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Affirmative Action in Higher Education over the Next Twenty-five Years

A Need for Study and Action



Sandra Day O'Connor and Stewart J. Schwab

Affirmative action in higher education remains controversial and vexing. Few people argue that consideration of race in college or law-school applications would be the best policy in an ideal world. In that world, skin color would be treated like eye color (or perhaps like one's religion, whose differences the ideal world would tolerate and celebrate but not rank invidiously). In today's America, however, race still matters in painful ways.

No one knows for sure how best to move toward that ideal world. As with many contested legal or policy propositions, the arguments in the affirmative action debate tend toward absolutes. One position asserts that a university should never consider race in admissions decisions, no matter how grave the problem it seeks to remedy. Another counters that all race-conscious efforts—be they goals, quotas, or something else—are permissible in the name of diversity, regardless of whether they intensify the very racial antagonism they seek to remedy. Whatever the attractiveness of these absolutes, the Supreme Court has never adopted them, and we do not advocate for them here.

The tension between the competing absolute positions was apparent in the 1978 case of *Regents of the University of California v. Bakke*. In the 1970s, the University of California at Davis Medical School employed an affirmative action policy in which 84 of the 100 available spots for incoming students were filled through a standard admissions process focusing on grades and standardized test scores. The 16 remaining spots, however, were filled through a separate process designed to increase the low numbers of racial minorities being admitted under the standard process. These 16 slots were in effect reserved for racial minorities, and cut-off scores for these places were lower than for students admitted under the standard criteria. A 32-year-old NASA engineer named Allan Bakke contested Davis's admissions program, asserting that it operated as an impermissible quota system.

The breakdown of the Court's votes in *Bakke* revealed the polarized positions at issue. Four justices thought that the program should be invalidated simply because it used race to allocate slots. Another four justices

thought with equal fervor that Davis's admissions program should pass constitutional muster because, by their lights, the plan had no stigmatizing intent or effect. Writing only for himself, Justice Powell attempted to carve out some middle ground and, in the process, explain to all eight of his colleagues why they were wrong—or, as Justice Powell himself might have put the point, to demonstrate why those eight colleagues were *somewhat* correct. His opinion (which became the controlling opinion in the case) showed how university admissions officials could constitutionally use race in a tempered but not single-minded way. The opinion succeeded admirably, allowing universities to experiment with affirmative action while counseling them against becoming too comfortable in doing so.

One difficult issue that Justice Powell's opinion confronted was the level of applicable scrutiny. The university contended (and four justices agreed) that because its program sought to include rather than exclude racial minorities, the Court should apply a diminished standard of review, rather than the usual "strict scrutiny" otherwise applicable to racial classifications. Justice Powell rejected this contention, however, asserting that strict scrutiny applied even to supposedly benign racial classifications. Drawing on the Court's precedent in *Hirabayashi* and *Korematsu* (which applied strict scrutiny but nevertheless upheld the constitutionality of the government's curfew and exclusion during World War II of Japanese-Americans from large military zones in California), Justice Powell wrote: "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."

Nevertheless, Justice Powell did not believe that strict scrutiny doomed all university efforts to foster racial diversity. In analyzing the Davis program, he found that it was impermissibly race conscious because it set aside a certain number of places for racial minorities, establishing what was in effect a spoils system. According to Justice Powell, this approach unfairly insulated the 16 spots from competition: "Fairness in individual competition for opportunities, especially those provided by the State, is a widely cherished American ethic," he wrote. Looking beyond the specifics of the Davis program, however, Justice Powell reasoned that some admissions programs that took race into account in composing the entering class, like the one at Harvard, could survive constitutional scrutiny. Such programs were permissible, according to Justice Powell, because "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to pro-

mote beneficial educational pluralism.” And Justice Powell was careful to note that racial diversity was but one type of diversity that universities could pursue: “[E]thnic diversity . . . is only one element in a range of factors a university may properly consider in attaining the goal of a heterogeneous student body.”

Justice Powell rejected absolute positions because he thought they were ill-suited to addressing the complex and competing concerns swirling around affirmative action in higher education. He rejected the color-blind absolute because he was wary of the educational resegregation that would have likely occurred in the absence of race-conscious admission programs. And he rejected the benign racial classification absolute, in turn, because he did not want to abandon the goal of transitioning, however deliberately, toward a color-blind society. Instead, Justice Powell confronted the world as he saw it, without extinguishing the promise of the world that he hoped we would all one day see.

