

## CHAPTER 2

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### RACE-CONSCIOUS AFFIRMATIVE ACTION AND RACE-NEUTRAL POLICIES IN THE AFTERMATH OF THE MICHIGAN CASES



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## Introduction

In 2003, the United States Supreme Court issued landmark opinions in the University of Michigan affirmative action cases.<sup>1</sup> The Court resolved the pivotal uncertainty that had plagued selective universities' admissions policies for the past quarter century—whether student body diversity is a sufficiently weighty interest to justify an affirmative action program.<sup>2</sup> In holding that student body diversity may constitute a compelling state interest, the Supreme Court placed affirmative action policies in higher education on much firmer constitutional footing.<sup>3</sup>

However, the Court's decisions neither insulate race-conscious university practices from constitutional challenge, nor diminish the ardor of affirmative action's most vehement and well organized critics, who have continued to challenge race-conscious policies both in courts of law and in the court of public opinion.<sup>4</sup> Affirmative action admissions policies may be legally vulnerable if they do not comply with the constitutional standards set forth in the Michigan decisions. Moreover, a wide variety of race-conscious supplemental programs not directly at issue in the Michigan cases have come under scrutiny as well. These supplemental programs include recruitment efforts, financial aid, and academic support, preparation and enrichment programs. Such supplemental programs may be integral to a university's efforts to attract and maintain a diverse student body, yet the Supreme Court said little about them in the Michigan decisions. Admissions practices and supplemental programs alike may be subject to political attack as well through the sort of anti-affirmative action referenda approved by voters in both Michigan and California.

Both before and since the Michigan decisions, debate about affirmative action has prominently featured what have come to be known as race-neutral alternatives to affirmative action. Race-neutral admissions policies do not distinguish among individual applicants on the basis of race (as conventional affirmative action policies do), yet may have been enacted in furtherance of the same race-related purposes as a conventional affirmative action policy.<sup>5</sup> Race-neutral policies

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<sup>1</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003) (law school admissions); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (undergraduate admissions).

<sup>2</sup> In the Michigan cases, the Court reiterated its earlier view that the federal statutes applicable to private universities embody the same standards as the constitutional principles that formally apply only to public institutions. Thus, the Court's ruling clarified the applicable law for public and private universities alike.

<sup>3</sup> The Court's decisions did not consider the propriety of affirmative action in other settings, such as primary and secondary education. At the time of the writing of this chapter, two cases were pending before the Supreme Court that concerned school boards' consideration of race in student assignment in order to maintain racially integrated schools. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005) (en banc), *cert. granted*, 126 S.Ct. 2351 (2006); *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834 (W.D. Ky. 2004), *aff'd per curiam*, 416 F.3d 513 (6th Cir. 2005), *cert. granted sub nom*, 126 S.Ct. 2351 (2006). As this chapter was going to publication, the Court issued its ruling in these two cases. See 2007 WL 1836531 (June 28, 2007). While the Court's ruling addressed the separate issue of the constitutionality of race-conscious voluntary school integration policies, the Court's decision made clear that its holding in *Grutter* remained good law. Due to the timing of this publication, this chapter does not address the implications of the Court's decision on the issues discussed here.

<sup>4</sup> Prominent opponents of affirmative action include organizations such as the Center for Equal Opportunity, the American Civil Rights Institute, the Center for Individual Rights, the National Association of Scholars, and the Federalist Society, among others.

<sup>5</sup> Throughout the discussion, references to affirmative action refer to admissions practices that entail the evaluation of individual applicants partly on the basis of their race.

may seek to produce a racially diverse student body through the consideration, for example, of applicants' place of residence, high school characteristics, or socioeconomic status. Race-neutral policies figured prominently in the legal debate leading up to the Michigan decisions because prior Supreme Court rulings had suggested that the constitutional permissibility of a challenged affirmative action policy would depend, in part, on the absence of feasible race-neutral alternatives. Thus, affirmative action opponents, including the United States Department of Education, proclaimed the promise of race-neutral policies, while affirmative action supporters asserted the inadequacy of such policies, with each side often relying on empirical evidence to bolster their assertions. In the political context as well, race-neutral policies—now relied on in the public university systems of three of our most populous and racially diverse states<sup>6</sup>—have functioned as a foil to conventional affirmative action. The allure of race-neutral policies has helped to underwrite opposition to affirmative action.

In this chapter, I explore potential legal challenges to race-conscious university policies in the aftermath of the University of Michigan cases, with particular attention to the role of race-neutral policies. I also consider the implications of the changed legal landscape for the empirical social science researchers who have played an important role in the affirmative action debate. The chapter first describes the Michigan decisions and considers likely legal post-Michigan challenges to affirmative action and race-conscious supplemental programs. It then explains the centrality of race-neutral policies in the law and politics of affirmative action and highlights some questions for future empirical research related to race and higher education.

## **The Michigan Decisions**

### The Legal Background

The Michigan cases presented the possibility that the Supreme Court would categorically preclude diversity-based affirmative action policies in higher education. Prior Supreme Court decisions had left little doubt that an affirmative action policy would be subjected to the most stringent form of constitutional review, known as strict scrutiny.<sup>7</sup> For a policy subject to strict scrutiny to be upheld, it must be a precisely calibrated means of furthering an extraordinarily important governmental interest. In the language of constitutional doctrine, the two requirements of strict scrutiny are that the state interest be “compelling” and that the policy be “narrowly tailored” in furtherance of that interest.

The central question in the Michigan cases was whether diversity may constitute a compelling state interest. A ruling by the Court that student body diversity is not sufficiently important to

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<sup>6</sup> The abandonment of a race-conscious policy and the adoption of a race-neutral one came after a judicial ruling in Texas, a Board of Regents decision and a statewide voter referendum in California, and an executive order of the governor in Florida. Each of these states has adopted a so-called percentage plan, which guarantees applicants who graduate at the top of their high school class acceptance either to the university system as a whole or to a particular campus.

<sup>7</sup> The Court has held that “the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (citations omitted).

count as compelling would have virtually prohibited affirmative action in higher education, as diversity is the asserted justification for nearly all universities' affirmative action policies.<sup>8</sup>

The uncertain constitutional status of diversity, as well as its popularity as an affirmative action rationale, stemmed partly from the Supreme Court's decision 25 years earlier in *Regents of the University of California v. Bakke*,<sup>9</sup> the only case in which the Supreme Court had ruled on the constitutionality of an affirmative action admissions policy. In *Bakke*, a sharply divided Court considered a minority admissions quota adopted by the University of California, Davis medical school. Four Justices opposed nearly any use of race in admissions, whereas four other Justices would have permitted quotas in order to "remedy disadvantages cast on minorities by past racial prejudice."<sup>10</sup> Justice Powell cast the deciding vote, striking down the medical school's policy, but holding open the possibility of a constitutionally permissible affirmative action policy premised on the value of student body diversity.<sup>11</sup>

Although Powell cast the pivotal vote in *Bakke*, his endorsement of diversity provided a dubious constitutional foundation for the diversity-based affirmative action policies that would follow in the decision's wake. No other Justice had joined Justice Powell in characterizing diversity as a compelling interest. In a case decided after *Bakke* that involved federal regulation of broadcast licensees,<sup>12</sup> the Supreme Court concluded only that diversity was a sufficiently weighty interest to satisfy intermediate scrutiny, a less demanding standard than the strict scrutiny test to which affirmative action policies are now clearly subject.

