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THE AFFIRMATIVE ACTION POLICY: A TALE OF TWO NATIONS AND THE IMPLEMENTATION CONUNDRUM

Kwame Badu ANTWI-BOASIAKO[1]

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The enforcement of affirmative action programs such as quotas has not only generated endless debate in many countries but has also encountered resistance from those, usually conservatives, who question the fairness of such a program or policy. Brazil and the United States of America are two of the destinations for enslaved people of African descent who were, on their arrival to their new countries, treated as second-class citizens and had to endure institutional, political, and legalized structural racism and discrimination in high education. This paper provides some of the definitions of affirmative action found in the literature and discusses the struggles of the Brazilian government is using to addressing past discrimination in university admissions. Some legal challenges of affirmative action policy regarding university admissions in the United States are provided to show the implementation conundrum of the policy. Despite the controversial nature of the policy the impact theory is utilized to predict the policy's possible benefits and outcomes.

Key words: public policy; slavery; affirmative action; discrimination; higher education.

1 INTRODUCTION

Using race as a factor in admission into a university in the United States of America has been a conundrum that has seen several court decisions on affirmative action.[2] While some of the court decisions might slightly contradict

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[2] The debate on using race as a factor in university admission seems to be fading off. There are several cases where the courts have ruled against universities using race as factor in college

previous court rulings, affirmative action is not a law in the US, however, public universities in Brazil, by law, have to utilize the quota-law in university admission for non-whites who were historically discriminated because of their race. The two main factors that have fuelled the affirmative action debate are as result of slavery and colonization where Europeans enslaved and took ownership of the properties of the natives: Brazil and the US.

European dominance of the world is not a new phenomenon, "For centuries, Europeans whose narratives are based on their own concept of how the world ought to be, have written on the politics of *non-European countries*, insisting on how *others (non-Europeans)* ought to behave to be accepted in the international community" (Antwi-Boasiako 2014, 38). According to Weatherby et al. (2011, 19), Europeans, or Westerners, believe they are "destined by history to act as the trustee for a less fortunate colonial world," which they terrorized for centuries. Historically, Westerners do not see anything evil about terrorizing weaker societies by forcing their religion, culture, and language on them including taking their lands. For example, the Native American Indian lands, in North America, would go to their new European settlers as they annexed lands and forced the natives onto reservations becoming prisoners on their own land (Geisler 2014). As President William McKinley, the 25th president of the United States, would justify "the annexation of the Philippines on the grounds that the United States would bring Christianity *and civilization* to the islands" (Zinn 1995, 305–306). In the same spirit, the Portuguese "had largely a free hand in Africa, Brazil, and parts of Asia" (Weatherby 2011, 19) while the Spanish spontaneously conquered the rest of the Americas and the Pacific. In all, the Europeans invaders saw the natives as lesser human beings and treated them as properties including the enslaved Africans who were imported to the occupied lands including north and south America: The US and Brazil.

However, there were attempts by some of these colonizers who terrorized their enslaved citizens to address the unfortunate barbaric issues of lynching, racism, and discrimination against their defenceless minorities and rightful land owners: The natives. One of the policies used by governments to addressing this historically legalized discrimination against minorities, particularly Blacks, is affirmative action, which faces resistance by conservative ideologues arguing that such a policy is not only unfair but it is a reverse discrimination against dominant groups. This conservative stance in both countries cements the notion that the slave masters knew that their policies were intentionally discriminatory. This paper looks at definitions of affirmative action policy as discussed in the literature, and how the United States and Brazil have attempted to use this policy to addressing past discrimination in higher education through university admissions. The impact theory is utilized to predict the possible impact of the affirmative action policy in the two countries. So how does policy affect change?

2 THE IMPORTANCE OF POLICY AS A TOOL OF CHANGE

Social scientists have various models and theories through which policy analyses are made in relation to decision making. The art of crafting policy is more of a process as it must involved various actors, if such a policy would be beneficial to society as a whole. However, because of ideological differences,

admissions.   See   http://www.ncsl.org/research/education/affirmative-action-court-decisions.aspx.

cultural background, including religious beliefs, enacting a policy has always and would continue to be a political conundrum. A good policy is likely to adopt the political system model where initial inputs to solving a problem are discussed before decisions are made. However, there are competing approaches to arriving at a policy decision through group, institutional, or elite theories (Anderson 2006, 18–24). None of these theories is seen as a panacea in solving a political issue, like racism and discrimination, but they provide guidelines in arriving at a decision or an outcome. So why is a policy to resolving racism, discrimination, and access to educational institutions become a problem? Categorization of policies helps to identify specificity and what issue is to be addressed. For this paper, we classify policy into substantive and procedural. Substantively, policies are involved in the future actions of government in addressing an issue or issues.

