Public Discourse versus Public Policy:
Latinas/os, Affirmative Action, and the Court of Public Opinion

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Abstract

The purpose of this article is to highlight the power of popular discourse in shaping public policy debates concerning educational access and opportunity for historically marginalized and minoritized students, especially for Latinas/os. I argue that proponents of race-conscious policies would do well to challenge the elimination of affirmative action by employing a more critical approach to discourse consumption, one which interrogates, historicizes, and contextualizes the often truncated and/or deceptive narratives relied upon by critics of affirmative action, to call for the end of all race-conscious social policy.

Introduction

The future of affirmative action in higher education for historically underrepresented students, including Latinas/os, may well hinge on how critically scholars, policymakers, practitioners, as well as the general public interrogate public discourses and public narratives framing educational policy-making decisions. Even as the Supreme Court's majority opinion in the University of Michigan's Law School case *Grutter v. Bollinger* (2003) continues to uphold the limited use of race in university admissions, the High Court's plurality decision in *Schuette v. Coalition to Defend Affirmative Action* (2014) is poised to open the door for critics of affirmative action to launch focused, frequently misleading, attacks on these policies with the end goal of eliminating all race-conscious practices. *Schuette* (2014) grants states permission to curtail and/or terminate the use of race-conscious policy via ballot initiative and/or constitutional amendment. This strategy, to use the political process of voter approved ballot initiatives and/or constitutional amendments, to legislate the end of race-conscious affirmative action policies, serves to showcase the importance of the court of public opinion.

The purpose of this article is to highlight the power of popular discourse in shaping public policy debates concerning educational access and opportunity for historically marginalized and minoritized students, especially for Latinas/os. Revisiting California's anti-immigrant and anti-Latina/o propositions of the 1990s provides one example to showcase how public discourse manipulation, informed by racist nativism, helped sideline educational opportunities for Latina/o students within a state that houses the largest Latina/o population in the nation (Brown & Lopez, 2013). Studying Supreme Court Justice Sonia Sotomayor's nomination and confirmation process provides another example of how the power of public narrative shapes perceptions about Latinas/os and educational attainment. Finally, in the wake of a resurgent movement towards colorblindness, I review how new narratives around educational opportunity in California and elsewhere, have worked to pit historically marginalized communities against one-another while at the same time deflecting attention away from the real problem of white supremacy. In the end I argue that proponents of race-conscious policies would do well to challenge the elimination of affirmative action by employing a more critical approach to discourse consumption, one which interrogates, historicizes, and contextualizes the often truncated and/or deceptive narratives relied upon by critics of affirmative action, to call for the end of all race-conscious social policy. I began this examination by addressing the importance of a critical discourse analysis approach when reviewing, debating, and deciding race-conscious public policy.

Critical Discourse Analysis, Framing, and Reading Race

Discourse scholars (Fairclough, 2013; Fairclough & Fairclough, 2012; Lemke, 1995; van Dijk, 1993) have observed that a key function of analyzing language and studying discourse is to uncover, name, and confront social

inequities. Discourse analysts also posit that the use of language is always strategic. As Lemke (1995) explains, language does not operate in isolation; rather, we give language meaning in contexts and social expectations by the manner in which we use it. Consequently, texts take meaning and convey power. The textual is always political. Per Lemke (1995),

> Discourses do not just function ideologically as identity kits or to obtain 'goods.' They also function to legitimate, naturalize or disguise the inequities they sustain. They function to get us thinking along particular lines, the lines of a common sense, which are not as likely to lead to subversive conclusions as using some other discourses might. (p. 13)

In summary, as Gee (2011) succinctly points out, "discourse analysis is the study of language-in-use" (p. 8). And while there are different approaches to discourse analysis, they all suggest that the use of language is *always purposeful*, especially in public forums and public debates. Indeed, even in the most benign of circumstances language may be considered a powerful weapon. However, in the case of addressing highly politicized and controversial topics, such as race-conscious affirmative action, understanding how language is deployed and operationalized becomes just as important as understanding the issue(s) being addressed.

Early on, Bolinger (1980) pointed out that "political propaganda is a battleground of good- and bad-naming" (p. 119). He added, "The struggle between the haves and the have-nots brings a new confrontation of word-images in every generation" (Bolinger, 1980). Bolinger's observations, rooted in history, are reflected in the founding of this nation where poor, marginalized, and otherwise disempowered and minoritized communities, especially Latinas/os, have always been subjected to *othering* (Zinn, 2011). As an example, we may look to the perennial immigration debate, in which undocumented persons are labeled, and in the process dehumanized, by the application of the term "illegal." As Lakoff and Ferguson (2006) explain, the reliance on the term illegal is deliberate and meant to evoke specific frames. They contend, "Illegal," used as an adjective in "illegal immigrants" and "illegal aliens," or simply as a noun in in "illegals" defines the immigrants as criminals, as if they were inherently bad people. In conservative doctrine, those who break laws must be punished—or all law and order will break down. Failure to punish is immoral (Lakoff & Ferguson, 2006, p. 3).

Fairclough (2013) also clarifies, "Discourse types and orders of discourse vary across cultures. But in such gatekeeping encounters [such as immigration and education policy decisions], white middle-class gatekeepers are likely to constrain the discourse types which can be drawn upon to those of the dominant cultural grouping" (p. 40). In other words, the use of specific trigger words and imagery is not accidental in debates addressing highly politicized and controversial topics. And those that hold power are often in the position to frame and shape these narratives. For example, while promoting his party's ticket during the 2012 Presidential race, Republican Vice-Presidential Candidate Paul Ryan drew fire upon presenting his budgetary proposal. Critiquing the supposed growth of financial "entitlement" programs, including welfare subsidies, Ryan declared, "We're going to a majority of takers versus makers" (Chait, 2013, para 5).[13] Commentators contended that Ryan's phrasing, implying an "us" versus "them" mentality, was laced with racial innuendo and suggested the need to protect financial entitlements for those who truly *deserve* them (Corn, 2014). Likewise, in the debate over admissions into the nation's most elite and selective institutions, critics of affirmative action have sought to differentiate between those students (i.e. students of color, including Latinas/os) who are perceived to "take away" admissions opportunities from those students (i.e. white students) who "deserve admissions" (read, rightfully earned) admissions.