Another key issue in the Michigan cases concerned the role of race-neutral policies in the narrow tailoring test. Justice Powell had reasoned that a university could not institute a quota or use separate admissions tracks or procedures for different races, but must instead consider race in a flexible manner, as one factor among many in a holistic evaluation of each individual applicant.<sup>13</sup> In later cases, the Supreme Court incorporated into the narrow tailoring analysis a consideration that Justice Powell had not mentioned—the availability of so-called race-neutral alternatives.<sup>14</sup> According to the Court's approach, for an affirmative action policy to be upheld, the institution would have to show that it considered race-neutral alternatives to the affirmative action policy and that they were unworkable. Lower federal courts followed the Supreme Court's

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<sup>8</sup> Affirmative action policies may also, in theory, be justified as remedial measures. For example, current law permits affirmative action as a remedy for identified discrimination, but most universities would be unwilling and/or unable to satisfy the requirements of that remedial justification. Thus, nearly all selective universities rely on the diversity rationale.

<sup>9</sup> 438 U.S. 265 (1978).

<sup>10</sup> 438 U.S. at 325.

<sup>11</sup> Justice Powell rejected the remedying of societal discrimination as a sufficient justification for affirmative action.

<sup>12</sup> *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547 (1990).

<sup>13</sup> In Powell's view, race was "only one element in a range of factors a university may properly consider in attaining the goal of a heterogeneous student body." 438 U.S. at 314. He observed that the "diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." 438 U.S. at 315.

<sup>14</sup> The Court first emphasized the importance of the availability of race-neutral alternatives in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), a case that concerned a challenge to a municipality's race-based contracting set-aside. In striking down the set-aside, the Court approvingly referenced race-neutral policies and then impugned the City's affirmative action policy because "there [did] not appear to have been any consideration of the use of race neutral means to increase minority business participation in city contracting." 488 U.S. at 507.

lead in evaluating affirmative action programs in light of the availability of race-neutral alternatives.<sup>15</sup> In these cases, the more plausible the race-neutral alternatives are to further the university's interest, the less justifiable the affirmative action policy.

### The Court's Rulings

In the Michigan cases, the Supreme Court followed the tracks laid down by Justice Powell in *Bakke*, concluding that "student body diversity is a compelling state interest that can justify the use of race in university admissions."<sup>16</sup> Thus, both the undergraduate policy at issue in *Gratz* and the law school policy challenged in *Grutter* satisfied the compelling interest component of the strict scrutiny test.

The Court struck down the undergraduate policy because it was not narrowly tailored and upheld the law school policy because it was. Echoing Powell's opinion in *Bakke*, the Court emphasized that "[t]o be narrowly tailored, a race-conscious admissions program cannot use a quota system"<sup>17</sup> or employ separate admissions tracks for white and minority applicants.<sup>18</sup> Instead, universities must "consider race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant"<sup>19</sup> and not in a manner that "makes an applicant's race the defining feature of his or her application."<sup>20</sup> Whereas the University's undergraduate admissions process used a point system that automatically awarded a large number of points to applicants from certain minority groups, the law school's more flexible approach considered each applicant individually and accorded substantial weight to a variety of diversity factors in addition to race.

The Court stated that narrow tailoring also "require[s] serious, good faith consideration of workable race-neutral alternatives" that are consistent with "the academic selectivity that is the cornerstone of [a university's] educational mission."<sup>21</sup> The Court was careful to note, though, that narrow tailoring "does not require exhaustion of every conceivable race-neutral alternative."<sup>22</sup> Finally, the Court explained that race-conscious admissions policies, along with potential race-neutral alternatives, must be periodically re-evaluated "to determine whether racial preferences are still necessary to achieve student body diversity."<sup>23</sup>

### **Post-Michigan Challenges to Admissions Policies**

In the aftermath of the Michigan decisions, affirmative action opponents may continue to challenge admissions policies by contesting i) the genuineness of a university's commitment to

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<sup>15</sup> See, e.g., *Ensley Branch NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Peightal v. Metropolitan Dade County*, 26 F.3d 1545 (11th Cir. 1994); *Billish v. City of Chicago*, 962 F.2d 1269 (7th Cir. 1992); *Walker v. City of Mesquite*, 169 F.3d 973, 983 (5th Cir. 1999); *Podbresky v. Kirwan*, 38 F.3d 147, 161 (4th Cir. 1994).

<sup>16</sup> 539 U.S. at 325.

<sup>17</sup> 539 U.S. at 334.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> 539 U.S. at 337.

<sup>21</sup> 539 U.S. at 339, 340.

<sup>22</sup> 539 U.S. at 339.

<sup>23</sup> 539 U.S. at 342.

diversity, ii) whether its use of race is within constitutional parameters, and iii) whether race-neutral alternatives were adequately considered. Indeed, affirmative action opponents have used Freedom of Information Act requests and other means to get information that might be used to undermine a university's claims that its policies comply with the standards set forth in the Michigan cases. In some cases, complaints have been filed with the United States Department of Education Office of Civil Rights that a university is violating the law. This section evaluates each of these potential challenges in turn before expanding on the consideration of race-neutral alternatives in more detail in the next section.

### The Diversity Goal

As Justice Scalia noted in his *Grutter* dissent, affirmative action opponents may “challenge the bona fides of the institution’s expressed commitment to the educational benefits of diversity.”<sup>24</sup> While universities may consider race for purposes of realizing the educational benefits of diversity, they may not seek racial diversity for its own sake, which the Court disparagingly refers to as “racial balancing.” Although the Michigan decisions do not suggest that each university would be required to demonstrate anew the educational benefits of diversity, they do not preclude lower courts from evaluating whether an institution is actually committed to realizing those educational benefits.<sup>25</sup>

While it is not clear how a court would go about determining the genuineness of a university’s professed commitment to diversity, the existence of other policies and programs that reflect an interest in the educational benefits of diversity would lend credence to a university’s claim that the goal of its race-conscious admissions program is to create diversity in furtherance of its educational mission.