Unfortunately, substantive policy does provide advantages and disadvantages to different sections of society but the responsibility of who is going to take (implement) action becomes governmental or administrative procedural. It, therefore, leads to the creation of administrative directives specifying the "process and techniques that …can be use [*d*] in carrying out their programs (*policies*) (ibid., 10). Anderson sees policy as "a relatively stable, purposive course of action…dealing with a problem or matter of concern" (ibid., 18). While Kraft and Furlong (2007, 4) maintain that public policy by extension is what "governments choose to do or not to do about public problems." The authors insist that a problem is publicly recognized or perceived unacceptable condition, which needs government intervention. Given our understanding of public policy, as a tool of change to curb discrimination, racism, and university admissions, how useful is affirmative action? From a public policy perspective, there would always be a conflict over who gets what and when (Wilson 2006). Scholars have presented different definitions and approaches regarding public policy, however, they affirmed that a policy must distinguish between what governments will and will not do (Kraft and Furlong 2007). Hence it is the responsibility of both the American and Brazilian governments to identify how they want to address the issues of historical discrimination, which does not seem to go away in both countries. Theodoulou and Cahn (1995, 2) posit that addressing an issue of public concern through policy could involve both formal and informal actions, which means addressing discrimination in higher education could be the result of legislation, executive orders, rules, and regulations. The authors maintain that a policy must be an "intentional course of action with an accomplished end as its objective. Here, such a policy must be seen as the government activities that would a positive outputs and impact on the targeted recipients of the said policy.

3 AFFIRMATIVE ACTION POLICY: IS IT NECESSARY?

There have been historical trends to discourage discrimination through government policies and programs in many nations including the United States of America and Brazil. Despite the introduction of affirmative action in both countries, racism and discrimination still exists in many forms, particularly in the educational sector and law enforcement or the criminal justice system. Abel and Sementelli (2004, 91) see discrimination from a rather historical perspective of subjectivity. That means "oppression and social injustice are often the result of social and historical constructs. All such constructs are addressed to historical and not contemporary conditions...". So the demand for fairness and equality by minorities may be, according to the authors, buried in

history and not present conditions in both countries. While one may objectively concur with the authors premise it could be also argued that the persistence of social inequalities and injustices in the United States of America and Brazil could be explained through historical social systems and political structures that have not been fully deconstructed to reconstruct a system where all Brazilians and American citizens have equal opportunities in educational and the criminal justice system in both countries.

Understandably, capitalist societies allocate resources unequally among groups in an open market economy but racism, slavery, and colonization have caused persistent disadvantage for minorities. For example, in the United States, it was uncommon for blacks to be admitted into all white educational institutions. Racial segregation was not only common but also constitutional. For example, with the Civil Rights Act of 1866, all persons born in the United States, "with the exception of American Indians, were "declared to be citizens of the United States." It further states that all people had the right to "equal employment and accommodations... regardless of race or previous condition of servitude," but this did not provide enough teeth to cause any needed societal changes, and was eventually judged as unconstitutional in 1883 with regard toward private entities or individuals being required by the government to participate (Moore 2005, 76).

However, in a case of *Plessy v. Ferguson* (1896), the US Supreme Court did rule that "separate but equal" accommodations on railroad cars kowtowed to the Fourteenth Amendment's guarantee of equal protection. Unfortunately, but to the delight of conservatives, especially southerners in the United States of America, that decision became a legal tool to justify segregation in all public facilities, including schools. So from 1896 segregation had a solid constitutional backing until 1954 when in a case of *Brown v. Board of Education of Topeka, Kansas,* the US Supreme Court ruling declared segregation in public educational institutions unconstitutional. In 1957 the state of Arkansas, under its Governor, Orval Faubus, used the state National Guard to bar nine black students' entry into its all-white Little Rock Central High School. It took the US federal government and military to intervene for those students, the "Little Rock Nine" to attend school. Here, it was the wilful action of the US Federal government that desegregated the schools through military intervention. Affirmative action policy arguably, is also seen as intervention to ensure diversity and equality. Segregation socially created "unequal two-class society exacerbating extreme racism that condemns Blacks into deep poverty" (Duncan 1999, 188). An attempt is made here to look at this one policy, affirmative action, which has been used in the literature as one of the several interventions to confront discrimination, racism, social, and educational inequalities both countries.