Lakoff's (2004) explorations into the power of language and framing are particularly relevant in debates over affirmative action. As Lakoff (2004) explains, "Framing is about getting language that fits your worldview. It is not just language. The ideas are primary—and language carries those ideas, evokes those ideas" (p. 4). In the case of a policy like affirmative action, opponents have come to rely upon ahistorical and acontextual narrative framings, which in turn often serve to elicit heightened visceral responses (Ledesma, 2013). Indeed, as numerous scholars (Armour, 1997; Crenshaw, 2007; Haney López, 2014) have uncovered, narratives around affirmative action are too often presented utilizing color-blind frames. Such frames strategically bypass any significant analysis of the legacy of race and racism that has necessitated the need for affirmative action programs

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13. Ryan stated, "Right now about 60 percent of the American people get more benefits in dollar value from the federal government than they pay back in taxes. So we're going to a majority of takers versus makers" (Chait, 2013).

in the first place; ignoring the need for corrective action, critics of affirmative action can focus on casting affirmative action policies as nothing more than "unmeritocratic" "preferences" for "underqualified" students of color. Another common anti-affirmative action trope relies on positioning African-American, American Indian, and Latina/o students as "preferred minorities" while casting white and Asian-American students as "victims" of race-conscious practices (Thernstrom & Thernstrom, 1997). This trope is problematic on multiple levels, not the least of which is the tendency to essentialize racial minority groups into monoliths, ignoring how unique ethnic and/or cultural differences distinguish students' educational opportunities and trajectories. For instance, despite sharing the label "Latinas/os," a first-generation Chicana/o student is very likely to have a distinctly different educational experience from a second- or third-generation Cuban student. Likewise, in spite of falling under the same "Asian American" veil, a Chinese student's educational experience will almost certainly differ from those of a Vietnamese or Hmong student. However, an additional criticism of this strategy rests on the fact that by pitting students of color against each other, dominant issues of structural racism and white supremacy are obfuscated.

Haley and Sidanius (2006) make clear that "past research has repeatedly shown that the popularity of affirmative action programs can radically rise or decline depending on how the term 'affirmative action' is framed and/or what specific policy is under consideration" (p. 657). In the debate over the future of affirmative action, proponents of the policy support its continuance by citing frames such as inequality, fairness, and opportunity, while opponents rely on frames that describe the policy using terms like mis-match, reverse discrimination, preference or/and stigma (Ledesma, 2015). Unfortunately, when it comes to a policy as controversial as affirmative action, critics of the policy most often depend on incomplete and/or inaccurate language, including ahistorical and acontextual narratives, to criticize the policy and call for its end (Crenshaw, 2007; Ledesma, 2013; Kennedy, 1986).

Long ago, Kennedy (1986) emphasized the importance of acknowledging the use of both overt and covert discourse in affirmative action debates. He emphasized that,

> …the affirmative action debate cannot be understood without acknowledging simultaneously the force of the openly stated arguments for and against preferential treatment and the submerged intuitions that disguise themselves in these arguments. To disregard either of these features of the debate is to ignore an essential aspect of the controversy. To appreciate both is to recognize the frustrating complexity of our racial situation. (Kennedy, 1986, p. 1328)

Close to three decades after Kennedy's original observation, the frustrating complexity surrounding affirmative action has only intensified. All of which contribute to what Crenshaw (2007) has come to describe as the "distorted discourse around affirmative action" (p. 129). For scholars, educational leaders, policymakers, and practitioners, as well as the general public, concerned with educational equity and social justice, deciphering this distorted discourse, in both its overt and covert forms, is absolutely imperative if we ever hope to have an honest conversation addressing educational equity and social justice. To emphasize this point, I revisit how discourse helped reshape the educational landscape for Latinas/os in California, an effect we are still living with today.

Public Discourse vs. Public Policy: California as a Case Study

The reliance on discourse manipulation as a force to drive public policy initiatives is nothing new. In California, a decade of nativist rhetoric helped produce social policies which would come to redefine issues of access and equity in public education, especially for Latina/o students. In the 1990s, California passed the first in a series of what some viewed as seemingly "progressive" propositions, which sought to uphold and protect individual rights. Beginning in 1994, voters passed Proposition 187, otherwise known as "The Save Our State Initiative," or "S.O.S." for short. Proponents of Proposition 187 sought to restrict social services for undocumented immigrants residing in the state, aiming their attack on California's Mexican immigrant population. Resorting to divisive politics and discourse manipulation, anti-immigration pundits characterized undocumented immigrants as "criminal" and "unlawful" by airing sensationalized television ads, which portrayed Mexican immigrant *hordes* swarming across the border (Santa Ana, 2002). In his study of newspaper articles

covering the Proposition 187 campaign, Santa Ana (2002) observed how "the metaphorization of the immigrant in public discourse" (p.68) was dominated by textual and visual narratives of Mexican immigrants "flooding" into and "invading" California. These narratives depicted Mexican immigrants in one-dimensional fashion, as devious law-breakers.