Perhaps predictably, commentators attacked Justice Powell’s decision from a wide variety of vantage points. In a 1979 article in the *Washington University Law Quarterly* titled “The Disease as Cure,” then-professor Antonin Scalia (now a Supreme Court justice) wrote that “Justice Powell’s opinion . . . strikes me as an excellent compromise between two committees of the American Bar Association on some insignificant legislative proposal. But it is thoroughly unconvincing as an honest, hard-minded, reasoned analysis of an important provision of the Constitution.”¹ Not to be outdone, then-professor Guido Calabresi (now a judge on the U.S. Court of Appeals for the Second Circuit) published a piece entitled “Bakke as Pseudo-Tragedy” in the *Catholic University Law Review* that same year, in which he declared: “It may be that Justice Powell is right. But the dangers of using subterfuges are sufficiently great and the temptation to rely on them unnecessarily so substantial, that any uncandid solution should be suspect. For that reason I remain unconvinced, and continue to regard the opinion in *Bakke* as more tragic than the underlying choices.”² Despite the initial criticism, Justice Powell’s approach has endured.

Justice Powell’s opinion helped shape the views of many on affirmative action in higher education, admittedly including the authors of this article, one of whom wrote the majority opinion in *Grutter v. Bollinger*. In considering the University of Michigan Law School’s affirmative action program, the majority opinion stated: “[T]oday we endorse Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions.” Following Justice Powell’s lead, the majority applied strict scrutiny in reviewing both the Michigan law school’s program in *Grutter* and the university’s undergraduate program in *Gratz*. In *Grutter*, the Court acknowledged the importance of context, contending

that “[n]ot every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.”

Applying strict scrutiny, the Court reached different conclusions in assessing the two University of Michigan programs. The Court invalidated the undergraduate admissions program at issue in *Gratz* because out of 100 points needed to gain admission it rigidly assigned a 20-point bonus to applicants from racially underrepresented backgrounds. This program, the Court reasoned, defied the individualized assessment that was the hallmark of the permissible race-conscious admissions programs that Justice Powell validated in *Bakke*.

When the Court examined the law school’s admissions program, in contrast, it rejected calls demanding a totally race-blind admissions process. Instead, the Court concluded that educational institutions should be permitted to consider race because prohibiting them from doing so might intensify the nation’s racial problems, rather than eliminate them. The Court was guided to this conclusion in part by an amicus brief filed by retired military leaders, who contended that without affirmative action they would have a nearly all-white officer corps commanding an overwhelmingly minority group of enlisted soldiers. The military leaders suggested that such a stark racial disparity could damage the military’s morale. The Court also heard from many corporations who urged that some minimal forms of race consciousness be permitted because today’s workforce must be prepared to work with colleagues and customers from a wide variety of backgrounds. Acknowledging that law schools often act as paths to power and leadership, the majority declared that “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized. In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented individuals of every race and ethnicity.”

While the Court in *Grutter* validated the University of Michigan’s law school program, it also echoed Justice Powell in stressing that affirmative action should be a temporary bandage, rather than a permanent cure. “Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle,” the Court wrote. The *Grutter* majority further suggested that these programs must eventually fade away. “It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education,” the Court noted. “Since that time, the number of minority applicants with high grades and test scores has indeed improved. We expect 25

years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” That 25-year expectation is, of course, far from binding on any justices who may be responsible for entertaining a challenge to an affirmative action program in 2028. Those justices will be charged—as Lewis Powell was in *Bakke* in 1978, and as the Court was in *Grutter* in 2003—with applying abstract constitutional principles to concrete educational endeavors.

Educators should not take this 25-year expectation, however, as a grace period to postpone consideration of affirmative action for another generation. Thought, study, and action are needed now.

Three modest points merit attention in this context. To restate our most basic point: our society does not want to be in the same quandary 20 years from now (over five having already gone by since the 2003 *Grutter* decision) that it currently faces in affirmative action in higher education. Freeing ourselves from this quandary will require many types of action, but perhaps most essentially it will require continued research, debate, and innovation by academics, policymakers, and the public at large. Educators should use the next 20 years to evaluate their admissions dilemma, rather than carry on business as usual. Indeed, the deference society shows to higher-education leaders in formulating policy obligates them to use their talents and resources continually to assess themselves. These 20 years should be sufficient time to gather data and experiment with alternatives to directly considering race to promote student-body diversity and excellence.