4 TRACING THE GENESIS, POLITICS OF AFFIRMATIVE ACTION, AND SELECTED COURT CASES

As a policy, affirmative action has been something of an amalgamation of historical enigma, which lacks a solid coherent foundational framework but a combination of court decision, presidential executive orders, and administrative policies. Skrentny (1996) traces the roots of affirmation action to centuries of old English administrative practice to ensure justice for all citizens. As Skrentny noted the English administration was favoring just a section of the masses and others who were equally contributing to the up keep of the British Empire but were not enjoying equal benefits. Thus, it was only very few people, individuals

of European decent, who had access to certain amenities. How did affirmative action policy make it across the oceans to the Americas is a poser as the genesis of the policy in Brazil and the United States of America remains a perpetual conundrum. Nevertheless, the literature pins the origin of affirmative action in the United States, for example, to 1935 (Skrentny 1996; Tomasson, Crosby and Herzberger 2001). However, tracing the roots of affirmative action policy in Brazil dates back to the slavery period (Fausto 1999) but did not have the same political momentum as in the 2000s. Would the policy work through set aside quota in the higher educational systems of both countries? And what is the affirmative action? No matter how it is defined the interpretation can be political and controversial.

5 THE POLITICS AND LEGALITY OF A DEFINITION

Affirmative action in the United States and Brazil may be defined slightly differently however, regardless of which definition one works with, it tends to serve the same purpose. It is the amalgamation of intervention policies, set of laws, and administrative practices with the goal of ending and correcting the effects of a specific form of discrimination. The administrative practices may include but not limited to government-mandates, government-sanctions, and voluntary private programs that tend to focus on access to education specifically granting special consideration to historically excluded racial groups including women or non white males. Regarding admission into universities and higher education, affirmative action refers to admission policies that provide equal access to education for those groups that have been historically excluded or underrepresented, such as women and minorities.

The affirmative action literature lacks precise and concrete definition either in the legal or political arena. There are several schools of thought when it comes to defining affirmative action. This lack of consensus in the literature has encouraged each school to advance its agendum based on its ideological understanding of affirmative action. It should be noted that globally, "nations have some type of affirmative action policies in higher education admissions," which could relate to "caste, class, disability, ethnicity, gender, or race" (Moses et al. 2014, 11). Proponents of affirmative action mostly liberals, see beyond the legal definition and focus more into the matters of social justice and equal opportunity for all (ibid., 168-176). Even within this school of thought, while there may be variations in the definitions of affirmative action, the common denominator of proponents' definition is the use of policies and programs to eliminate underrepresentation of qualified people from certain groups and positions where their participation is discouraged. They see such a policy as improving diversity and inclusive approach to reflect the composition of the entire population.

Opponents, usually conservatives, on the contrary, see it as a system or situation of preference where some individuals, minorities especially, who are considered "less qualified," as the critics put it, get extra boost or points given their race. Simply put, critics and conservative ideologues see the 2012 Brazilian affirmative action – laws of quotas – policy as reverse discrimination against Whites who are presumed more qualified (Daflon et al. 2013). Conservatives, insist "that easing access to higher education denies the

principle of merit that brings excellence to universities."[3] According to Antonio Freitas, Provost of the Getulio Vargas Foundation, a private university in Brazil argues that the affirmative action quota policy "is bad for the future of Brazil, because the main objective of universities is research, is to achieve quality"[4] as a result of the implementation of the policy "eventually you may not have the most qualified people in engineering, in medical school, in the most challenging areas which Brazil needs to develop" (Carneiro 2013).