Indeed, media coverage leading up to and after President Barack Obama's 2014 proposed executive action on immigration confirms Lakoff and Ferguson's observations.[14] Contemporary immigration debates continue to stir-up resurgent anti-immigrant, anti-Latina/o narratives, framing Latina/o immigrants as unlawful perpetual foreigners. For example, as community leaders, politicians, education and health professionals attempted to respond to the humanitarian crisis, which in the summer of 2014 saw tens of thousands of Latina/o children crossing the U.S. border to seek asylum from the war-torn and poverty ridden conditions in their Central American homelands, critics contended that these children were nothing more than criminals. As detailed by Santana (2014), conservative Republicans seized this opportunity to paint "Latino immigrants as Ebola carriers to fan the anti-immigration reform movement" (para 1). Citing a letter written by Georgia Republican, and medical doctor, Phil Gingrey, Santana recounts how Gingrey cautioned the Director of the Center for Disease Control and Prevention about 'Reports of illegal migrants carrying deadly diseases such as swine flu, dengue fever, Ebola virus and tuberculosis' (Santana, 2014, para 10). This "Ebolification of immigration reform" (Santana, 2014), in turn, served to perpetuate anti-immigrant sentiments and stereotypes. And while the most outspoken responses have quelled, they have not disappeared entirely. More recently, Alabama Republican Mo Brooks speculated that "illegal immigrants" might be to blame for a high-profile measles outbreak in California. Brooks declared, "I don't think there is any health care professional who has examined the facts who could honestly say that Americans have not died because the disease is brought into America by illegal aliens who are not properly health case screened, as lawful immigrants are…" (Reilly, 2015, para 3). This anti-immigrant rhetoric ebbs and flows, but it is never too far away from discussions around public policy.

Just two years after passage of the anti-immigrant Proposition 187, California voters approved Proposition 209, "The California Civil Rights Initiative," which brought an end to race-conscious affirmative action in public hiring, public contracting, and public higher education. The *California Civil Rights Initiative's* title alone served to confuse many would-be affirmative action supporters into voting against the policy. And while Proposition 209 was not exclusively targeting Californian's Latina/o population, since its passage in 1996 it has worked to chill the aspirations of a great number of students of color seeking admission into the University of California system (Kidder, 2013). In 1998, Proposition 227, "The English for the Children Initiative," followed with the intent to do away with bilingual education. Proposition 227 specifically targeted Spanish and bilingual education, and aimed to finalize the unfinished work of Proposition 187, which by this time found itself in legal limbo.

In each case, the authors of these propositions used strategic language and discourse manipulation to help sway public opinion in support of their initiatives. As Bowler, Nicholson, and Segura (2006) observed, "Voting for the initiatives had strong racial and partisan dimensions, further underscoring their salience and widespread voter understanding" (p. 149). Despite the fact that the authors of these propositions hailed overwhelmingly from conservative backgrounds, they strategically worded the proposals borrowing from traditional civil rights discourse. As a result, recounting the passage of Proposition 209, Chávez (1998) explains:

> When voters walked into the booth in November 1996, they wouldn't be asked to dump affirmative action. They would be asked to support an initiative that prohibited the state from 'discriminating against, or granting preferential treatment to, any individual or group, on the basis of race or gender. Who could disagree with such an exalted principle? The proposal sounded as if it had been written by Martin Luther King Jr. himself. (p. 80)

Chávez's analysis exemplifies the power of discourse manipulation. Opponents of affirmative action intentionally relied on traditional civil rights language to call for the end of race-conscious policies.

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14. In November 2014, President Obama announced executive actions on immigration, wherein he expanded the population eligible for the Deferred Action for Childhood Arrivals (DACA); made allowances for parents of U.S. citizens and permanent residents to request deferred action and authorization for employment through a new Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA); expanded the use of provisional waivers to allow for the presence of "unlawful" spouses and children of lawful permanent residents and U.S. citizens; modernized and improved the immigrant/non-immigrant visa programs; and, promoted citizenship education and public awareness for lawful permanent residents (see http://www.uscis.gov/immigrationaction).

The successful passage of Propositions 187, 209, and 227, across a span of less than five years was due to a constellation of factors, including a rise in anti-immigrant discord and a pushback against race-conscious social policies, such as bilingual education and affirmative action, perceived to favor a growing racial "minority" population. However, it is also true that the coded language used to frame and couch these initiatives helped convince voters that they were voting in favor of a more democratic society. As explained by Santa Ana (2002),

> For the privileged, the status quo [was] better left unnoticed; for the disadvantaged, pointing out the injustice [opened] up the possibility of change. Accordingly, this neoconservative discourse stratagem calling for an indefinite moratorium on discussions of racism [maintained] the comfort zone for white Americans. (p. 146)

Banks (1981) explained the rise of neoconservatism, or the "back to basics movement," (p.12) as a movement driven by leaders who tired of the efforts focused on advancing a "national commitment to equality for excluded groups," and who pine for the "good old days" in which there was little, if any, "attention devoted to the problems and promises of ethnic group life in the United States" (Banks, 1981). While the successful passage of Proposition 209, and its predecessors, may have been led or spearheaded by neoconservatives, ironically, exit poll results found that some voters, confused by how the propositions were framed and worded, voted in support of proposals they did not favor (Chávez, 1998; Moses & Saenz, 2008). For instance, with respect to Proposition 209, Chávez (1998) explains that "the problem was that most people reading the language of the initiatives had no idea that it would result in wiping out most current affirmative action programs" (p. 99). Voters voted against "discrimination" and "preferences" despite being in favor of affirmative action, a term strategically omitted from the language describing the proposition.

Public Discourse vs. Public Policy: Other States Follow Suit

The fallout from the passage of Proposition 209 has not been contained to California. Close to two decades after California voters endorsed the passage of the California Civil Rights Initiative, similar initiatives have been enacted in six additional states, all borrowing from Proposition 209's original language.[15] In Arizona (Proposition 107 passed in 2010), Michigan (Proposal 2 passed in 2006), Nebraska (Initiative 424 passed in 2008), Oklahoma (State Question 759 passed in 2012), and Washington State (aka Initiative 2000 passed in 1998), voters have prohibited the use of race and ethnicity in university admissions decisions under their own versions of Proposition 209. What is more, California itself is still recovering from the passage of Proposition 209 and no group has been more hampered than Latinas/os. Even while the population of Latina/o students has grown to become the majority of the K-12 enrollment in the state, Latina/o admission into the University of California system at both the undergraduate and graduate levels has yet to fully recover to its pre-209 figures (Garces, 2012; Grosky & Kurlaender, 2010; Kidder, 2013).