### The Use of Race

Affirmative action opponents might also assert that a university considers applicants’ race not to produce a “critical mass” of minority students (which is permissible) but instead to satisfy a de facto quota (which is not). The distinction between a permissible critical mass and an impermissible quota will often be in the eye of the beholder. What the *Grutter* majority characterized as the University of Michigan Law School’s effort to enroll a critical mass of minority students, Justice Rehnquist, in dissent, described as a de facto quota, achieved by “extend[ing] offers of admission to members of selected minority groups in proportion to their statistical representation in the applicant pool.”<sup>26</sup> Where the majority identified yearly variation in minority enrollment as negating the existence of any quota, Justice Rehnquist interpreted a rough equivalence, from year to year, between the percentage of minority admits and minority

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<sup>24</sup> 539 U.S. at 349.

<sup>25</sup> In the Michigan cases, the Court declined to examine this question too closely. The Court stated that “Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School’s proper institutional mission, and that good faith on the part of the university is presumed absent a showing to the contrary.” 539 U.S. at 329 (quotations omitted). Other courts could nominally adhere to this standard yet apply a low threshold for what counts as a “showing to the contrary.”

<sup>26</sup> 539 U.S. at 386.

applicants as confirming the existence of one. The best course for a university, then, is to avoid even the appearance of a quota.<sup>27</sup>

Even if a university does not seek to implement a quota, affirmative action opponents might still argue that a university's admissions policy accords race too much weight or values it in too mechanical a manner. Admissions officers must treat race as a flexible "plus" factor, not as a defining feature of an individual's application, nor as the basis for an automatic bonus. While the *Grutter* majority clarified that race could be accorded more weight than other diversity factors, the Court in *Gratz* also identified the automatic award of points so that nearly any minimally qualified minority applicant was admitted as a defect in the undergraduate admissions policy.

These sorts of challenges have been actively pursued by affirmative action opponents, who are continuing to collect information about admissions decision-making and outcomes in an effort to show that universities accord too much weight to race and that they employ de facto quotas. By documenting dramatically different odds of admission to a particular university for, say, white and black students with similar grades and test scores, affirmative action opponents aim to show that university officials have done much more than place the proverbial thumb on the scale in evaluating minority applicants. Through comparison of admission and enrollment patterns across multiple years, they aim to show that a university seeks a de facto quota rather than a critical mass.

#### The Consideration of Race-Neutral Alternatives

Affirmative action opponents might also contend that a university has failed to consider the adequacy of race-neutral policies. As with race-conscious policies, a race-neutral admissions policy may take any number of forms. A race-neutral policy may operate in a mechanical manner (as do the percentage plans adopted in Texas, Florida, and California) or rely wholly on the discretion and subjective assessments of individual admissions officers. For example, a whole file review process in which admissions officers consider factors such as economic status, obstacles overcome, parental education, school setting and so forth, would be race neutral, as long as race is not one of the factors considered.<sup>28</sup> In between these two extremes are policies that would award points on the basis, for example, of an applicant's background or experience with adversity. It is important to bear in mind that a university need not prove that no conceivable race-neutral policy would have been adequate, simply that it seriously considered race-neutral alternatives.

Although courts have not done so in the past, it is possible that an affirmative action admissions policy might also be evaluated with respect to race-neutral policies related to recruitment and financial aid, as well as academic and social support programs.<sup>29</sup> A court could decide, for

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<sup>27</sup> Of course, this approach would require the university to be extraordinarily sensitive to the numbers and percentages of minority admits, which, ironically, would constitute the same sort of engineering of outcomes that the Court wants to avoid.

<sup>28</sup> The University of California, Berkeley uses such a policy to admit a portion of its entering class.

<sup>29</sup> In the Michigan cases, the Court's analysis centered on the sorts of percentage plans that have been adopted in California, Florida, and Texas, which the Court rejected both because they are inapplicable to professional school admissions and because they would sacrifice the academic excellence of the student body. The Court did not

example, that in order to justify an affirmative action admissions policy, the university must have considered whether race-neutral recruitment, support or financial aid efforts would have been sufficient to create a diverse student body. The race-neutral alternatives requirement has been applied in this manner in other contexts both by the Supreme Court<sup>30</sup> and by lower federal courts.<sup>31</sup>

Recruitment programs, in particular, would be especially likely to be incorporated into the narrow tailoring calculus, because they expand opportunities for minorities by enlarging the pool of qualified applicants. Expanded recruitment is fully consistent with the ideals of equal opportunity and meritocracy that inform higher education admissions. Financial aid and academic support policies, in contrast, may appear to reallocate a fixed resource, benefiting some at the expense of others.

A requirement that universities consider the potential effects of race-neutral recruitment, support and financial aid measures in evaluating the need for affirmative action would, obviously, increase the uncertainty of the constitutional calculus. The potential impact of race-neutral supplemental programs might be difficult to forecast, given that the consequences of a particular supplemental program would depend both upon what other supplemental programs are in place and upon the school's admissions policy. The effectiveness of a race-neutral recruitment program, for example, in expanding the pool of qualified (and likely to be admitted) minority applicants would depend in part on the criteria on the basis of which those applicants are evaluated. Similarly, the impact of an expanded financial aid program would depend on the percentage and number of minority applicants in the pool of potential financial aid recipients. Assessment of supplemental programs is further complicated by the fact that increased funding may dramatically expand such programs, in contrast to admissions where, for example, a school's physical facilities may limit the size of the student body (at least in the short term).<sup>32</sup>

### Post-Michigan Challenges to Race-Conscious Supplemental Policies

Affirmative action opponents have already challenged race-conscious policies related to financial aid, recruitment, and academic and social support.<sup>33</sup> Even while the Michigan cases were pending, the Center for Equal Opportunity challenged a number of race-conscious supplemental programs at the University of Michigan, and also filed a complaint with the Office of Civil

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consider whole file review that does not take account of race per se. Nor did the Court consider any supplemental policies, such as recruitment.

<sup>30</sup> See, e.g., *City of Richmond v. J. A. Croson*, 488 U.S. 469 (1989).

<sup>31</sup> See, e.g., *Peightal v. Metropolitan Dade County*, 26 F.3d 1545 (11th Cir. 1994); *Ensley Branch NAACP v. Siebels*, 31 F.3d 1548 (11th Cir. 1994); *Billish v. City of Chicago*, 962 F.2d 1269 (7th Cir. 1992).

<sup>32</sup> Although universities cannot, say, double the size of an entering class, they could, if they wanted, dramatically increase recruiting, financial aid, or support programs. A university could provide scholarships to all minority students, for example, by deciding to provide scholarships to all admitted or enrolled students, or the university could choose to increase academic support services for all students.