Admittedly, affirmative action policies can influence college admission procedures as well as addressing the issue of under unutilized population in the public sector or educational departments (Francis and Tannuri-Pianto 2012). Moore (2005) noted that many organizations do internal self-study to determining whether "utilization falls short of the available pools of talent" (Crosby et al. 2006, 587). If the numbers reveal that, for example, qualified women and people of colour are underutilized, then the organisation must establish goals and plans to correct the problem. However, the U.S. Supreme Court decision has forbidden the use of strong preferential treatment or strict quotas, as opponents of the affirmative action policy view the quota laws as preferential treatment for the less qualified students. The Court ordered the Equal Opportunity Act of 1974, which empowers federal courts to require organisations guilty of discrimination to use affirmative action. Crosby et al. noted that organisations and educational institutions often implement voluntary affirmative action policy, even though the federal government may not mandate such an action. This was the practice of some the universities in Brazil before the quota laws of 2012. Well noted among those universities was The Federal University of Rio de Janeiro (*Universidad Federal do Rio de Janeiro*, UFRJ). For the affirmative action policy to be seen as a good policy, according to Wilson (2006), it must reflect the actions of what the government plans to achieve in the long run.

Liberals, usually supporters of affirmative action policy, believe that it helps with issues such as social justice, and equal opportunity. However, as Salinas (2003) noted, critics of affirmative action view it as a way for people who are less qualified to get preferential treatment. Affirmative action is supported by the idea of diversity, and educators focus on the increased diversity aspect rather than merit. Diversity in education has many benefits. Universities with diverse student population expose individuals to new perspectives, allowing them to engage in deeper and more complex learning situation. It also prepares students for future interactions in an increasingly diverse society and increases the likelihood that students will seek out more diversely integrated communities while helping to bring social stability in society (Crosby et al. 2003). Rice (2010) discussed the importance of diversity in the public sector. He found out that in the public sector minority representation decreases as rank (or grade) increases. Rice maintains that minority representations in the public sector top grades is dim, hence the need for more minorities entering high education.

For educational admissions, students get accepted based on merit, which is usually based on standardized testing. However, this does not show how much

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[3] See BBC News, August 31, 2013: Issue No, 285: Brazil: Universities take affirmative action. Available at http://www.bbc.com/news/business-23862676.

[4] Not only do some conservatives see affirmative action as reversed discrimination but they believe that the quota policy reverses the progress of Brazil: Antonio Freitas insist it is a backward trend, which sees Brazil on the wrong path while others argue that the affirmative action policy is in the right direction. See http://reiffcenterblog.cnu.edu/2016/02/a-step-in-the-right-direction-affirmative-action-in-universities-in-brazil/.

students progressed through their education. To determine merit, it is important to know where an individual started, not just where that person ended up. Affirmative action policy tries to level the playing field and attempts to take into account pre-existing historical differences in access to resources, educational opportunities, socioeconomic status, "and a lot of other social and cultural factors… Affirmative Action, therefore, can be defined in this vein merely as an attempt to correct the systematic error that exists in our subjective evaluation of merit" (Crosby et al. 2003, 12). If minorities had the same access to resources as dominate groups do, then their representation in top colleges and higher management should be similar to that of their percentages in the population (Salinas 2003).

6 AFFIRMATIVE ACTION AND SLAVERY

Brazil, like the United States, is one of the popular final destinations of enslaved Africans. Brazil was Portuguese colony, whose geographical location availed it for European sailors. Unlike other colonies in the Americas, Brazil was the only Portuguese colony on the American continent (Bernardino-Costa and Rosa 2013, 183–184).

Colonized Brazil, like in the ancient India Caste[5] system and the United States had a social structure that segregated its people based on the colour of their skin (Matthews 2002). The Portuguese, like the Americans, saw their race (whiteness) as pure and superior; therefore people of non-European descent were considered inferior, unintelligent, uncouth, and second-class citizens including the natives (Duncan 1999). As Bernardino-Costa and Rosa noted after the Sexagenarian Law of 1885, Brazil tried to get rid of Black slaves, just as the United States wanted to resettle Black slaves back in Liberia,[6] Africa, and allow European migrant workers to *whiten* the populations of the two countries. This was an attempt to replace the so-called "inferior Blacks" from Brazil and the United States. According to the authors, "this migration was not only a solution to the labour problem but also an opportunity to whiten-and therefore" as they put it, "civilize- the country, since science[7] claimed that Whites were superior to non-whites: that is Blacks…" (Bernardino-Costa and Rosa 2013, 185). This brief

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[5] The India caste system was by and large based on occupation rather than skin color but the reference made here is to show how historically people were identified based on social segregation. See the History of India's Caste System, available at http://asianhistory.about.com/od/india/p/indiancastesystem.htm. See also Perez (2004).