At a national level the battle over the future of affirmative action has also ushered in a new type of sophisticated first-hand involvement by right-wing conservative think tanks and organizations, skilled in discourse manipulation and intent on dismantling affirmative action. As Cokorinos (2003) points out, "an intensive outburst of strategic planning at the beginning of the 1990s, leading to the implementation of another, even more destructive phase of right-wing capacity building through the creation of the groups" (p. 21) that would lead this new anti-affirmative action revolution proved to be on the horizon. As explained by Cokorinos (2003),

> Opponents of affirmative action have long recognized that their campaign to overturn decades of progress in civil rights would be made easier if the public faces of their operations were African Americans, Latinos, and women. They have also recognized that in order to erode the hard-won but solid support for civil rights among the American people, they have to strike at the very heart of the message of racial and gender equity. They have done this by developing a beguiling and confusing vocabulary in which carefully selected 'victims' of the correct race and sex pose as defenders of civil rights, when they are in fact fronting for its deadliest enemies. (p. 31)

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15. The text of Proposition 209 read as follows, "Prohibits the state, local governments, districts, public universities, colleges, and schools, and other government instrumentalities from discriminating against or giving preferential treatment to any individual or group in public employment, public education, or public contracting on the basis of race, sex, color, ethnicity, or national origin." (Retrieved from http://vote96.sos.ca.gov/Vote96/html/BP/209.htm on May 26, 2014).

In the University of Michigan's affirmative action cases, *Grutter v. Bollinger* (2003) and *Gratz v. Bollinger* (2003), as well as in the more recent *Fisher v. University of Texas* (2013), there was an opportunity to follow this script at the highest level. Each of these cases provided an opportunity for the architects in charge of dismantling affirmative action to cast white females as victims of race-conscious education policy. Even while white women represent the largest group of affirmative action beneficiaries (Cho, 2002), affirmative action detractors continue to rely on casting them as victims in order to protest the policy's continuance.

The use of morality has also been a strategy used by critics of affirmative action to call for its end. As described by Morrison (1993) "…the habit of ignoring race is understood to be a graceful, even generous, liberal gesture" (pp. 9-10). Correspondingly, detractors of affirmative action have learned to couch their opposition to affirmative action in morality laced frames, implying that the policy too often "mis-matches" and/or "stigmatizes," the very students it tries to help (Sander & Taylor, 2012; Thernstrom & Thernstrom, 1997). While the mis-match and stigma frames are frequently relied upon by anti-affirmative action advocates (Ledesma, 2013); too often these frames are presented in incomplete fashion, without accounting for how racism and white supremacy are primarily responsible for shaping cognition in the first place (Steele & Aronson, 1995). Nevertheless, the stigma and mis-match tropes allow affirmative action critics to frame their opposition to the policy as an altruistic one; one in which they are looking out for the physical, psychological, and economic interests of under-represented students of color, including Latinas/os. Through these frames, disapproval of affirmative action is cloaked in a veil of morality, which in turn serves to conceal how opposition to race-conscious policies protects the normative majority's sense of entitlement into those predominantly white institutions that practice affirmative action.

Ironically, even when affirmative action has proven to be successful and its beneficiaries embrace and claim the policy as instrumental in their own success, critics are quick to discredit such successes as nothing more than racial gamesmanship. The insinuation here being that no accomplishment is real if it is attained in the shadow of affirmative action. To follow, I revisit Supreme Court Justice Sonia Sotomayor's nomination and confirmation process, including the rhetoric used to speak about her and her qualifications. I argue that beyond being a media spectacle, Justice Sotomayor's nomination and confirmation hearings showcase how demonizing affirmative action, and those that dare proclaim its benefits, has proven to be much easier than honestly confronting why a corrective program like affirmative action remains necessary in the first place.

A Wise Latina on the Supreme Court

Roughly five months into his first term in office, President Barack Obama selected Judge Sonia Sotomayor for appointment as the one hundred and eleventh Justice on the Supreme Court of the United States. In his nomination speech, President Obama praised Judge Sotomayor's academic and professional credentials, including degrees from Princeton and Yale Law School, and service on both the U.S. District Court and the Federal Court of Appeals. In his speech, President Obama took time to explain that "walking in the door, [Justice Sotomayor] would bring more experience on the bench, and more varied experience on the bench, than anyone currently serving on the United States Supreme Court when they were appointed" (The White House, Office of the Press Secretary, 2009, para 9). President Obama also made clear to point out that the decision to nominate Justice Sotomayor had been rigorous and exhaustive, including consultation with governmental bodies and agencies as well as with advocacy organizations and bar associations "representing an array of interests and opinions" (President Obama, 2009, para 6). In short, the nation's first African-American President stressed that the decision to appoint the nation's first Latina Justice had been an arduous and comprehensive one, not one made in the flight of fancy.

Still, in spite of the President's deliberate approach towards her nomination, and irrespective of Justice Sotomayor's hard won qualifications, to many, Justice Sotomayor's nomination was an affront to the American principle of meritocracy. Critics sneered at the fact that Justice Sotomayor had had the audacity to credit affirmative action with providing her the opportunity to attain success. During her confirmation process, politicians and conservative commentators alike lambasted Justice Sotomayor for past speeches and decisions she had previously rendered. Critics zeroed in on an address delivered to a student symposium at the University of California (UC) Berkeley School of Law in October 2001, a speech entitled "A Latina Judge's Voice," wherein

Justice Sotomayor spoke candidly about her experience in the legal profession. Her reflections on that day included sharing with attendees the importance of having diverse voices and perspectives on the bench. Justice Sotomayor (2002) declared:

> Each day on the bench I learn something new about the judicial process and about being a professional Latina woman in a world that sometimes looks at me with suspicion. I am reminded each day that I render decisions that affect people concretely and that I owe them constant and complete vigilance in checking my assumptions, presumptions and perspectives and ensuring that to the extent that my limited abilities and capabilities permit me, that I reevaluate them and change as circumstances and cases before me requires. (p. 93)

