted for African Americans since its original purpose has been repeatedly broadened to include characteristics (such as gender, language, and immigration) and other educational conditions and life experiences (such as economic class and geographic diversity) that are not necessarily associated with the historical racial exclusion of African Americans. This position naturally highlights the irony behind white women being affirmative action's greatest "unintended" beneficiaries (Cho, 2002; Crenshaw, 2007).

In this special issue we focus on Latinas/os, education, and affirmative action; we take up the central premise raised by those who argue that affirmative action was not intended to benefit *all* excluded racial and

1. Latinas/os include women and men of Mexican, Central American, South American, Cuban, and Puerto Rican origin, regardless of birthplace, immigration, or generational status (Villalpando, 2010).

ethnic communities. We proposed to explore this proposition and its ancillary explanations of why affirmative action in higher education has lacked a consistently positive, broad and proportional impact among Latinas/os. In light of the reactionary and neoliberal *post-racial* forces that permeate U.S. education (Goldberg, 2009; St. John, Duan-Barnett, & Moronski-Chapman, 2013), and the ever-changing social and legal landscape surrounding affirmative action as a race-conscious policy, this Special Issue problematizes the utility of affirmative action for Latinas/os.

## Purpose

As guest editors, we were most interested in exploring the role of affirmative action in advancing and expanding educational access and opportunity for Latina/o students. Our approach to this work led us to conceptualize the term “*acción*.” While *acción* is a literal Spanish translation for the word “action,” we also envision “*acción*” as a richer, more complex term. We take *acción* to represent a model of hope. Such a model is dynamic, changing, flexible, and always being constructed. By adapting the word *acción* we also recognize that the term “affirmative action” for good or bad, is laden with baggage. For critics of affirmative action the term itself is shorthand for unjust preferences and reverse discrimination. For proponents of race-conscious policy, the term affirmative action represents an as of yet unmet promise, an ideal conceptualized but not yet actualized. Indeed, it is curious to recognize that in her extraordinary opinion in *Schuetz* (2014) Justice Sotomayor, the first Latina Justice on the Supreme Court of the United States opts to use the phrase “race-sensitive admissions policies” (p. 2) rather than “affirmative action” beginning on page 2 of her 58-page dissent. And while we do not mean to suggest that the time has come to abandon the affirmative action nomenclature, we hope that the papers in this special issue help spark new conversations about the future of race-conscious policies, especially for a steadily growing Latina/o population. We posit that an *acción* model recognizes that policy is not enough. Indeed, while affirmative action has existed for fifty-four years, it has become the imperfect tool we depend on rather than the ideal tool we need. However, we hope that the papers to follow help get us thinking in new directions.

As we embark further into the twenty-first century we stand on the cusp of new possibilities. In *Fisher v. University of Texas* (2013) the Supreme Court left untouched its ruling in *Grutter v. Bollinger* (2003), wherein the Court’s majority affirmed Justice Lewis Powell’s declaration in *The Regents of the University of California v. Bakke* (1978) that student body diversity constitutes a compelling interest in support of affirmative action policies and practices. The Supreme Court’s decision to uphold the limited use of race-conscious affirmative action policy in *Fisher* (2013) coupled with reports and projections confirming the rapid and expanding growth of the Latina/o population (Census.org; Fry & Taylor, 2013) across the U.S. present a timely opportunity to delve deeper into exploring Latinas/os’ educational success (or lack thereof). Indeed, the rapid and steady growth of Latina/o populations across the Nation’s most populous states, including California, Florida, New York, and Texas—along with the population explosion of Latinas/os in Georgia, South Carolina, Illinois and the Northeast corridor—signal an urgent need to understand how to best serve a growing Latina/o student body. This urgency is further compounded by the fact that Latina/o demographic growth is no longer confined to coastal and metropolitan states. Latina/o demographic growth in new places, like Alabama and Tennessee, further intensify the need to address issues of educational access and equity.