Voters in several states have already mandated that educators not wait 20 years. In 1996, California voters passed Proposition 209, which required that the state’s public universities abandon race-based affirmative action. The state of Washington passed a similar measure in 1998. Public universities in Florida and Texas have also eliminated affirmative action. In 2006, Michigan voters passed Proposal 2, designed to end “preferential treatment” in university admissions based on race, gender, ethnicity, and national origin. Similar ballot initiatives are under way in other states. Like it or not, change is upon us. One benefit of cultivating various approaches to affirmative action is the opportunity to assess whether effective alternatives exist to considering race in achieving educational quality and diversity.

Our second point is that higher education cannot resolve the admissions dilemma on its own, because higher education is powerless to alter the basic profile of its applicant pool. Unless major changes are made in our K–12 education system, higher education 20 years from now will face the same conflict between educational talent and diversity that it faces today. But K–12 is not the only culprit. African Americans face a myriad of challenges that powerfully alter the profile of applications to higher education, includ-

ing an extraordinarily high imprisonment rate among black males and a culture that often discourages academic success.

Our third point is a plea for more social-science information on the benefits of diversity itself. When the time comes to reassess the constitutionality of considering race in higher-education admissions, we will need social scientists to clearly demonstrate the educational benefits of diverse student bodies, and to better understand the links between role models in one generation and the aspirations and achievements of succeeding generations.

The K-12 Problem



Admissions officers working to achieve a racially diverse student body are currently faced with the stark realization that the academic qualifications of black applicants to selective colleges and law schools are substantially weaker than those of white applicants. This disparity forces a conflict between efforts to select the most academically able students and parallel efforts to create a diverse class. Universities can either set aside their interest in academic quality, or ignore the goal of racial diversity, or try to balance the two goals as best they can. But unless our K-12 system narrows this gap, higher education will face the same quality-versus-diversity dilemma in 20 years that it faces today.

Attendance and achievement data on the American K-12 system reveal troubling racial disparities. Blacks are more likely than whites to have poor attendance records in school and to drop out of high school.³ Blacks consistently score lower than other ethnic groups in reading, mathematics, and science, and the performance discrepancies between white and black students have not significantly improved since the mid-1980s.⁴ Some evidence indicates that the black-white gap, particularly in mathematics, increases in junior high and remains constant in high school,⁵ suggesting that the transition to adolescence poses a particular academic challenge for blacks. Black students are less likely than whites to take advanced academic classes in high school, and are far less likely to take advanced-placement tests.⁶

The trends are not uniformly bleak. Black students have substantially narrowed the gap with whites since the 1970s in their mathematics and reading scores on the SAT and National Assessment of Educational Progress (NAEP) examinations.⁷ The black-white difference in high school/GED completion rates has also narrowed substantially in roughly the same period.⁸ Programs for very young children, such as the Head Start prekindergarten program, may be particularly effective in increasing the

relative achievement of blacks. Put more pessimistically, differences in outcomes at age three are similar to those among adolescents, suggesting that efforts to reduce test-score gaps must start in preschool.⁹

A key question is whether K–12 administrators may themselves explicitly consider race in making school assignments or other policies. School assignments are critical because more than two-thirds of black students are enrolled in schools with predominantly minority student bodies.¹⁰ The Supreme Court recently addressed this issue in *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007). As always, the facts of the particular case are critical. But we found persuasive Justice Kennedy’s perspective that the simple “postulate that ‘[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race’ . . . is not sufficient,” and that “[f]ifty years of experience since *Brown v. Board of Education* . . . should teach us that the problem before us defies so easy a solution” (id. at 2791). A mandate that school officials ignore the racial makeup of our schools ignores the complexity of the situation.

Cascades and the Prison Problem



The racial disparities familiar to college admissions officers do not arise just from primary schools, however. Other factors contribute to the racial gap. While all children face challenges in becoming high academic achievers, black children confront more of these challenges. Motivated children can overcome poor primary education, but it is harder to do so if one is poor, has unstable family support, lives in a dangerous neighborhood, or is threatened with prison.¹¹ The cumulative challenges create a devastating cascade for many black children, greatly impeding their academic progress.