Unfortunately, even while Justice Sotomayor acknowledged that *all* judges are influenced by their personal histories and experiences, and that, "No one person, judge or nominee will speak in a female or people of color voice" (Sotomayor, 2002, p. 91), she was vilified for her candor. Critics pounced on Justice Sotomayor's every word, most famously of which was her reflections to aspiring Latina/o law students with whom she shared, "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life" (Sotomayor, 2002, p. 92). Under the confirmation spotlight, conservative critics, among them politicians and media analysts, attacked then Nominee Sotomayor. They implied that she was unqualified and undeserving of an appointment to the highest court in the land. To her critics, Justice Sotomayor's self-identification as a "wise Latina" coupled with her admission to benefitting from affirmative action, was proof enough to suggest that she had not earned her impressive professional accomplishments. These actions were enough to sully her entire career and to label her as a "reverse racist" and "bigot" in the eyes of right-leaning conservative pundits.

The most vocal opposition to Justice Sotomayor came from far right conservative politicians and pundits. Linda Chavez, director of the conservative think-tank Center for Equal Opportunity, known for opposing affirmative action of Sotomayor's record, opined "that she has drunk deep from the well of identity politics"[16]—implying that it was impossible for Sotomayor to be a fair judge. More pointed commentary came from figures like Rush Limbaugh who labeled Justice Sotomayor a "reverse racist" (Hananoki, 2009) and Lou Dobbs who accused her of "pandering to *the* Hispanics" (Hananoki, 2009, emphasis added). In the end, claims accusing Justice Sotomayor of "blatant racism" (Hananoki, 2009) because of her "wise Latina" comment were hard to quell but not enough to sideline her appointment to the Supreme Court. Nevertheless, discourse and narrative framings used to scrutinize Nominee Sotomayor's credentials highlight how a legacy of racism and white supremacy continues to inform popular discourse, even in the face of stellar academic and professional credentials. To her critics, Justice Sotomayor's acknowledgement of the role that affirmative action had played in shaping her educational career was enough to invalidate all of her earned accomplishments.

Justice Sotomayor's nomination and confirmation hearings can be seen as a type of allegory concerning the nation's enduring struggle with affirmative action. As Justice Sotomayor herself explained to students during her highly scrutinized Berkeley speech,

> America has a deeply confused image of itself that is in perpetual tension. We are a nation that takes pride in our ethnic diversity, recognizing its importance in shaping our society and in adding richness to its existence. Yet, we simultaneously insist that we can and must function and live in a race- and color-blind way that ignore [sic] these very differences that in other contexts we laud. (Sotomayor, 2002, p. 88)

Justice Sotomayor's observations continue to remain prescient. As Culp (1994) observed, "Myths are often created to fill a necessary psychological space" (p. 165). And "Colorblindness has been [such a myth, one] created to help us get over the difficulty of race in a society where race is particularly powerful" (Culp, 1994, p. 165). Ironically, so long as colorblindness and post-racialism continue to be championed, we continue to be in need of serious and honest dialogues about the history and future of affirmative action, including candid talk about how race, racism, and white supremacy continue to mitigate and impede equitable opportunities, educational, and otherwise (Ladson-Billings, 2007; Liu, 2003). It is only through such dialogues that we might begin to understand that the act of slandering the accomplishments of the highest-ranking Latina in the U.S.

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16. See http://www.cnn.com/2009/POLITICS/07/16/sotomayor.hearing/index.html?iref=24hours

government was about more than critiquing personal politics and ideologies. Following, I speak to the changing national demographics, driven primarily by Latina/o population growth, and how this reality presents a unique opportunity to (re)frame educational access and opportunity for Latina/o students. I also suggest that we need to be more skilled at identifying and combating narratives that pit disempowered communities against one another while deflecting attention away from the problems of racism and white supremacy. I posit that an important way to challenge these tropes is by pressing for more critical discourse consumption.

Framing Affirmative Action in the Twenty-first Century: Why it Matters to Latinas/os

The twenty-first century has ushered in a new racial landscape to the United States. As of 2012, Latinas/os comprise the largest share of the population in California and Texas (Brown & Lopez, 2013). These demographic shifts are momentous for several reasons, not the least of which is the fact that two of the most populous states in the Union are now majority "minority," and that majority is Latina/o. The demographic tipping points in California and Texas signal a larger trend, one in which Latinas/os are steadily growing across the nation. According to the U.S. Census Bureau in 2012, for the first time ever Latina/o births surpassed white births. And while the "browning" of America is occurring in expected places, like the Southwest (i.e., Arizona, Nevada, and New Mexico are now majority Latina/o), what is more surprising is that Latinas/os are the fastest growing populations in states like Alabama, Arkansas, Georgia, Kentucky, South Carolina, and Tennessee, just to name a few (Brown & Lopez, 2013). This newfound visibility has proven to be a double-edged sword. On the one-hand, (re)newed attention has been focused on Latinas/os core issues, such as immigration and education. On the other hand, Latinas/os have become prime targets for politicians, pundits, and the general public who are at odds with the nation's new and projected demographic destiny.

Amongst the aforementioned backdrop, Latinas/os have come under attack in the form of policies and governmental programs. For instance, nationally, under the Obama Administration, the deportation or "removal" of Latina/o immigrants has vastly outpaced emigration into the United States (United States Department of Homeland Security [USDHS], 2013), making immigration a particularly sensitive topic for many Latinas/os. In the South and West, Georgia and Arizona spearheaded sweeping anti-immigrant campaigns against undocumented communities, zeroing in especially on Mexican immigrants.