[6] There was an attempt to whiten the United States population therefore a movement, the American Colonization Society (ACS) in the 1800s wanted to resettle all the freed slaves back to Africa since the slave masters saw the growing number of the Black population as a threat and problem for the Whites. See the Founding of Liberia in 1847, available at https://history.state.gov/milestones/1830-1860/liberia. The ACS also wanted to export the freed slaves to the Caribbean Islands including Haiti depriving the Blacks their birthrights. See https://psmag.com/remember-that-time-abraham-lincoln-tried-to-get-the-slaves-to-leave-america-c73fd238eaff#.4712gvmxg.

[7] It is rather unfortunate but there are several white studies that claim Blacks are "less intelligent" and cannot sustain European civilization. This is a debate arguable many people would not want to discuss it openly but there are evidence in the literature to support this claim while others think its Biblical and creation of God: The so-called famed historian Arnold Toynbee (1934, 15) wrote in his history book: "It will be seen that when we classify mankind by color, the only primary race that has not made a creative contribution to any civilization is the Black race." See Christianity and Faith, available at http://www.christianityandrace.org/p/black-and-iq-distribution-jesus-said.html and also see Fur at DNA pioneer's theory: Africans are less intelligent than Westerners, available at http://www.independent.co.uk/news/science/fury-at-dna-pioneers-theory-africans-are-less-intelligent-than-westerners-394898.html.

history tried to depict what minorities went through in both countries and arguably, this discriminatory attitude has not completely evaporated.

Discrimination against minorities is not a new phenomenon. In the United States of America, for example, punishing or lynching a slave or descendants of African slaves was not uncommon (Matthews 2002) and the story was not different in Brazil. According to Krueger (2002), African slaves in Brazil were just tools for production just as in the United States of America, they worked "constantly to please the master's desires...And if a slave ever dared to run away, they'd come after him, and with a very sharp knife they'd puncture the soles of his feet...During slavery, the Brazilian slaves were prohibited from wearing footwear" (Krueger 2002, 174). In his article, *Brazilian slaves represented in their own words, slavery & abolition,* Krueger qualitatively chronicles the deliberate atrocities committed on Black slaves and how they were prevented from enjoying certain things as human being including good education. For example, as Humphries (1995) noted, in the earlier days of the United States of America, it was a crime for Blacks to have formal education. Recounting in their own words, Krueger noted the plight of a slave who echoed his life in a typical day, "I was soon placed at hard labour, such as none but slaves and horses are put to... I was compelled to carry them [stones] that were so heavy it took three men to raise them to my head ... I was then sent out to sell bread for my master ... the lash was my portion..." (Krueger 2002, 179). Given this legitimated cruelty of the slave masters, which was constitutionally (legally) acceptable, governments however, attempted to address issues of discrimination against minorities especially after the abolishing of slavery in both countries.

7 AFFIRMATIVE ACTION WHO'S INTERPRETATION WORKS?

While Brazilian affirmation action policy on education dominantly focuses on the quota-based approach to addressing access to higher educational institutions, the term can also refer to any collection of programs, incentives, and policies "designed to remedy the present effects or past discrimination" (Chun and Evans 2015, 1). It is also seen as "a set of positive anti-discrimination policies, stemming largely from a series of Executive Orders, intended to include stigmatized groups in preferred positions of society, aims to promote institutional desegregation" (Aja and Bustillo 2015, 27). Our understanding of affirmative action relies on a revised version of the universal principle of equality where the state is to recognize the differences and redress the vulnerabilities of social groups through corrective programs (Cicalo 2012, 3–7). Theoretically, it brings to mind the works of John Rawls (2001) who argues for *justice of fairness.* This theory, which is supported largely by civil rights movements across nations, is equality through difference and also popular among liberals (Kymlicka and Norman 2000). This means conservative ideologues are more likely to reject or resist affirmative action policy. Politically, issues concerning affirmative action, like immigration, religion, and abortion tend to divide Americans and Brazilians into ideological compartments: Conservatives/Liberals.