Let us comment briefly on the prison issue. The number of black males in prison is staggering. In 2004, almost 13 percent of black males age 25 to 29 were in prison or jail, compared to only 1.7 percent of whites.¹² One-third of black men can expect to be imprisoned sometime in their life, compared to 6 percent of white men.¹³ Perhaps most appalling is the statistic that more black men graduate from prison than college.¹⁴ Imprisonment harms not only the individual, but also family members and others in their social network, raising the economic, social and psychological hurdles to success.¹⁵ Moreover, the relative imprisonment rates for black versus white men are considerably higher than those of black versus white women.¹⁶ This illustrates that there is considerably more to the racial-gap problem than K–12 education, important as that may be, since girls and boys generally attend the same schools.

A final point we observe here is the multifaceted racial and ethnic tapes-

try of contemporary America, compared to a generation ago. In 1970, most policymakers could focus solely on black/white comparisons, because blacks and non-Hispanic whites made up 98.6 percent of the U.S. population.¹⁷ Today, a higher percentage of the U.S. population is Hispanic or Latino (14.5 percent) than African American (12.1 percent), while Asian-Americans comprise another 4.3 percent of the population.¹⁸ Many of these racial shifts have come from changes in immigration policy, including the major alterations to the quota system of the 1965 Hart-Cellar Act.¹⁹ Policymakers should not lump all racial and ethnic minorities together, and of special concern is the specter that African Americans remain on the low rungs of academic and economic achievement as other ethnicities surge ahead.

Understanding the causes of the racial differences we have sketched, and figuring out policy responses, remains a huge task for our nation's scholars and policymakers. But unless substantial progress is made, higher education will continue to face the dilemma of choosing between educational achievement and diversity.

The Value of Diversity in Higher Education



Many benefits flow from having a racially diverse student body in colleges and graduate and professional schools. This is an article of faith for many, but further social science research is needed in order to refine our appreciation of diversity's value and to enable us to balance the value of diversity against the cost of achieving diversity through race-conscious programs.

It is widely understood that diversity enriches the college experience both in and out of the classroom. The claim is not so much that members of one race necessarily offer a distinctive viewpoint that others would find worth hearing. Rather, it is that, given our diverse society, all students will benefit from learning how to interact with and understand individuals of different races. Very often, the invaluable lesson is that we are more similar than different.

Another benefit of educational diversity comes from the value of role models. If children can identify with prominent persons in our society, they may be inspired to surmount hurdles and achieve similar positions. We collectively hope that a young person will take as role models persons in socially acceptable positions, like doctors and lawyers, rather than drug dealers or others in undesirable positions of influence. Assuming that children most emulate persons from their own race, then members of all races need to obtain the necessary college, graduate, and professional degrees to be effective role models. Today, they cannot do so in substantial numbers unless admis-

sions officers consider race as a factor. Racial diversity in leadership positions can also increase productivity in the workplace. The amicus briefs filed by retired military officers and by various corporations in *Grutter* garnered significant attention, and were cited by the Court, for making this argument.

A third benefit of educational diversity comes from the diversity it creates in our political process. College graduates participate more frequently and effectively in our democratic institutions than do less-educated citizens. For example, over 70 percent of blacks with at least a bachelor's degree voted in the November 2000 elections, while only 42 percent of those failing to complete high school cast a ballot.²⁰ Promotion of racial diversity among college students, then, should promote diversity in our institutions of democracy.

We hesitate to cite scholarly work to back our speculations in this part. Certainly useful studies have already been conducted on the benefits from diverse student bodies, but in our view more needs to be done. "Diversity studies" are fraught with political implications, and many fear that the results of any particular study will be manipulated. But the response to this fear should be a call for more studies by scholars of all stripes, rather than a reluctance to examine seriously for fear the answers will be used to distort rather than inform policy.