<sup>33</sup> Some universities that have abandoned race-conscious admissions employ a wide array of race-neutral supplemental programs that are intended to create and maintain a diverse student body. The University of Texas, for example, has instituted a Presidential Achievement Scholars program for students from economically disadvantaged backgrounds who may have attended an academically inferior school. The University of Texas also offers a Longhorn Opportunity Scholarship for students from high schools designated as having not previously sent many students to its university.

Rights of the U.S. Department of Education regarding race-conscious supplemental programs at Virginia Tech and Virginia Bioinformatics Institute.<sup>34</sup>

Supplemental programs might use race in any number of ways. Racially exclusive programs would limit eligibility on the basis of race. Or a supplemental program might consider an individual's race as a "plus," one factor among many taken into account in the allocation of program benefits. Finally, race targeted programs do not use race as an eligibility criterion, but are purposefully formulated to reach and benefit racial minority students. Generally speaking, racially exclusive programs would be the most difficult to justify, as they seem akin to a racial quota or set-aside, which the Court has declared impermissible. Race targeted policies, in contrast, would be the easiest to justify, as they could be characterized as race neutral in that they do not differentiate among individuals on the basis of their race, and not even subject to strict scrutiny. Between these two extremes would be programs that use race as a plus factor, mirroring the approach the Court endorsed in the Michigan cases.

Extending the principles developed in the admissions context to supplemental programs does not only require consideration of whether a program's use of race tracks or maps onto the distinctions the Supreme Court outlined with respect to admissions policies. A court would also need to consider the similarities between the admissions process on one hand, and the supplemental program on the other.

There are good reasons for a court to allow a university more leeway with a race-conscious supplemental program than with an affirmative action admissions program. The Court might conclude that reliance on race is less objectionable in most supplemental programs than in the admissions process itself. A court could also note that permitting the university to use race in its supplemental programs might lessen the need to use race in the admissions process.

### Financial Aid Policies

The only federal court decision that directly addressed the constitutionality of race-conscious financial aid invalidated a racially exclusive scholarship administered by the University of Maryland.<sup>35</sup> This ruling, however, does not shed much light on the implications of the Michigan decisions because the court considered the challenged program only in terms of the University's asserted interest in remedying the present effects of its own past discrimination.

Compared to recruitment and support programs, financial aid seems most analogous to admissions, and therefore most subject to direct application of the narrow tailoring principles set forth in the Michigan decisions. Although many applicants may view getting accepted to a school as more important than receiving financial aid, the availability of financial aid will often, as a practical matter, determine whether an admitted student will be able to attend an institution. Thus, scholarship programs where race is considered as one of many factors in a flexible and non-mechanical manner would be preferable to policies that automatically assign some number

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<sup>34</sup> More recently, the Civil Rights Division of the United States Department of Justice, after being contacted by the Center for Equal Opportunity, has singled out three fellowship programs at Southern Illinois University for allegedly discriminating against men, whites, and non-preferred minorities.

<sup>35</sup> *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994).

of points on the basis of race or that are racially exclusive. Indeed, a racially exclusive scholarship seems to mirror the admissions quota or set-aside that the Court has unequivocally declared impermissible.

Yet there are also important distinctions between financial aid and admissions, which weigh in favor of the permissibility of some race-conscious financial aid policies even where analogous admissions policies would be struck down. These distinctions are discussed in a 1994 policy guidance issued by the Department of Education that discussed race-conscious financial aid. The key distinction is that the burden on non-minorities of a race-conscious (or even racially exclusive) scholarship may be negligible. While the total number of slots in an entering class is independent of the existence of a race-conscious admissions program, the total amount of financial aid is not so invariant. As the policy guidance states, “in contrast to the number of admissions slots, the amount of financial aid available to students is not necessarily fixed.”<sup>36</sup> The guidance goes on to note that “a decision to bar the award of race targeted financial aid will not necessarily translate into increased resources for students from non-targeted groups ... [as previously race targeted funds] might be re-channeled into other methods of recruitment.”<sup>37</sup> If the elimination of the race-based scholarship would not result in any increase in general scholarship funds (perhaps because the scholarship funds were provided by a private donor), then the race-conscious scholarship would not have caused non-minority students to receive any less funding.<sup>38</sup> Thus, even a racially exclusive scholarship might be permitted, though an admissions quota certainly would not.

The justifications for invalidating a race-conscious financial aid policy become even less weighty if, as is increasingly true at the most elite schools, each admitted student’s demonstrated financial need is fully met. In a financial aid program that meets each student’s demonstrated financial need and no more, a racial designation attached to any aid funds (perhaps at the behest of a donor) would influence the distribution of specific aid funds, but not the amount of aid available to any particular student.<sup>39</sup> Thus, no white student would be denied funding as a result of the race-conscious program.

### Recruitment Policies

Many universities operate a variety of race-conscious recruitment programs.<sup>40</sup> Recruitment programs that treat individuals differently on the basis of race would be most akin to a conventional affirmative action policy. Such programs would include i) minority only visitation

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<sup>36</sup> Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964; Notice, 59 Fed. Reg. 8756, 8762 (Feb. 23, 1994).

<sup>37</sup> *Id.*

<sup>38</sup> Indeed, non-minority students might have more scholarship funds available if some minority-only scholarships are used by minority students who otherwise would have been awarded general scholarships.

<sup>39</sup> It could also be the case, however, that race-conscious financial aid practices might influence the form of aid funds that students receive. Having one’s financial need met through low-interest university loans would obviously not be equivalent to having one’s need met through grant funds.

<sup>40</sup> The race-conscious–race neutral distinction is a bit inapt as applied to recruiting inasmuch as most recruiting efforts are by their nature directed at groups and do not distinguish among individuals. Indeed, in the cases, courts typically refer to race targeted or racially oriented recruitment, and do not draw a sharp distinction between race-conscious and race-neutral recruitment.

programs, ii) the payment of travel expenses for minority admittees, but not white admittees, to visit campus, iii) sending solicitation of application letters to potential minority applicants but not to potential white applicants. Race-conscious recruitment efforts that do not use race as an eligibility criterion—for example, a decision to concentrate recruiting efforts at schools with large numbers of minority students—would be race-targeted, and more analogous to race-neutral admissions policies.

Recruitment policies are even more dissimilar from admissions policies than are financial aid policies. As with financial aid, the level of recruitment is not fixed, so that the elimination of a race-conscious recruitment program would not necessarily result in any increase in the recruitment resources directed toward non-minority students. Thus, the existence of a race-conscious recruitment measure might not disadvantage non-minority students as a group. In addition, race-conscious recruitment practices might be characterized as less burdensome to non-minorities to the extent that the benefit that recruitment programs provide—information, or the opportunity to obtain information—is viewed as less substantial than the concrete benefit of admission. Conversely, the more concrete the benefits—paid visitation expenses, for example—the more likely a court would be to apply strict scrutiny.