Such a divide is sometimes so deep that opponents and supporters of affirmative action fail to critically analyse each other's argument and line of reasoning. This unfortunate impasse is not uncommon in American and Brazilian legislative chambers. Conservatives are by no means ignorant of the historical atrocities against minorities in the United States and Brazil. The

Portuguese (white) injustices meted out to the minority are abundant in the literature, and it would be very myopic on the part of the resisters to argue otherwise. Matthews (2002) also argues how minorities in the United States lived under the mercy of the people European decent (whites). In fact, he goes further to show minorities who were regularly reduced to second-class citizens were publicly lynched and education was never on the horizon for minorities. When it comes to education, the conservative argument in both nations have come a long way to end discrimination and therefore the affirmative action policy may rather bring divisions among the populations with such racial distinctions and quotas, which is likely to help just a section of the population and in the long run may not be beneficial to all.

To the conservative school of thought, these two countries are more or less capitalist societies where the individual must be competitive in their dealings to earn a living. Such individualistic attitudes of capitalism help build a nation for prosperity. What conservative narratives fail to factor into their analyses are the everlasting impact of slavery and colonization and institutional structures that have held back minorities for centuries. Despite this assertion, it is difficult to characterize Brazilian or American politics into solely conservative or liberal ideology. The desire to dichotomize and explain issues on the basis of *we versus them or the other* tends to eclipse the substance and outcomes of a genuinely constructive debate on issues like discrimination in education, the quota system, and race, which are of national interest to all. It is unfortunate that the literature dichotomizes policy issues where such categorization limits the voices of the other segments of the population, who may not want to identify themselves with either of the two schools of thought but have valuable inputs to contribute on those issues. The argument for affirmative action policy or the quota laws in Brazilian educational system, for example, needs a critical examination and an in-depth analysis rather than the current assumption that those who resist the policy of favouring minorities are racists or conservative ideologues. Conservatives understand integrations, but such a mix should be done on competitive basis and not reserving quotas for the less qualified.

8 MEASURING AND ASSESSING AFFIRMATIVE ACTION METHODS

Garrison-Wade and Lewis used seven objectives to measure affirmative action methods and policies: These included, all possible outcomes, social factors, fluidity of challenges and perceptions, validity of measures, review of the original goals of the program, and the ability of the entity to fulfil their anti-discriminatory method. The authors, emphasised on outcomes argued "The anticipated outcomes of affirmative action policies include improved educational opportunities for students regardless of race or gender, increased diversity in enrolment, and positive effects of both learning and democratic outcomes" (Garrison-Wade and Lewis 2003, 3).

Even though Brazil is lawfully using the quota system for admission into universities, this methodological approach has been considered illegal in the United States of America. However, the University of California has demonstrated multiple affirmative action methods that include high school outreach programs, "focus on achievement over aptitude testing, admissions emphasis on how students have faced negative circumstances, eligibility under high graduation percentage plans, and guaranteed admission plans based upon community college course requirements" (Kaufman 2007, 6). As an example of support for preference style affirmative action, during a conflict at the

University of Michigan in 2000, the argument was made that "if legacies, athletes, and other groups deemed beneficial to the university were given preferential treatment so too could minority groups (Aja and Bustill 2015, 38). Attention is brought to the unique characteristic of this proactive types of affirmative action, which is argued as why they prove more effective than others, by "the fact that it is the only means of correcting injustices in the United States that does not rely on the aggrieved parties to come forward on their own behalf" (Crosby et al. 2006, 592). According to the authors, this distinction is made between equal opportunity initiatives, which is considered reactive on discrimination is detective, while affirmative action incentives such as admissions policies and outreach programs are reaction are proactive, or rather avert to discrimination.

9 AFFIRMATIVE ACTION AND UNIVERSITY ADMISSION IN BRAZIL

Affirmative action policies in Brazil would exist to benefit the majority of the population, as non-whites are now more than whites.[8] According to Davis (2014, 74), "over half of Brazil's population was classified as non-white: either as Blacks (6.9%) or mixed, commonly known as *pardo* (44.2%)." He noted that while nearly two-thirds of white students go to college, less than one-third of non-white students are able to gain admission. The author posits that of the total college graduates in 2009, 4.7% were Blacks and 5.3% were mixed. In fact, descendants of Africans make up a significant proportion (46.5%) of the Brazilian population. "Yet they have a very low representation in *High Education*, where they comprise under 20% of the total student population" (McCowan 2007, 591).