Even as we take time to examine the state of Latinas/os, education, and affirmative action, new challenges against race-conscious practices are already on the horizon and on the legal docket. Next term the Supreme Court of the United States will again hear arguments in *Fisher v. University of Texas*. At issue once again will be the future of race-conscious university admissions plans. At the same time, the Center for Fair Representation and Students for Fair Admissions, spearheaded by their founder Edward Blum, have brought suit against Harvard University, the University of North Carolina, and the University of Wisconsin, Madison, alleging that these universities unduly burden Asian American students in the college admissions process. The insinuation here being that unlike other racial/ethnic groups, including Latinas/os, Asian American students are expected to excel academically (including earning above average SAT scores) and are penalized for doing so. As we await the outcome of these latest challenges to affirmative action, it is worth noting the troublesome messages implied in these new lawsuits. First, that students of color, including Latinas/os, are displacing “more qualified” racial/ethnic

minority students in admissions to selective universities. And secondly, the fact that Blum's organizations, which are responsible for taking both *Fisher* and *Schuetz* to the Supreme Court, have seized on the opportunity to exploit the Asian model minority myth to pit racial/ethnic minority students against one another in his ultimate quest to finally overthrow all affirmative action practices.

Critical legal scholar Kimberlé Crenshaw (2007) has rightly observed, "What most people think they know about affirmative action isn't right, and what is right about affirmative action most people don't know" (p. 131). Our hope is that the five papers contained in this special issue will contribute to the conversation around race, civil rights, epistemic justice, Latinas/os and affirmative action.

### Range of Scholarship

Enrique Alemán, Jr., Dolores Delgado Bernal, and Edén Cortez are the authors of the first article in the themed issue. These scholars envision affirmative action as a broader positive action rather than the traditional policies that address discriminatory practices in employment, housing, and access to higher education. With an emphasis in access to higher education, they call for the inclusion of student, parent/family, and community voices as a condition for supplementing affirmative action. In their article, *A Chican@ Pathways Model of Acción: Affirming the Racial, Cultural and Academic Assets of Students, Families and Communities*, they provide three premises that are necessary for effective realization of affirmative action for Latin@s/Chican@s. First, effective affirmative action must be based on Chicana/o K-12 experiences. Second, students and their families must be incorporated into equity efforts from the earliest educational stage. Finally, an effective affirmative action model must cultivate action by and with families and communities. Together, these premises inform analysis of data collected in K-12 classrooms for more than a decade in the state of Utah. The Westside Pathways Project is centered on college awareness and access, fostering academic leadership and academic enrichment and affirming the racial and cultural identities of students and their families. It is a model of *acción* that incorporates the perspectives of students, families and communities who would otherwise experience inequitable schooling along the educational pathway to higher education.

Leslie D. Gonzales conceptualizes a model of *acción* for Hispanic Serving Institutions (HSIs) in the second article. She presents potential scenarios for application when a comprehensive take up of affirmative action is taken up by HSIs. An argument is made in, *An Acción Approach to Affirmative Action: Hispanic-Serving Institutions as Spaces of Epistemic Justice*, for employing funds of knowledge theory and method in order to foster epistemic justice in HSIs and beyond. The epistemic justice perspective positions the Latina/o community as possessing epistemic riches and important ways of knowing that can inform the daily work, practices and policies in HSIs, specifically when these institutions are intent on providing more relevant and empowering spaces for students. The model is conceived as a pathway for leadership in HSIs to apply at three distinct levels: 1) leaders and administrators, 2) student service professionals, and 3) the professoriate. She states, "The start point for leaders must be a willingness to ask themselves and others what it means to carry a Hispanic-Serving designation, and to hold themselves, their programs, and staff responsible for fulfilling what should be a distinctive mission." In this way, a call for affirmative action is not limited to a policy to ensure equitable admission practices. Instead, a call is made to challenge the relations of power that restrict the legitimization of the funds of knowledge from Latina/o communities.

Moving from HSIs to research-intensive universities, Michelle M. Espino, in her article, *Sacrificing a Latina/o Presence in the Professoriate: An Analysis of Affirmative Action as Racial Remedy and Silent Covenant*, investigates the lived experiences of 22 Mexican-American faculty and post-doctoral fellows. The article explores how affirmative action policies reflect a silent covenant among policymakers and universities to promote racial/ethnic diversity while limiting the presence of Latina/o faculty. Using Derrick Bell's (2004) concept of the silent covenant, Espino, argues that remedies to address racial injustice in higher education reflect symbolic encouragement that discrimination can be overcome. In her analysis she shows interest convergence since the benefits of limited diversity does not diminish the entitlement of Whites in research-intensive institutions. The narratives presented provide strong justification for the maintenance of race-conscious admissions policies to higher education for Mexican American students including summer bridge programs from high school to college, undergraduate