While morally reprehensible, a historical retrospective reminds us that the maltreatment and scapegoating of traditionally marginalized and oppressed peoples, especially Latina/o immigrants, is nothing new (Acuña, 1988; Haney López, 1996; Santa Ana, 2002). After all, history has proven that the present-day United States was built upon a system of racial stratification where white supremacy has reigned (Bonilla-Silva, 2001, 2014; Feagin, 2013; Omi & Winant, 2015). However, whereas past racial narratives were more overt, today's racial discourse is subtler and trickier, but equally as pernicious. As explained by Haney López (2014),

> The new racial politics presents itself as steadfastly opposed to racism and ever ready to condemn those who publicly use racial profanity… Meanwhile, though, the new racial discourse keeps a steady drumbeat of subliminal racial grievances and appeals to color-coded solidarity…The new racism rips through society, inaudible and also easily defended insofar as it fails to whoop in the tones of the old racism, yet booming in its racial meaning and provoking predictable responses among those who immediately hear the racial undertones of references to the undeserving poor, [and] illegal aliens… (pp.3-4).

Ironically, the election and re-election of the nation's first African-American President complicated rather than simplified today's racial discourse.[17] As Coates (2012) revealed in his detailed exposé of the Obama presidency, "After Obama won, the longed-for post-racial moment did not arrive; on the contrary, racism intensified" (para 44). These developments while not all together surprising are the latest manifestations of what

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17. Shortly after his confirmation, Attorney General Eric Holder, the first African American to hold this post, delivered a national address commemorating Black History Month in which he observed the Nation's recalcitrance in speaking about race. Holder stated, "Though this nation has proudly thought of itself as an ethnic melting pot, in things racial we have always been and continue to be, in too many ways, essentially a *nation of cowards*. Though race related issues continue to occupy a significant portion of our political discussion, and though there remain many unresolved racial issues in this nation, we, average Americans, simply do not talk enough with each other about race" (2009, para 2: emphasis added). Holder's speech drew ire, especially from Fox News and affiliated pundits, who among other things, accused the Attorney General of playing the race card.

Feagin (2013) has termed "the white racial frame." Feagin (2013) explains that the white racial frame operates by integrating cognitive elements, with visual and auditory elements, and feelings, among other elements, to perpetuate whiteness and white supremacy (p. 10). Feagin (2013) suggests that

> central to the dominant racial frame are several "big picture" narratives that connect the frame elements into historically oriented stories with morals that are especially important to white Americans. These emotion-laden scenarios include stories about white conquest, superiority, hard work, and achievement. They make powerful use of stereotypes, images, and other elements from the overachieving frame. (p. 13)

As Feagin details, once the frame is used it works to activate additional frames and sub-frames. Still, while the white racial frame is deeply embedded in society, contemporary attempts to maintain the racial status quo are now often cleverly cloaked in pseudo-altruistic tropes and coded discourse. For example, with respect to affirmative action, critiques have shifted away from maintaining the racial status quo to "protecting" the policy's intended beneficiaries, who it is argued are likely to be mis-matched and hurt and stigmatized by the very policy that intends to help them (Sander & Taylor, 2012: Thernstrom & Thernstrom, 1997). Research has suggested that arguments against affirmative action very often rely on ahistorical and acontextual framing (Crenshaw, 2007; Ledesma, 2013; Kennedy, 1986). They also suggest that the practice of discourse manipulation is very real and very powerful. As cited in Fairclough and Fairclough (2012), Van Eemeren explains that

> manipulation of discourse boils down to intentionally deceiving one's addressees by persuading them of something that is foremost in one's own interest through the covert use of communicative devices that are not in agreement with generally acknowledged critical standards of reasonableness. (p. 95)

Fairclough and Fairclough (2012) further emphasize that discourse manipulation is "always intentional and always covert" (p. 95).

The rhetorical and legal battle over the future of affirmative action has become more important than ever, despite the fact that the limited use of race in university admissions continues to be legal; the Supreme Court's majority opinion in *Schuette v. Coalition to Defend Affirmative Action* (2014) is set to adversely impact the educational futures of many historically under-represented students of color, especially Latinas/os, who aspire to attend the nation's most selective colleges and universities. In *Schuette* (2014) a majority of six justices approved the constitutionality of allowing voters to enact "policies as an exercise of democratic self-government" (*Schuette*, 2014, slip opinion, p. 13). Justice Anthony Kennedy, writing for the Court's majority, emphasized that the case was *not* about the constitutionality or merits of affirmative action. He stated that the key issue in *Schuette* concerned "…in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions" (*Schuette*, 2014, slip opinion, p. 4). Justice Kennedy also emphasized that the "holding in the instant case is simply that the courts may not disempower the voters from choosing which path to follow" (*Schuette*, 2014, slip opinion, p. 13). However as noted by Justice Sotomayor (*Schuette,* 2014, Sotomayor dissenting, slip opinion), the Court's ahistorical majority decision, while democratic in theory, failed to account for the fact that in light of the nation's "long and lamentable record of stymieing the right of racial minorities to participate in the political process" (*Schuette*, 2014, Sotomayor dissenting, slip opinion, p. 1), not all voters are equally empowered.

Moses and Saenz (2012) have suggested that ballot initiative processes necessitate robust and in depth analysis, especially when initiatives are concerned with the production and implementation of education policy. They stipulate:

> …whereas in the past these policies were determined by "experts" assumed to possess deep knowledge of the issues—policymakers and political representatives—citizens now hold the power (and responsibility). This shift in policymaking responsibility from experts to citizens means that in order to promote fair and equitable policy decisions, voters should have access to meaningful information about the policy. (Moses & Saenz 2012, p. 114)

Crenshaw (2007) adds another dimension to the analysis of deliberate democracy. Employing a critical race analysis, Crenshaw suggests the need to interrogate "the people have voted" stratagem. Unfortunately, the strategic use of narrative to manipulate and influence the political process of voter approved ballot initiatives and/or

constitutional amendments has proven to be very real and very detrimental to historically disenfranchised groups. And as Crenshaw (2007) recounts, part of the problem with initiatives like Proposition 209, and its progeny, has been that these invite majority voters to join a "mythical past wherein equal treatment and nondiscrimination ruled the day" (p. 128). What is more, these ahistorical and acontextual framings serve to amplify the false beliefs that racism, discrimination, and inequality are passé (Crenshaw, 2007), thereby complicating and contradicting calls for the continuation of race-conscious policies, like affirmative action.