Higher socio-economic groups, usually whites, in Brazil have the best access to higher education opportunities. This is due to the limited spots within public universities, where entrance is determined by the *vestibulares*, which give those with high quality secondary education a better chance. Higher education enrolment in Brazil has been increasing steadily since the 1990s. This increase has led to a considerable growth in the private universities, but most Brazilian students cannot afford the tuition and fees of for-profit private universities. At public universities nearly 8.4 candidates do apply for each spot, while there are 1.5 applications per spot at private universities (McCowan 2007, 584–585). Thus nearly 38% of private universities vacancies go unfilled (INEP 2004) while the public universities, where tuition is free, are not able to accommodate all their applicants. Interestingly, the free public universities are arguably superior to private universities, so that the students who are enrolled in public universities disproportionately come from the private high schools that Brazil's privileged classes attend. Unfortunately, poor Brazilians attend the poorly resourced public schools, and those who graduate and go on to college predominately go to private universities, which account for 70% of higher education students in Brazil (Paixão and Carvano 2008).[9]

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[8] Minorities in Brazil are now becoming the majority and the white population is gradually dwindling. See data from 2010 Brazil census, available at http://www.bbc.com/news/world-latin-america-15766840.
[9] See also Edward Telles and Marcelo Paixao (2013).

10 THE RACE CONUNDRUM IN BRAZIL AND THE UNITED STATE

The use of affirmative action policy in any educational system is problematic on many grounds, in that any use of racial categorization in decision-making is socially harmful. Racism has been damaging to every fabric of society, and any attempt to eliminate the problems that racial discrimination and racial differences have created has become legally and politically challenging. Universities in both countries have struggled to correct historical discrimination in their educational systems regarding race but continue to face resistance from those who reject the idea that race is used as a variable for university admission.

The State University of Campinas in São Paulo State (Unicamp), applied an *Affirmative Action and Social Inclusion Program* (PAAIS) to its national *Vestibular* (Davis 2014). It also expanded the definition of merit to include individual experiences and differences in addition to *vestibular* scores. Affirmative action policies are difficult to implement in Brazil due to the complexity of defining race. It's difficult to determine race in Brazil by ancestry, because almost everyone has some traces of African descent. While the US has 6 categories to classify race, such simple classification in Brazil is extremely difficulty (Loveman, Muniz and Bailey 2012). Moore (2005, 49) makes the claim that if schools " are unable to maintain diversity among their student bodies and faculty, the goal of an equitable society will not be realized; this ties into the American cultural belief and social structure where it is the educated members of society who set and make the most important societal and cultural decisions and standards. If the educated population is not representative to the American populace, then populations not represented will be at a great disadvantage at the end of the day.

Schwartzman (2008) noted that affirmative action policies that rely exclusively on the *Negro* label may be excluding many lighter-skinned Afro-Brazilians who may still suffer disadvantages based on skin colour, but who tend to classify themselves as *pardo.* Through the affirmative action policy, universities may be admitting students from a relatively well-off segment of the population, who are disproportionately likely to come from "multi-racial" families and therefore might have a wider *realm of possibility* in their choice of labels. Schwartzman insists the problem with access to higher education cannot be solved by just having quotas in the universities because many Brazilians do not even qualify for admission to universities. He further argues that the public pre-university institutions are weak and mostly attended by the poor. Whites and privileged send their kids to private secondary schools where they are more likely to obtain higher entrance scores to get into public universities for free. There is the need to improve primary and secondary education in Brazil for the public schools to be able to compete with private schools on entrance exams. How can this be done? The next section uses the impact theory to discuss how the quota law may improve not only the educational system in Brazil but also its effect on the public as a whole in the long run.

11 HIGHER EDUCATION FROM THE BOTTOM UP: THE DISPARATE IMPACT THEORY

There are several theories to justify or reverse historical discrimination but "The most common theory of discrimination, referred to as *disparate* treatment, occurs when there is evidence of discriminatory intent in the employment decision in question" (Pyburn et al. 2008, 145). The disparate impact theory states that employment, housing, and other areas such as education can be considered discriminatory and illegal if a policy has an unequal and negative impact on people of a protected class. This theory initially arose to deal with specific practices that maintained past and intentional discriminations. Even though the theory does not require evidence, it has been justified based on the difficulty of being able to prove intentional discrimination as a result of past policies seen as the status quo. The United States of America and Brazil historically and intentionally had policies that were discriminatory against the descendants of slaves, where access to education and accommodation were denied because of their colour.