The various hypothesized benefits of diversity have different long-run implications, and social science will have to evaluate the hypotheses in various ways. To examine the educational benefits of a diverse student body in higher education, for example, researchers will need to discern how the relative degree of school integration helps or harms the educational achievements of black, white, Hispanic, and Asian students. Does variance along this dimension lead to measurable differences in classroom discussions on subjects like immigration, abortion, ecological diversity, or capital punishment? Do students become more or less tolerant of members of other racial groups, as they are exposed to classmates from those groups?

Any social-science consensus that could be reached on these questions would help educational policymakers, even if the resulting prescriptions vary. For example, if the educational achievement of both black and white students seems to be harmed by the classroom integration of students with varying academic qualifications, surely that would give proponents of continued affirmative action some pause. What if classroom discussions are found to be less robust in integrated settings, as students are chilled from saying what they really think about policies affecting other racial groups who might be present? Perhaps most disturbing for affirmative action would be studies suggesting that integrated student bodies make students less, rather than more tolerant. The importance of the topic should not prevent us from asking questions whose answers might disappoint us. We ap-

plaud here the hard-minded work by political scientist Robert Putnam, who reports that ethnically diverse neighborhoods tend to have less trust and cooperation, thus reducing in the short run a society's social solidarity and social capital.²¹

The benefits of role models are also potentially measurable, although we have a harder time envisioning precise studies. One question is whether children in K–12 achieve more if they personally identify with a lawyer, doctor, or politician. Is the identification stronger with persons of the same racial or ethnic group? Or does affirmative action backfire as a means to foster role models, by fueling cynicism that positions are obtained by status rather than achievement—a cynicism that would inhibit, rather than promote, achievement in the next generation? Can we find others methods to document the productivity gains provoked by racial diversity in corporate leadership?

Current Experience in Race-Blind Admissions



Public universities in at least five states are now mandated to ignore race in their admissions decisions. Their experience bears continued watching, especially as more states may soon follow suit. This chapter is not the place to document all that is happening, but a few observations may be helpful.

California has had the longest experience with race-blind admissions, and that experience suggests the effect on minority enrollments is dramatic. In 1995, the Board of Regents of the University of California System banned consideration of “race, religion, sex, color, ethnicity, or national origin” in admissions via Special Resolution SP-1, and in employment via Special Resolution SP-2. One year later, a successful ballot initiative, Proposition 209, expanded these prohibitions to all public entities in California. Minority enrollments soon plunged. In 1995, the eight-campus California system enrolled 945 African American freshmen. A decade later, in 2005, the system had only 909 African American freshmen, despite a 37 percent increase in the overall size of the freshman classes and a series of ameliorative efforts designed to continue recruiting minorities. The absolute number of Chicano and Latino freshmen increased from 3,432 to 4,652, but declined as a percentage of the student body, and substantially declined as a percentage of overall applications.²²

The flagship campuses at UCLA and Berkeley saw the largest drops in African American enrollment. These elite campuses have the most stringent admissions standards, and affirmative action had consequently played a larger role in enrolling African Americans prior to Proposition 209. UCLA counted only 96 African American freshmen in fall 2006, down from 211 in

fall 1997. Berkeley dropped from 258 African American freshmen to 140 in 2006. In a recent speech, UC president emeritus Richard Atkinson reported that "African American men, in particular, are virtually disappearing from our campuses," and that nearly half of the 83 African American men that UCLA and Berkeley admitted in 2004 entered on athletic scholarships.²³ In contrast to Latino enrollments, the percentage of African Americans at Berkeley and UCLA has not rebounded over the decade since Proposition 209.²⁴ The UC system's San Diego and Santa Barbara campuses also saw declines in African American enrollment during this period, albeit less dramatic ones than at Berkeley and UCLA, while the number and percentage of African Americans actually increased at the Davis, Santa Clara, Irvine, and Riverside campuses.