“minority” programs, and graduate student “minority” fellowships. Unfortunately, despite their successes a majority of participants felt constantly interrogated and held under suspicion because they supposedly had not “earned the right” to be in college and graduate school. As Target of Opportunity hires in the professoriate, racism and backlash from a number of faculty peers was also felt. Accordingly, Espino concludes, “Based on the findings, affirmative action policies are beneficial to Latinas/os students and faculty, and are also beneficial to maintaining the stability of White power structures.”

In her article, *Public Discourse versus Public Policy: Latinas/os, Affirmative Action, and the Court of Public Opinion*, María C. Ledesma proposes that critics of affirmative action use truncated and/or deceptive narratives in their quest to end race-conscious policies. Using the case of California, she argues that popular discourse has the power to limit educational access and opportunity for historically marginalized students, especially Latinas/os of Mexican decent. She traces a historical pattern of reliance on media that frames the popular discourse with inaccurate language, strategic language manipulations, and ahistorical and acontextualized narratives. These discourse strategies contribute to a landscape for Latinas/os that not only constrains race-conscious policies but also creates an anti-immigrant rhetoric with dangerous ebbs and flows. The passage in California of Propositions 187, 209, and 227 strengthened the language of initiatives in six additional states. The result on Latina/o admissions into the University of California system is that to date pre-209 enrollment figures have not been attained. Ledesma concedes that the power of popular discourse on similar public policies undermines access to higher education and educational outcomes for Latinas/os across the United States, particularly in light of the recent *Schuetz v. Coalition To Defend Affirmative Action* (2014). While this decision grants states permission to curtail and/or terminate the use of race-conscious policy via ballot initiative, Ledesma points us to Justice Sonia Sotomayor’s dissent as a point for dialogue to strengthen the language used by advocates for communicating to the populace that affirmative action matters.

As shown across the articles in this special issue, race-conscious admissions policies at selective postsecondary institutions remain a critical factor for the educational opportunities of Latinas/os in the 21<sup>st</sup> century. For this reason Liliana M. Garces analyzes and discusses a significant affirmative action case in her article, *University of Texas, at Austin’s Defense of Affirmative Action in Fisher v University of Texas: Lessons for Institutional Policies and Practices*. In *Fisher*, the U.S. Supreme Court recognized the right of universities to pursue a mission-centered or compelling interest in the educational benefits of student body diversity. At the same time, there are limited ways in which race can be considered in admissions policies. She points out that post-*Fisher* it is important for institutions of higher education to pay attention to race-conscious admissions practices that further their mission but also cautions, “numbers alone do not produce educational benefits; what institutions do during a student’s years of education matters in terms of generating the educational benefits of diversity.” In this way, affirmative action is not just about access. Garces highlights that it is also about providing admissions to students across a wide range of social dimensions, engaging in productive cross-racial experiences, assuring a safe racial campus, maintaining a positive racial climate, among other important ways to advance an affirming sense of belonging and success in institutions of higher education.

The collection of articles in this special issue provide an expanded landscape for situating Latinas/or within conversations about where affirmative action has been, where it is now, and where it could be. The editors and authors contend that affirmative action matters for the educational success of Latinas/os from the earliest educational age. Together, students, families and communities can create models of *acción* amidst the local and national vision of advancing racial equity and access to higher education for all.