Another reason that race-conscious recruitment policies may be viewed as less objectionable than race-conscious admissions policies is that recruitment policies are readily characterized as furthering the goal of equal opportunity. Our entire antidiscrimination edifice—as reflected in constitutional doctrine, statutory law, and lay intuition—pivots on the classically liberal distinction between equal opportunity and equal results. The principle of equal opportunity is widely supported, as is the notion that government should undertake efforts to promote equality of opportunity. People are less likely to believe, however, that the government should strive for equal results. The concepts of equal outcomes and equal opportunity are not as analytically distinct as they may seem. Nonetheless, that divide unquestionably shapes the thinking of many people (including some judges) about antidiscrimination law and policy. Providing opportunity is permissible; the engineering of results is not. In the college admissions context, in particular, the provision of opportunity to the meritorious is a widely shared goal. Thus, a court might exempt from strict scrutiny a race-conscious recruitment program that is primarily perceived as opportunity expanding.

The question then becomes how universities might depict race-conscious recruiting efforts as promoting opportunity rather than engineering results. One useful strategy would be to sharply distinguish recruiting practices from selection criteria and processes. A recruiting program that slots participants into a separate admissions process or provides any form of preferred consideration in the admissions process could seem more like an effort to engineer results. In contrast, recruitment practices that enlarge the pool of applicants, but that do not provide any admissions preference, would more readily be viewed as opportunity promoting and, thus, not subject to strict scrutiny.

Many courts have relied, often implicitly, on these sorts of distinctions in deciding affirmative action cases. A number of courts have approvingly referred to race targeted recruitment as

wholly permissible and unobjectionable efforts to enlarge the applicant pool.<sup>41</sup> Some courts have explicitly upheld race-targeted recruitment as an opportunity expanding effort that is exempt from strict scrutiny.<sup>42</sup> As one federal appeals court has stated, “where the government does not exclude persons from benefits based on race, but chooses to undertake outreach efforts to persons of one race broadening the pool of applicants, but disadvantaging no one, strict scrutiny is generally inapplicable.”<sup>43</sup>

Some courts have treated governmental regulations requiring race targeted outreach by government contractors or regulated institutions as a racial classification.<sup>44</sup> In most of these cases, the court viewed the outreach requirement as pressuring the organization to engage in race-based hiring.<sup>45</sup> As one court stated “where ‘outreach’ requirements operate as a sub rosa racial preference—that is, where their administration ‘indisputably pressures’ contractors to hire minority subcontractors—courts must apply strict scrutiny.”<sup>46</sup>

The voluntary race-conscious recruitment efforts undertaken by a university, however, can be distinguished from these cases, which all involve the pressure that a government regulator might exert against a private party. In the regulatory context, an institution might perceive the need to satisfy a requirement for race-conscious outreach through race-conscious hiring or contracting. Such pressures would seem less worrisome, if not totally absent, when an institution engages in race-conscious outreach on its own. However, at least one court has identified the possibility of the same sort of “pressure” within a university.<sup>47</sup> In that case, the court reasoned that an incentive fund for the purpose of hiring minority faculty would warrant strict scrutiny if it operated as an inducement to minority faculty hiring, but not if it operated as an inducement to expand recruiting efforts so as to attract more minority applicants.

### Support, Preparation, and Retention Programs

There are a wide variety of race-conscious support, preparation, and retention programs which aim to bolster minority students’ academic skills and social comfort in the university environment. Pre-enrollment summer bridge programs, post-matriculation tutoring programs, student centers, housing, graduation ceremonies, mentoring programs, university funded student organizations—all may be operated in a race-conscious manner.

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<sup>41</sup> See, e.g., *Duffy v. Wolle*, 123 F.3d 1026 (8th Cir. 1997); *Peightal v. Metropolitan Dade County*, 26 F.3d 1545 (11th Cir. 1994); *Ensley Branch NAACP v. Siebels*, 31 F.3d 1548 (11th Cir. 1994); *Sussman v. Tanoue*, 39 F. Supp. 2d 13 (D.D.C. 1999); *Billish v. City of Chicago*, 962 F.2d 1269 (7th Cir. 1992).

<sup>42</sup> *Sussman v. Tanoue*, 39 F. Supp. 2d 13 (D.D.C. 1999).

<sup>43</sup> *Allen v. Alabama State Bd. of Educ.*, 164 F.3d 1347, 1352 (11th Cir. 1999), vacated for other reasons by 216 F.3d 1263 (11th Cir. 2000).

<sup>44</sup> See, e.g., *Safeco Ins. Co. of America v. City of White House*, 191 F.3d 675 (6th Cir. 1999); *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997); *Bowen Engineering Corp. v. Village of Channahon, Ill.*, 2003 WL 21525254 (N.D. Ill.); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998).

<sup>45</sup> One court, however, has even gone so far as to conclude that pressure to engage in race-conscious recruitment is itself unconstitutional. In *MD/DC/DE Broadcasters Assn v. FCC*, 236 F.3d 13 (D.C. Cir. 2001), the court of appeals reviewed an FCC rule requiring a “licensee [to] make a good faith effort to disseminate widely any information about job openings,” and concluded that the rule “does create pressure to recruit women and minorities, which pressure ultimately does not withstand constitutional review.” 236 F.3d at 17-18.

<sup>46</sup> *Safeco Ins. Co. of America v. City of White House*, 191 F.3d 675, 692 (6th Cir. 1999) (citations omitted).

<sup>47</sup> *Honadle v. the University of Vermont and State Agricultural College*, 56 F. Supp. 2d 419 (D.Vermont 1999).

Although the *Grutter* majority did not speak to the constitutionality of race-conscious supplemental programs, Justice Scalia's dissent specifically criticized some such programs, referring to "universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority only graduation ceremonies."<sup>48</sup>

Prior to the Court's rulings in the Michigan cases, affirmative action opponents had challenged a number of race-exclusive support programs.<sup>49</sup> Since the Michigan cases, a number of universities have reconstituted their support programs, either to open participation to members of all groups or eliminate any hint of a racial focus. Most of these university decisions have been preemptive efforts to avoid a lawsuit, rather than a response to a judicial finding of invalidity.

Race-conscious support programs occupy a constitutionally hazy space. They might be viewed as more permissible than race-conscious admissions or financial aid because they do not determine whether one may attend an institution. On the other hand, though, their burden on white students might be viewed as substantial. In the same way that current white employees have stronger claims in opposition to affirmative action than prospective employees, already enrolled students may have a stronger entitlement to equal access to programs that will help them to remain in school.