The admissions experience of Chicanos and Latinos at the University of California since Proposition 209 differs significantly from that of African Americans, a good illustration that minority groups in this country have distinct histories and experiences that should not be mindlessly lumped together. After Proposition 209, both Berkeley and UCLA experienced a sudden drop in Chicano and Latino freshmen. Berkeley went from 487 Chicano and Latino freshmen in 1997 to 264 in 1998, a decline of 46 percent. UCLA enrollment dropped from 600 to 451 during the same period, a 25 percent decline. But over the next decade, the absolute numbers of Chicano and Latino students gradually increased at both Berkeley and UCLA, so that by 2006 there were more Chicano/Latino freshmen enrolled (509 at Berkeley and 659 at UCLA) in absolute numbers than there had been a decade earlier. As a percentage of all students, however, Chicano/Latino enrollment in fall 2006 remained below the fall 1997 percentage at both campuses.²⁵

The absolute decline in African American students and percentage decline in Chicano/Latino students at Berkeley and UCLA occurred despite considerable efforts by the University of California system to remain inclusive after Proposition 209. President Emeritus Atkinson recently outlined their indirect strategies. Outreach campaigns, which previously directly targeted candidates by race and ethnicity, now focus on low-performing high schools, which disproportionately include African Americans and Latinos. Admissions officers began to emphasize achievement tests over aptitude tests, and looked more closely at the obstacles applicants had overcome to succeed academically. The UC system also expanded transfer programs from community colleges.

Universities in other states with race-blind admissions have also emphasized outreach and related programs in an attempt to maintain racial and ethnic diversity. Richard McCormick, then-president of the University of Washington, helpfully categorized these efforts in a 2000 speech to the

American Association of Colleges and Universities as short term, medium term, and long term.²⁶ In November 1998, voters in his state passed Initiative 200, which banned the use of race or ethnicity in college admissions. The University of Washington saw a 32 percent drop in underrepresented minority freshmen the following year. As a short-term response, the University rethought the “personal factors” in its admissions criteria, and began to more highly value evidence of leadership, overcoming personal adversity, and cultural awareness, among other factors. Admissions staff also increased their recruiting efforts in areas of Washington and the west with large minority populations.

Pipeline efforts are the medium-term response. The University works with K–12 schools to identify and mentor talented minority students, raising their ambitions, counseling them to take college preparatory classes, and explaining the value of higher education. Methods can include tutorials by current college students, visits to campus, summer programs, and science contests. The goal is to increase the number of academically talented minorities who apply to college.

The long-term issues, as President McCormick framed them, involve overall K–12 school reform and changing dysfunctional cultures that perpetuate academic underachievement. As President McCormick observed, “For too many black youngsters, doing well in school is stigmatized as ‘acting white.’” While universities can help these efforts by increasing our understanding of the issues and making policy prescriptions, the problems are society-wide.

Percentage plans for admissions are the most publicized feature of the new race-blind admissions policies. Texas was the first to implement a percentage plan, in 1997, in response to the *Hopwood* decision of the Court of Appeals for the Fifth Circuit, which declared that any race-conscious admissions policy violated the federal Constitution’s equal protection clause. By statute, the top 10 percent of graduating students in any public or private high school in Texas are now guaranteed admission to the Texas public university of their choice, regardless of SAT scores or other factors. Because many Texas high schools have heavy minority enrollments, the 10 percent plan fosters some racial diversity without directly considering race. In 2000, Florida implemented a “Talented Twenty” plan as part of Governor Jeb Bush’s One Florida executive decree, which forbade the university system from considering race in admissions. The Talented Twenty plan guarantees admission for the top 20 percent of every public high school in the state into one of the University of Florida campuses. In 2001, the University of California system implemented its 4 percent Eligibility in Local Context plan, which guarantees admission into the UC system for all students graduating in the top 4 percent of their high-school class.

The percentage plans vary in important details beyond the 4, or 10, or 20 percent cutoffs.²⁷ Florida limits its plan to public-school students, while the Texas and California plans include private schools. Florida and California only guarantee admission to a school in the system, while Texas guarantees admissions into the campus of the student's choice, including the more selective programs at the University of Texas–Austin and Texas A&M. Coursework requirements vary, as do such important details as how and by whom GPAs are calculated.