## References

- Bell, D. (2004). *Silent covenants: Brown v. Board of Education and the unfulfilled hopes for racial reform*. New York: Oxford University Press.
- Bowen, W.G., & Bok, D. (1998). *The shape of the river: Long-term consequences of considering race in college and university admissions*. Princeton, NJ: Princeton University Press.
- Brent, P. & Oshige, M. (1995). Affirmative action for whom? *Stanford Law Review*, 47(5), 855-900.
- Carnevale, A.P., & Stohl, J. (2013). *Separate and unequal: How higher education reinforces the intergenerational reproduction of White racial privilege*. Georgetown Public Policy Institute: Georgetown University. Available at: <http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/Separate&Unequal.FR.pdf>
- Cho, S. (2002). Understanding white women's ambivalence towards affirmative action: Theorizing political accountability in coalitions. *University of Missouri, Kansas City Law Review*, Vol. 71 (2), 399-418.
- Chronicle of Higher Education (2014). *Almanac of Higher Education 2014-15*, LX(45). The Chronicle of Higher Education.
- Crenshaw, K.W. (2007). Framing affirmative action. *Michigan Law Review First Impressions*, 105, 123-133.
- Delgado Bernal, D. (2002). Critical Race Theory, LatCrit Theory, and Critical Race-Gendered Epistemologies: Recognizing Students of Color as Holders and Creators of Knowledge. *Qualitative Inquiry*, 8(1), 105-126.
- Fisher v. University of Texas, 133 U.S. 2411 (2013).
- Fry, R., & Taylor, P. (2013). Hispanic high school graduates pass Whites in rate of college enrollment. Retrieved from Pew Research Hispanic Center website: [www.pewhispanic.org/2013/05/09/hispanic-high-school-graduates-pass-whites-in-college-enrollment/](http://www.pewhispanic.org/2013/05/09/hispanic-high-school-graduates-pass-whites-in-college-enrollment/)
- Gándara, P. (2010). Overcoming triple segregation. *Educational Leadership*, 68(30), 60-64.
- Gándara, P. & Contreras, F. (2010). *The Latino education crisis: The consequences of failed school policies*. Cambridge, MA: Harvard University Press.
- Goldberg, D.T. (2009). *The threat of race: Reflections on racial neoliberalism*. Malden, MA: Blackwell Publishing.
- Gratz v. Bollinger et al., 539 U.S. 244 (2003).
- Grutter v. Bollinger et al., 539 U.S. 203 (2003).
- Oakes, J. (2005). *Keeping track* (2nd ed.). New Haven CT: Yale University Press.
- O'Neill, T.J. (1985). *Bakke & the politics of equality: Friends & foes in the classroom of litigation*. Middleton, CT: Wesleyan University Press.
- Patterson, O. (2005). On the provenance of diversity. *Yale Law & Policy Review*, 23(1), 51-63.
- Regents of the University of California v. Bakke, 98 S.Ct.2733 (1978).
- Santiago, D. (May, 2013). *Hispanic-serving institutions (HSIs): 2011 -12* Retrieved from <http://edexcelencia.org/research/hispanic-serving-institutions-hsis-fact-sheet-2011-12>.
- Schuetz v. Coalition to Defend Affirmative Action, 572 U.S. (2014).
- Smith, D.G. (2009). *Diversity's promise for higher education: Making it work*. Baltimore: The John Hopkins University Press.
- Solorzano, D.G., & Ornelas, A. (2002). A Critical Race Analysis of Advanced Placement Classes: A Case of Educational Inequities. *Journal of Latinos and Education*, 1(4), 215-229.
- Solorzano, D.G., Villalpando, O., & Oseguera, L. (2005). Educational Inequities and Latina/o Undergraduate Students in the United States: A Critical Race Analysis of Their Educational Progress. *Journal of Hispanic Higher Education*, 4, 272-294.
- Solorzano, D.G. & Yosso, T. (2002). A Critical Race Counterstory of Affirmative Action in Higher Education. *Equity and Excellence in Education*, 35, 155-168.
- Solorzano, D.G. & Yosso, T. (2000). Toward a critical race theory of Chicana and Chicano education. In C. Tejeda, C. Martinez, & Z. Leonardo (Eds.), *Charting terrains of Chicana(o)/Latina(o) education*. Cresskill,

NJ: Hampton Press, Inc.

St. John, E.P., Duan-Barnett, N., & Moronski-Chapman, K.M. (2013). *Public policy in higher education: Reframing strategies for preparation, access, and college success*. New York: Routledge. .

Villalpando, O. (2010). Latinas/os in higher education: Eligibility, enrollment, and educational attainment. In E.G. Murillo, S.A. Villenas, R.T. Galvan, J.S. Munoz, C. Martinez, M. Machado-Casas (Eds.), *Handbook of Latinos and education: Theory, research and practice* (pp. 232 – 249). Routledge: New York.

Yosso, T.J. (2005). Whose culture has capital? A critical race theory discussion of community cultural wealth *Race Ethnicity and Education*, 8(1), 69-91