As with recruitment efforts, a court's assessment could turn in part on whether the court frames the program as conferral of a concrete benefit (akin to admissions) or as equal opportunity promoting (analogous to vigorous recruitment). If analogized to admissions, the consideration of race might be viewed as social engineering. If the program is viewed as a form of recruitment that expands opportunity, then courts might be more likely to permit the consideration of race. While some programs might seem closer to one characterization or the other, often the same program could be subject to contrary characterizations. A program that involves minority high school seniors in university faculty research projects, for example, could be viewed either as admitting the students to some smaller, and especially valuable, program within the university, or as recruitment with a developmental component.<sup>50</sup> The consideration of race in such programs might be viewed either as an effort to promote equal opportunity or to engineer equal results. Which characterization seems most apt depends largely on how one frames the program, as a discrete, concrete benefit or as a means of promoting opportunity within the larger institution.

### **The Paradox of Race-Neutral Policies**

In order to understand the law (and politics) of affirmative action, it is essential to appreciate the paradoxical character of race-neutral policies, which accounts for their centrality in the affirmative action controversy.

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<sup>48</sup> 539 U.S. at 349.

<sup>49</sup> For example, as a result of a complaint filed with the Office for Civil Rights of the U.S. Department of Education in May 2002, academic enrichment programs operated by the Massachusetts Institute of Technology for minority high school students were opened to non-minority students. Princeton University made similar changes.

<sup>50</sup> More generally, the same program may serve multiple purposes. A graduate fellowship program for minorities in engineering, for example, might simultaneously serve financial aid, recruitment, and support purposes.

### The Appeal of Race-Neutral Policies as Affirmative Action Foil

Race-neutral policies have typically served as the foil to conventional affirmative action policies, with the desirability of affirmative action policies being inversely related to the availability of race-neutral alternatives. This dynamic is well exemplified in constitutional doctrine. The narrow tailoring prong of the strict scrutiny test requires that an institution with an affirmative action policy have reasonably considered race-neutral policies and found them lacking. Although the Court in the Michigan cases did not require that a university consider every conceivable race-neutral policy, the clear implication of the narrow tailoring standard is that the more feasible the available race-neutral policies, the less justifiable a challenged affirmative action policy. The same sort of dynamic operates in the political domain, where efforts to end affirmative action are often coupled with calls to implement a race-neutral alternative policy.

Race-neutral policies' role as affirmative action foil becomes even more apparent when one considers the development of the Court's constitutional skepticism toward affirmative action. The Court first lauded the possibility of race-neutral alternatives in its 1989 decision in *City of Richmond v. Croson*<sup>51</sup> and then again in its 1995 decision in *Adarand v. Peña*.<sup>52</sup> While in earlier cases the Court had evaluated affirmative action policies in terms of less burdensome or less restrictive alternatives, it was only in *Croson* and *Adarand* that the Court used the terminology "race-neutral alternatives." *Croson* and *Adarand* are also the cases where the Court proclaimed that affirmative action policies would be subject to the same strict scrutiny standard applicable to discriminatory policies that burden racial minorities, an approach the Court termed the "consistency principle."

The most obvious reason for the appeal of race-neutral policies as affirmative action foil is that they do not treat individuals differently on account of race. Whatever the admissions criteria, race-neutral policies apply them uniformly to all applicants. In their operation, race-neutral policies thus fit with the prevailing ethos in opposition to evaluating individuals on the basis of their race. For some of the staunchest opponents of affirmative action, this virtue of race-neutral policies is enough to establish their superiority to conventional affirmative action policies which distinguish among individuals on the basis of their race.

There is an additional reason, however, for the appeal of race-neutral policies. Race-neutral policies are attractive partly because they may realize the same race-related goals as affirmative action. The narrow tailoring analysis of the strict scrutiny test, for example, entails the evaluation of race-neutral alternatives in terms of how effectively they further the race-related goals for which the affirmative action policy was implemented. Race-neutral policies are attractive then both because they do not differentiate among individuals on the basis of race and because they may further the race-related goals of the affirmative action policy they would replace. Race-neutral policies thus suggest that the goal of racial diversity may be realized without any consideration of race.

The realization of racial diversity without any consideration of race, however, is illusory. Race-neutral policies will only produce a racially diverse student body if they are designed and

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<sup>51</sup> 488 U.S. 469 (1989).

<sup>52</sup> 515 U.S. 200 (1995).

intended to do so. A race-neutral policy in whose development race played no role would be extraordinarily unlikely to produce a racially diverse student body. Acknowledgement that a race-neutral policy will only further racial diversity if it is intended to do so highlights the paradoxical status of race-neutral policies. Race-neutral policies are appealing because they do not take account of race, and because they do take account of race. Their appeal, and centrality in the affirmative action debate, would be diminished if they did not promise the benefit of racial diversity. They can only deliver on that promise if they are designed with race in mind.

From this perspective, affirmative action policies and the race-neutral policies that would replace them are both race conscious, albeit in different ways. Both types of policies would be enacted for the purpose of admitting a racially diverse student body, but only the conventional affirmative action policy would also distinguish among individual applicants on the basis of race.

### The Constitutionality of Race-Neutral Policies

Because they do not treat individual applicants differently on the basis of race, race-neutral policies are typically thought to be unquestionably constitutionally permissible. The Supreme Court's consideration of race-neutral policies in the narrow tailoring prong of the strict scrutiny test presumes that such policies are not themselves constitutionally suspect.

However, if race-neutral policies are formulated and enacted with race-related goals in mind (which they must be if they are to yield meaningful racial diversity), then race-neutral policies themselves may be constitutionally suspect. Recall that the consistency principle mandates the application of strict scrutiny to affirmative action policies, even though they benefit historically disadvantaged racial minority groups. Prior to its adoption of the consistency principle, the Supreme Court had made clear that law or policies animated by a discriminatory purpose are impermissible.<sup>53</sup> The coupling of the discriminatory purpose standard and the consistency principle suggests, simply as a matter of logical implication, that a formally race-neutral policy intended to increase the enrollment of racial minorities could be as constitutionally suspect as a parallel policy enacted in order to increase the enrollment of whites. Whether any particular policy is permissible would, of course, depend on its specific purpose, and the precise meaning of discriminatory purpose adopted by the Supreme Court.<sup>54</sup> It is not necessary to resolve these important issues to recognize that, under the formal dictates of equal protection doctrine, the enactment of a policy for race-related purposes invites some constitutional skepticism.

The race-consciousness of formally race-neutral policies has not been lost on anti-affirmative action groups. Those who oppose affirmative action because they want to rid governmental or institutional decision-making of any consideration of race might object to race-neutral policies as strenuously as they did affirmative action. For these groups, their prior support for race-neutral policies would have been merely a strategic decision calculated to bolster opposition to affirmative action. Indeed, some of the same affirmative action opponents who proclaimed the benefits of race-neutral alternatives while the Michigan cases were pending have more recently

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<sup>53</sup> See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979).