In *Grutter v. Bollinger* (2003) Justice Sandra Day O'Connor writing for the Court's majority declared, "Context matters when reviewing race-based governmental action…" (p. 327). O'Connor's directive is apropos for *all* types of race-based legislative action, but it is especially important when reviewing race-conscious policies. After all, although an imperfect tool, affirmative action has been primarily responsible for opening the doors of opportunity to students of color, including Latinas/os, to gain access into the nation's most elite and selective institutions. Justice Sotomayor herself has remarked, "Affirmative action for me was permission to get to the start of a race that I did not even know existed" (personal communication, January 27, 2015).

In the absence of affirmative action programs, colleges and universities—especially those that have historically relied upon race-conscious practices to admit and enroll historically under-represented students— have found their job severely constrained. In California, the wellspring of anti-affirmative legislation, the profound effects of the passage of Proposition 209 continue to reverberate across the University of California system even close to two decades after ending the practice of affirmative action. As detailed in their *amicus curiae*, or friend of the court, brief in support of respondents in *Schuette* (2014), the President and the Chancellors of the University of California explain that despite having implemented a number of race-neutral admissions initiatives—totaling over half a billion dollars since 1998—the University has yet to recover from the precipitous decline in student of color enrollment that occurred in the aftermath of Proposition 209 (Brief of the President and the Chancellors of the University of California, 2013). These results have been especially consequential for Latinas/os, who in spite of representing the majority of the state's K-12 population still struggle to find placement within the UC's most selective campuses (Brief of the President and the Chancellors of the University of California, 2013). Even outside of the UC system, in California and beyond, the truth is that students are more segregated now than pre-*Brown v. Board of Education* (1954) (Orfield & Frankenberg, 2014). In turn, these racial realities have had, and are projected to continue to have, real impacts on college accessibility and college choice for all students but especially for racially, geographically, and socio-economically isolated students, including Latinas/os (Hillman, 2014).

However, in the absence of critical narratives that account for the continued legacy of race, racism, and white supremacy, critics of affirmative action will most likely continue to be quick to embrace colorblindness and post-racialism. Haney López (2014) posits that in such instances, communities of color will continue to be pathologized. He explains:

> Colorblindness answers by opportunistically switching to another understanding of race, frequently dropping race-as-blood to talk about racial groups as *ethnicities marked by distinct cultures* [emphasis in original]… Ethnicity provides a basis for blaming minorities for their inferior positions, since it faults their supposedly defective cultures; simultaneously, it exonerates whites, since racism is no longer to blame for inequality. This in turn answers the question of government help: such assistance is futile because only nonwhites can reform their inferior cultures and self-defeating behaviors. (Haney López, 2014, p.93)

While the Supreme Court's decision in *Schuette v. Coalition to Defend Affirmative Action* (2014), including Justice Sotomayor's dissent, will be studied for years to come, *Schuette's* (2014) impact, granting states permission to curtail and/or terminate the use of race-conscious policy via ballot initiative and/or constitutional amendment, may be more immediate.

During the winter of 2014, California once again took center stage in the ongoing debates about the future of race-conscious social policy. During the state's 2013-2014 legislative session, Senator Ed Hernandez introduced Senate Constitutional Amendment No. 5—better known as "SCA5." The resolution proposed to amend Section 31 of Article 1 of the State's Constitution, relating to public postsecondary education. In short, the resolution aimed to re-instate the legal use of race in university admissions by over-riding Proposition 209's

prohibition of using race in public higher education. While similar resolutions had been introduced regularly throughout the course of the last few years, the most recent resolution unleashed a torrent of heated responses.

Unsurprisingly at the center of the ensuing debate are very racialized and politicized arguments about who is "helped" and/or "hurt" by overturning Proposition 209 and reinstating affirmative action. However, unlike previous debates, which have historically framed discussions concerning affirmative action as Black versus White, the SCA5 debate resulted in a complicated and very hyper-racialized discourse, one that pitted Black and Brown Californians against Asian Californians. And while to date there has been less overt vitriol framing the discourse associated with SCA5, the opposition to the constitutional amendment has been nonetheless layered with manipulated discourse and racial innuendo—including the exploitation of presumed minority on minority group tensions and the omission of the role of white supremacy on education policy making.[18] Further complicating matters in California is the new post-209 racial landscape. In the almost twenty years since the passage of Proposition 209, California's legislature as well as its K-12 enrollment has become majority Latina/o. In the same period of time, many of the University of California's most selective campuses, those most contested for admission, have become predominantly Asian. The current SCA5 controversy has served to exploit an increasingly popular but nevertheless troubling wedge issue, one that perpetuates the myth of Asian Americans as model minorities and victims of affirmative action policy (Thernstrom & Thernstrom, 1997). As Park and Liu (2014) uncover, "the most appealing poster children for the anti-affirmative action movement" (p.36) have become Asian Americans.

Indeed, detractors of race-conscious affirmative action have become increasingly skilled at exploiting this narrative. It is this Asian American as victim frame which Edward Blum, the chief architect responsible for legal proceedings against the University of Texas in *Fisher* (2013), has continued to lean on to now file charges against Harvard University, the University of North Carolina, and the University of Wisconsin for their use of race-conscious admissions policies (Liptak, 2014). Under the guise of the anti-affirmative action non-profit "Students for Fair Admissions," Blum is leading a new movement to dismantle all race-conscious policy. His argument is that even with stellar academic records, affirmative action policies adversely penalize Asian American students. Park (2015) explains that "the narrative that underlies the Students for Fair Admissions lawsuit—that Asian Americans need higher SAT scores to get into elite schools—is powerful. But it is also deeply misleading" (para 4). As Park and Liu (2014) posit, such narratives obscure the fact that there is widespread, and increasingly vocal support of affirmative action policies within and across Asian American communities. Nevertheless, clever politicians and anti-affirmative action pundits have seized on the popular Asian as model minority and victim of race-conscious policies trope to call for the end of affirmative action.