Nations will only be successful if the whole educational system is reformed especially at the elementary and secondary levels. It would be too "difficult for any university system to correct inequalities developed through the previous years of schooling" (McCowan 2007, 581). Under prepared university candidates retards the steady progress of instructions at the university level. There were few proposals in Brazil for the Federal government to get involved in affirmative action for the universities. One of the proposal "would oblige all federal universities to set aside half of their places for students from public schools, some of which would be reserved for African Brazilians and indigenous peoples depending on the proportions of these groups in the state in which the university is located" (ibid., 591). Another proposal suggests replacing the *vestibular* exam with results from the ENEM, which was an existing assessment. This was to remove the need for students to take pre-vestibular courses, which were not available to everyone as a result of affordability (finance). It was also suggested distant education might help accommodate the large number of applicants to universities in Brazil. This would help universities admit more students without increasing expenditures. McCowan noted that by encouraging distant education such an approach might increase enrolment at lower costs and provide access to higher education for students in more remote areas. While the Ping-Pong debate over the affirmative action or the quota system did draw attention at various states since 1999, the highest court of the land moved in decisively to end the racial ideological battle on university admissions.

In April 2012, the Brazilian Supreme Court recognized the constitutionality of racial quotas in universities, and unanimously approved the Affirmative Action Law. In arriving at their decision, the Justices argued that the federal government has the ability to correct past discriminations to ensure diverse community in universities across the country to achieving a more equal opportunities for all Brazilians. Pouncing on the Supreme Court's decision, President Dilma Rousseff, the 36th President of Brazil, enacted an affirmative action program, called the "Law of Social Quotas" on August 29, 2012. This law requires federal public universities to reserve half of their admissions to students from characteristically poor public high schools, and half of those positions for low-income families or for those who declare themselves as Black, mixed, indigenous or natives.

Even though using affirmative action, as part of university admission is not new in Brazil, it became law of the land in 2012. This means it is too early to access the full impact of the law as presented. However, a full impact of the law is predicted here using the impact theory. This theory was first set forth in the 1970s with the idea that there was a catastrophic collision between the earth and protoplanet some billions years ago. This, according to Matson (2012), resulted in the formation of the moon: While the celestial formation is not the focus, and beyond the scope of, this paper, the genesis and the understanding of the impact theory is borrowed here as used in the study of program and policy evaluation (Binghan and Felbinger 2002). In program evaluation, the impact theory is used to evaluate an end result or the impact a policy had in addressing an issue: Political, social, education or economic. Rossi et al. (2004) describe impact theory as a cause-and-effect sequence in which certain program activities are instigating causes and certain social benefiting the effects they eventually produce.

Given such a broad understanding of the impact theory as presented above, it is used here as the conceptual framework to predict that the Brazilian affirmative action program as directed by the Brazilian Federal Government, after its implementation is more likely to raise the educational credentials of Blacks in Brazil.

12 CONCLUSION

One of the main policies that governments use to address discrimination is affirmative action, which seeks to provide equal opportunities to minorities in government, employment, and education. Issues, such as affirmative action, religion, and abortion divide conservative and liberal on ideological lines, so it is important to understand both sides of the argument in practical terms. Supporters of affirmative action argue that the policy helps with social issues and encourages a diverse society while opponents insist that the policy will lower the educational standards to only benefit certain groups, which would not benefit society in the long run. However, by neglecting the impact of slavery and colonization in both countries, one is forced to accept the historical status quo as the socially putative norm. The discriminatory political and educational structures in countries that engaged in slavery and colonization are such that it is almost impossible to dismantle them. Affirmative action, arguably, is to promote social equality through the preferential treatment for the historically disadvantaged as a result of oppression, colonization, or slavery. However, opponents reject such preferential treatment for minorities. Despite the fact that affirmative action debates are fading in the United States, it has gathered momentum in Brazil. It is argued that selecting someone into a university, primarily on the basis of their colour other than their actual qualifications can be counterproductive to society as a whole.

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