<sup>54</sup> Would the sort of percentage plan enacted in some of our most populous states, for example, reflect a purpose of increasing the enrollment of racial minority students, of obtaining geographic representation, or promoting student body diversity?

charged that such policies are themselves discriminatory and would be subject to strict scrutiny if challenged.<sup>55</sup>

Affirmative action opponents who also disfavor race-neutral alternatives would highlight the fact that race-neutral policies may burden white applicants as much as, or more than, a conventional affirmative action policy. There is little relation between the mechanics of an admissions policy and the extent to which it increases or decreases the admission of various racial groups. The likelihood of admission for a particular white applicant or the rate of admission for white applicants as a group, for example, may be reduced more under a race-neutral substitute for affirmative action (compared to, say, a pure grades and test score criterion) than under a conventional affirmative action policy.

Notwithstanding their similarity to affirmative action, race-neutral alternatives will not likely be invalidated. The Supreme Court has rarely invalidated any formally race-neutral government policy, much less one that benefits historically disadvantaged racial minority groups.<sup>56</sup> Lower federal courts have considered the constitutionality of formally race-neutral policies or practices intended to benefit historically disadvantaged racial minorities and have generally upheld such policies and practices. The federal Court of Appeals that encompasses New York state did not apply strict scrutiny to a police entrance exam that was redesigned, using “race-conscious” factors to minimize the disparate impact on minority applicants.<sup>57</sup> Another federal appeals court did not apply strict scrutiny to a police department’s lowering of the written test score needed to proceed in the promotion process and the holding of mock interview sessions attended primarily by minority candidates amid allegations that such actions were taken “for affirmative action reasons.”<sup>58</sup> Other federal courts of appeals have similarly upheld formally neutral practices that were intended to benefit minorities, even as they would have invalidated an analogous practice found to be intended to benefit whites.<sup>59</sup> As these cases suggest, the invalidation of formally race-neutral practices intended to benefit racial minorities would put into question the constitutionality of a wide array of worthwhile and broadly supported public policies.

The constitutional doctrine is emblematic of a broader cultural ambivalence. On the one hand, our society is opposed to racial discrimination. We do not want the government or important institutions allocating benefits on the basis of race. The ideal of colorblindness is, to many, alluring. On the other hand, we recognize that racial inequality persists and believe that government should play a role in its amelioration. Constitutional doctrine mediates, rather than

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<sup>55</sup> Roger Clegg, the general counsel of the Center for Equal Opportunity, testified to that effect before members of the Texas legislature regarding that state’s Ten Percent Plan.

<sup>56</sup> The one arguable exception is political districting, where the Court has invalidated formally neutral districting schemes intended to benefit minorities. The Court’s political redistricting jurisprudence, however, is in my view a *sui generis* category of cases.

<sup>57</sup> *Hayden v. County of Nassau*, 180 F.3d 42 (2d. Cir. 1999).

<sup>58</sup> *Byers v. City of Albuquerque*, 150 F.3d 1271, 1276-77 (10th Cir. 1998).

<sup>59</sup> *See, e.g., Raso v. Lago*, 135 F.3d 11 (1st Cir. 1998) (declining to apply strict scrutiny to decision curtailing a mostly white tenants group’s statutory right of preference for new public housing in order to foster integrated housing pursuant to consent decree imposed on HUD as well as statutory fair housing obligations). In *Allen v. Ala. State Bd. of Educ.*, 164 F.3d 1347 (11th Cir. 1999), the court declined to apply strict scrutiny to a consent decree mandating that future teaching certification exams be formulated to minimize the disparate impact on minority teachers. The court stated that “[n]othing in *Adarand* requires the application of strict scrutiny to this sort of race-consciousness.” 164 F.3d at 1353 [vacated per parties request at 216 F.3d 1263].

resolves, this tension. The narrow tailoring test reflects a presumption that race-neutral alternatives are unquestionably constitutionally permissible, even as the discriminatory purpose standard coupled with the consistency principle puts their constitutionality into question.

The centrality of race-neutral alternatives in the affirmative action debate reflects the same sort of tension. Affirmative action generates unease because it is racially discriminatory. Yet the appeal of race-neutral alternatives depends partly on their having been purposefully formulated so as to yield racial diversity.

### Shifting the Debate

Recognition of the role of race-neutral policies and of the value conflict they mediate opens new rhetorical opportunities in the college admissions debate. Race-neutral policies are typically discussed in terms of their racial consequences as compared to affirmative action, with each side taking for granted that race-neutral policies are fundamentally distinct from affirmative action. It might be useful to efface the presumed categorical divide and instead emphasize their shared goal of racial diversity and inclusion. With the exception of some extremists, most people view the potential resegregation of our nation's selective colleges and universities as undesirable. That is why even those who are most staunchly opposed to affirmative action must, if their position is to develop political traction, at least advert to the possibility of race-neutral policies that would produce a meaningful measure of racial diversity.

Focusing on the broadly shared goal of racial inclusion could help to shift the debate, by reminding people that we have continue to strive to overcome the legacy of slavery and segregation, but have yet to fully do so. A multitude of race-conscious policies have been enacted to promote racial equality: the Fair Housing Act, the Voting Rights Act, and No Child Left Behind, to name just a few. Highlighting these policies would help to emphasize the extent to which race is already a valid and legitimate consideration throughout government policymaking. If President Bush pledges to undertake efforts to narrow the racial gap in homeownership or health status, few commentators would criticize such efforts as impermissible racial discrimination.

Once people understand that race is already an accepted aspect of policymaking, they might begin to view affirmative action differently. The goal would be to situate affirmative action as consistent with, rather than a deviation from, our moral values and commitments. Recognition of the race-consciousness of formally race-neutral policies not only makes affirmative action policies seem less exceptional, it usefully redirects attention to the consequences of race related policies rather than their form.

This approach to the politics of the affirmative action controversy—deemphasizing the categorical divide between race-neutral and affirmative action policies, and instead focusing on the consequences of specific policies—may also be a useful way to think about social science research related to race and higher education.

## **The Changed Research Landscape**

### Research Reorientation

During the period leading up to the Michigan cases, many social science researchers focused on defending the race-conscious admissions policies that universities had already adopted, either through documenting the educational benefits of diversity or by demonstrating the inadequacy of race-neutral alternatives to affirmative action. The prospect of adverse rulings in the Michigan cases may well have warranted that approach, as the Supreme Court could have categorically precluded affirmative action in higher education.