To follow I close by echoing Justice Sotomayor's dissent in *Schuette* (2014), wherein she argued that race and racism cannot be wished away. This reality coupled with the rising power and influence of the court of public opinion in public policy decision-making, I argue that as a growing sector of the U.S. populace, Latinas/os are in a prime position to help chart the future course of race-conscious affirmative action policy.

Conclusion

As we await developments in the latest affirmative action cases, including the Supreme Court's rehearing of Fisher v. University of Texas, and the outcomes of litigation against Harvard University, the University of North Carolina, Chapel Hill, and the University of Wisconsin, Madison, it would be useful to heed the words of the one hundred and eleventh Justice on the Supreme Court of the United States, the first Latina to hold

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18. For instance, anti-affirmative action advocates were quick to denounce SCA5. In one anti-SCA5 ad, the amendment's acronym is re-appropriated. Within a backdrop that includes an image of Dr. Martin Luther King, "SCA" is presented to spell out the "Skin Color Act." The phrase is crossed out alongside Dr. King's image with an excerpt from his "I have a dream speech." The excerpt reads, "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character" (see http://www.saynosca5.com/?page_id=4). Another anti-SCA5 ad depicts a pensive Malala Yousafzai, the young Nobel Peace Prize recipient best known as the young Pakistani teen shot by the Taliban. Next to Malala's image is a caption that reads, "The Talaban tried to stop her; SCA5 will stop American children." The insinuation here being that reinstating the use of race in university admissions will result in the displacement of more deserving American children from California's universities.

this post. Responding to the Court's majority decision in *Schuette* (2014), Justice Sotomayor (*Schuette*, 2014, Sotomayor dissenting, slip opinion) explained:

> My colleagues are of the view that we should leave race out of the picture entirely and let the voters sort it out…It is sentiment out of touch with reality…While "[t]he enduring hope is that race should not matter[,] the reality is that too often it does." [R]acial discrimination is not ancient history…Race matters. Race matters in part because of the long history of racial minorities' being denied access to the political process…Race also matters because of persistent racial inequality in society—inequality that cannot be ignored and that has produced stark socioeconomic disparities…And race matters for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away. (*Schuette*, 2014, Sotomayor dissenting, slip opinion, pp. 45-46: citations omitted)

So, if race cannot be "wished away," the question remains, "What are Latina/os to do in the face of anti-affirmative action discourse and the policies that emerge from it?" Justice Sonia Sotomayor's dissent in *Schuette* (2014), much like Justice Thurgood Marshall's dissent in *Regents of the University of California v. Bakke* (1978), provides a needed history lesson explaining why race and by extension affirmative action programs continue to matter.

Affirmative action matters for Latinas/os because in spite of their growing K-12 enrollment, Latina/o students still encounter great difficulties while trying to access the nation's most elite and selective campuses (Carnevale & Strohl, 2013). Affirmative action matters for Latinas/os because despite confronting a long history of deficit-oriented narratives, which argue that Latinas/os are "unmotivated" and/or "underprepared" for college enrollment and completion (Valencia, 2010), in truth Latina/o parents and students possess high aspirations to attend and complete college (Lopez, 2009). Affirmative action matters for Latinas/os even while critics of affirmative action profess that Latina/o students are "mis-matched" (read, academically underprepared) when they attempt to enroll in selective colleges and universities (Sander & Taylor, 2012; Thernstrom & Thernstrom, 1997); anti-affirmative action advocates are conspicuously silent on the concept of "under-matching," which suggests that Latino, low-income, and first-generation college students are "more likely to undermatch than their nonunderrepresented peers" (Rodriguez, 2013, p. 1). Rodriguez (2013) explains that historically underrepresented students in higher education, especially Latinas/os, who are eligible and capable of attending selective institutions of higher education are more likely to "under-match"—or attend less selective colleges and universities than their majoritarian peers.

However, in the end, narrative framing also matters because most all of these important arguments are glaringly absent in public discourse concerning the future of affirmative action policy. It is only by employing a more critical approach to discourse consumption, one which interrogates, historicizes, and contextualizes the often truncated and/or deceptive narratives relied upon by critics of affirmative action, to call for the end of all race-conscious social policy that we can even begin to prepare for what *Schuette* (2014) might usher in. Indeed, post-Schuette, the power of popular discourse in shaping public policy debates concerning educational access and opportunity for historically marginalized and minoritized students, especially for Latinas/os, will only intensify.

As we prepare for the next affirmative action challenge, we can look to Justice Sotomayor's *Schuette* dissent for guidance. As Fontana (2014) has observed, Justice Sotomayor's attention to discourse and language is just one of the many compelling features of her dissent. Commenting on what he calls the "Sotomayor Style," Fontana (2014) remarked, "She uses practical and therefore easily comprehendible language in her opinion. The usage of practical language is a judicial opinion which will reach regular citizens more because it gains more mass and social media attention" (para 8). As such, we might ask, How can this same type of "practical language" be adapted to address the still pertinent benefits, and necessity, of affirmative action policies for Latinas/os in the twenty-first century?

As one of the largest and fastest growing sectors of the U.S. populace, Latinas/os are in a prime position to help chart the future course of race-conscious affirmative action policy. However, in order to do so Latinas/os must pay much closer attention to how narratives are deployed, in both public and private spheres, when it comes to addressing issues of educational equity and social justice. In addition, Latina/o families, policy makers,

higher education researchers and practitioners, among others, must recognize that the future of race conscious policies has come to hinge as much on the court of public opinion as in the legal courtroom. The nation's demographic transformation has stirred-up old and new debates about power and entitlement, including, "Who has the right to gain access to and benefit from the nation's fountains of power?" If the answer includes Latinas/os, then these rationales must be fully explicated in national forums addressing both public discourse and public policy.

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