The effectiveness of these plans in increasing minority enrollment is debatable. The most competitive campuses see the least benefit. As we noted above, California's 4 percent plan does not offer direct access to UCLA or Berkeley, and those two campuses have seen no increases in African American enrollment over the last decade, and only limited absolute increases in Chicano/Latino enrollment. The Texas 10 percent plan does guarantee admission into the University of Texas–Austin to those who desire it, and over 70 percent of UT students are now admitted from the plan. African American undergraduate enrollment at UT rose above the 1996 pre-*Hopwood* levels for the first time in 2005 and 2006, after a 14 percent decline between 1996 and the low in 1999.²⁸ Some critics suggest that those campuses would have admitted most of the same students even without the plan, and that targeted recruiting and financial aid is more important than the percentage plan itself.²⁹ Furthermore, the effectiveness of percentage plans in promoting diversity depends entirely on segregated high schools, and so will not work in many states. Washington state, for example, did not consider a percentage plan because very few of its high schools were predominately minority.³⁰

Michigan's Proposal 2, passed in November 2006, is the most recent state initiative mandating race-blind admissions in public universities. Responses are already under way. Wayne State University Law School, located in Detroit, has made a notable effort to comply with the law while still pushing for racial diversity. Wayne State admissions officers will now consider a variety of factors beyond grades and LSAT scores, including whether an applicant has overcome socioeconomic disadvantage, whether the applicant is bilingual, whether the applicant is a first-generation college graduate, and whether the applicant is a resident of (predominantly black) Detroit. In addition, law-school applicants will be invited to describe their experiences overcoming discrimination. Despite the new admissions plan, Wayne State administrators fear that their law school's 17 percent minority enrollment will drop considerably as it complies with Proposal 2's requirements.

Other Michigan universities are also responding. Shortly after Michigan voters passed the state constitutional amendment, University of Michigan

president Mary Sue Coleman convened a task force to explore available options, seeking to avoid a sharp decline in minority enrollment. In its final report the task force suggested that the University should increase its outreach to minority communities and distribute proposed financial-aid packages to admitted students more quickly. But the task force was far from optimistic that these strategies would do much to sustain racial diversity among incoming students, at least in the near future. Surveying the experiences of states that had adopted measures similar to Proposal 2, the task force noted that those states “have experienced setbacks in demographic representation and discouraging dynamics in their campus interactions.” The report further noted that given “the political similarities between the recent changes to the Michigan State Constitution and the situations faced in these states, there is little to suggest that our initial experiences will be any different.”

The state initiatives do not purport to limit how private universities may determine which students gain admission. Rather, private schools would seem to be limited in their admissions schemes only by federal law, which to date closely tracks the Constitution. As interpreted by the United States Supreme Court in *Bakke* and now *Grutter*, the Constitution still permits nuanced consideration of race in admissions decisions. The result, oddly, could be that private universities can directly seek racial diversity while elite public universities are forbidden from doing so. As University of Michigan Law School dean Evan Caminker recently told the *New York Times*, “You’d think public universities are charged with special responsibility for ensuring access, but it could come to be exactly the opposite, if there are a lot of state initiatives.”

Concluding Thoughts



Our society needs citizens who participate in our democratic institutions and who are productive, broad-minded, and tolerant. A college education, and increasingly a graduate or professional degree, is the most reliable path for developing such citizens, as well as the most reliable path to individual success and fulfillment. This path must be practically available to individuals of every race. For now, affirmative action remains an important strategy for many universities in enabling individuals of all races to walk this path to success. With hard work, study, and experiment over the next 20 years, we will be in a position to assess whether affirmative action remains necessary to our efforts, or whether society can move on to the next step in our quest for a just society.