Now that the feared, catastrophic outcome has been averted, social science researchers can, and should, move beyond the defensive, litigation-centered approach that the Michigan cases demanded, and adopt a proactive and educational policy-centered approach. Rigorous research can now be geared not toward defending what institutions have decided to do, so much as providing guidance as to what they should do. Such research could be pivotal in both the legal and political controversy regarding race and higher education.

Rather than view race-neutral policies as categorically inferior to conventional affirmative action, researchers should instead evaluate particular policies on the basis of their outcomes. The outcomes of interest should include issues of access, as well as issues of academic performance. Minority students not only need access to our nation's selective colleges and universities, they also need the tools to succeed once they get there. Their success depends on both access and performance. The well-documented racial gap in achievement, for example, is apparent even in our nation's elite universities. Social science researchers should do what they can to help universities learn how to close that gap.

In addressing these issues, researchers should consider both admissions policies and supplemental programs. Each program or policy should be evaluated independently, and also in terms of its interplay with other programs. The consequences of a particular admissions policy, for example, might depend partly on existing supplemental programs. An academic preparation or enrichment program, for example, could aim to equip talented high school students to satisfy the university's admissions criteria. Understanding this sort of interplay is crucial not only to educational policy-making, it may figure into the constitutional analysis as well, as efficacious supplemental programs may reduce, if not eliminate altogether, the need for affirmative action in admissions.

### Admissions Policies

Admissions policies raise issues of both access and performance. Researchers now have the latitude to fully evaluate the consequences of various types of admissions policies. Considering the race of individual applicants, as do conventional affirmative action practices, is undoubtedly the most efficient means of producing a racially diverse group of admitted students. However, researchers should not ignore the potential of race-neutral admissions schemes. In light of the wide array of characteristics associated with race—family income, parents' education, family wealth, neighborhood and school characteristics, personal experience with hardship and

adversity, and so forth—one could imagine a race-neutral alternative that is nearly as effective as a race-conscious admissions policy in creating a diverse student body. Even if race-neutral policies are less effective means of creating a racially diverse class, it is nonetheless important to know how to craft the best race-neutral policies, given their political appeal.

Policies should also be evaluated on the basis of the subsequent performance of students who are admitted under one policy or another. Admissions policies may affect student performance either through a selection effect or a motivation effect. A race-neutral (or race-conscious) policy may better identify students who would perform well in college. In addition, a particular student may perform better if admitted under one policy than another, if, for example, knowledge of the admissions regime influences one's motivation, goals, or effort. There is some evidence, for example, that students admitted under the Ten Percent Plan in Texas perform better than students admitted under a conventional affirmative action policy.<sup>60</sup>

### Supplemental Programs

As with admissions policies, research about supplemental programs should consider broadly the question of how best to increase the numbers of minority students who make it to college and to boost their performance and graduation rates once they get there.

Financial aid and scholarship programs raise issues similar to those that arise with admissions policies. A race-conscious method of selection would be the most efficient means of directing financial aid to racial minority students.<sup>61</sup> But, as with admissions, the form of the scholarship program may also influence motivation or achievement. Receiving a named scholarship, for example, may mean something different to the recipient than simply receiving general financial aid funds. The named scholarship could be interpreted as evidence of the institution's belief in the recipient's promise and ability, which, in turn, may motivate the recipient or instill a confidence that otherwise would have been lacking. Put simply, if high school students know that a college scholarship awaits them if they met a certain academic standard, they may be more likely to work hard to meet that standard.

It would be useful to know whether the motivational effects of scholarship availability differ depending on the background or characteristics, including race, of the student recipient. It would also be useful to know whether such effects differ depending on whether the scholarship program is racially exclusive, race neutral, or considers race as one of many factors in the evaluation of applicants.

Assessing the potential benefit of recruitment programs depends, first, on investigating the potential pool of minority applicants. Are capable racial minority students less likely than white students to attend college or graduate school? Are there racial minority students who have been "missed," and who could be brought into higher education through more vigorous recruitment efforts? These are the sorts of questions it would be important to answer. In particular, it would

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<sup>60</sup> See the Chapa and Horn chapter, this volume.

<sup>61</sup> A scholarship program limited to minority students or that considers race in evaluating applicants is race conscious. A scholarship program for any graduate of certain largely minority or urban high schools would be race neutral.

be useful to know the extent to which recruitment efforts redistribute applicants among schools as opposed to bringing into the college or graduate/professional school process students who otherwise might be excluded.

Researchers might also help policy-makers to assess the difficult question of whether a recruitment program should be race conscious. Imagine, for example, that a professional school wants to attract the best racial minority students. The school already hosts an “admitted students day” during which admitted students who are undecided about where to enroll visit the campus and participate in activities that the school has arranged in order to acquaint the students with the school. The school has considered hosting an admitted students day only for minorities. Should it?

There are arguments both for and against a special admit day for minority students. A minorities-only day might facilitate the discussion of sensitive issues that some students would feel less comfortable voicing in a racially integrated setting. It might facilitate the formation of a supportive community that could enhance one’s subsequent school experience. On the other hand, a minorities-only day might give students the message, before they even enroll, that the school is already thinking of them in racial terms and that, by extension, they should think of themselves and their experiences in that manner as well. Racially exclusive enclaves might develop, which could reinforce the isolation of racial minority students from the broader student body. In the abstract, it is difficult to know which of these effects would predominate, or even to know how to evaluate differential outcomes. Well-designed research could help to begin to answer these sorts of questions.

Research concerning academic support and preparation programs could help identify means of improving minority students’ persistence and academic achievement. Research initiatives should investigate the consequences of varied support programs, with attention to the different contexts in which the programs are implemented and to the diverse student populations that they serve.

The question of the role of race in support programs is a difficult one, in part because support programs, to a greater extent than either financial aid or recruitment programs, involve creating a social setting whose race-related characteristics might influence academic achievement. It is perfectly plausible that a program to promote achievement in science among African-Americans, for example, would work best when the program is racially exclusive. But it is also plausible that the program would work best when it is intentionally racially integrated. Plausible stories could be told to support either possibility. Racial exclusivity might be conducive to the formation of an especially supportive learning community. Or it might reinforce an isolation and stigma that would undermine achievement. Credible research provides the only means of resolving an issue that could otherwise devolve into a matter of racial ideology.

### **Conclusion**

The controversy regarding minority students’ access to and performance in our nation’s selective colleges and universities will likely persist as long as race remains a fault line in American society. The dispute is a matter of law and politics, to be sure. But the difficult issues it raises should also be decided on the basis of sound research that sheds any ideological pre-commitment

to either conventional affirmative action policies or race-neutral policies. Credible research is useful not only in illuminating and framing policy options. It may help to resolve the political and legal controversy as well. Ultimately, here, as with many other contentious issues, law, politics and social science research are intertwined.