NOTES

1. Antonin Scalia, "The Disease as Cure," *Washington University Law Quarterly* (1979): 147, 148.
2. Guido Calabresi, "Bakke as Pseudo-Tragedy," *Catholic University Law Review* 28 (1979): 427-44.
3. See U.S. Department of Education, National Center for Education Statistics, Institute of Education Sciences, *Status and Trends in the Education of Blacks*, NCES 2003-034 42 (September 2003).
4. *Ibid.* at 48-53; U.S. Department of Education, National Center for Education Statistics, Office of Educational Research and Improvement, *Educational Achievement and Black-White Inequality*, NCES 2001-061 32-42 (July 2001).
5. U.S. Department of Education, *Black-White Inequality*, 32-42.
6. U.S. Department of Education, *Status and Trends*, 56-61
7. U.S. Department of Education, *Black-White Inequality*, 6-7.
8. *Ibid.*, 4-5.
9. G. Farkas, "How Educational Inequality Develops," in *The Colors of Poverty: Why Racial and Ethnic Disparities Exist*, ed. A. Chih Lin and D. R. Harris (New York: Russell Sage, 2008).
10. U.S. Department of Education, *Status and Trends*, 28.
11. For example, two-thirds of children born to black mothers are in single-parent homes, a 31 percent increase from 1970, compared to 29.4 percent of children of white mothers (up from 5.5 percent in 1970). National Center for Health Statistics. *Health, United States, 2005* (Washington, DC: U.S. Government Printing Office, 2005).
12. U.S. Department of Justice, Bureau of Justice Statistics, Office of Justice Programs, *Prison and Jail Inmates at Midyear 2004*, NCJ 208801 11 (April 2005).
13. T. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Special Report NCJ 197976 (August 2003).
14. See B. Western, "Retrenching Civil Rights: Mass Imprisonment in America," in this volume (reporting that "recent birth cohorts of black men are more likely to have prison records [22.4 percent] than military records [17.4 percent] or bachelor's degrees [12.5 percent]").
15. D. Wheelock and C. Uggen, "Race, Poverty and Punishment: The Impact of Criminal Sanctions on Racial, Ethnic, and Socioeconomic Inequality," in Chih Lin and Harris, *The Colors of Poverty*.
16. U.S. Department of Justice, *Prison and Jail Inmates at Midyear 2004* (showing the number of inmates in state or federal prison or local jails per 100,000 residents to be 4,919 for black men, 717 for white men, 359 for black women, and 81 for white women).
17. Bureau of the Census, "Table 1. United States—Race and Hispanic Origin: 1790 to 1990," <http://www.census.gov/population/documentation/twps0056/tab01.pdf>, 2002 (visited on May 16, 2007).
18. Bureau of the Census, *American Community Survey Data Profile Highlights*, available at http://factfinder.census.gov/servlet/ACSSAFFacts?_submenuId=factsheet_1&_sse=on, 2005 (visited on May 16, 2007).
19. Chih Lin, A. and D. Harris, "Why is American Poverty Still Colored in the 21st Century?" in Chih Lin and Harris, *The Colors of Poverty*.
20. *Ibid.*, 125.
21. R. D. Putnam, "E Pluribus Unum: Diversity and Community in the Twenty-first Century, The 2006 Johan Skytte Prize Lecture," *Scandinavian Political Studies* 30 (2007): 137.
22. University of California, *Application, Admissions, and Enrollment of California*

Resident Freshmen for Fall 1995 through 2005, available at http://www.ucop.edu/news/factsheets/Flowfrc_9505.pdf (last visited March 21, 2007).

23. R. C. Atkinson and P. A. Pelfrey, "Opportunity in a Democratic Society: A National Agenda," paper presented at the conference *Futuring Diversity: Creating a National Agenda*, Ann Arbor, MI, May 18, 2005.

24. Over the decade beginning fall 1997, the percentage of all freshmen who were African American at Berkeley was 7.3 percent, 2.7 percent, 3.1 percent, 3.7 percent, 3.4 percent, 3.5 percent, 3.9 percent, 3.1 percent, 3.2 percent, and 3.3 percent, a steady trend at best. The comparable numbers at UCLA were 5.4 percent, 3.1 percent, 3.7 percent, 3.5 percent, 3.0 percent, 3.7 percent, 2.8 percent, 3.1 percent, 2.6 percent, 2.0 percent, which looks like a downward trend.

25. University of California, *Distribution of Statement of Intent to Register (SIRs) for Admitted Freshmen, Fall 1997 through 2006*, table 2, available at http://www.ucop.edu/new/factsheets/2006/froshsirs_table2.pdf (last visited March 21, 2007).

26. R. L. McCormick, "Advancing Diversity in a Post-Affirmative Action State: Implications for the Future," speech to the Association of American Colleges and Universities, Washington, DC, January 20, 2000, available at <http://www.washington.edu/president/articles/AACU.html> (last visited March 25, 2007).

27. See generally C. L. Horn and S. M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* (Cambridge: Civil Rights Project at Harvard University, 2003).

28. University of Texas at Austin Office of Institutional Research, 2005–6 and 2006–7 Statistical Handbooks, table S4A, "Fall Enrollment by Level and Ethnicity," available at http://www.utexas.edu/academic/oir/statistical_handbook/05-06/pdf/0506students.pdf (last visited January 23, 2000).

29. M. Tienda, K. Leicht, T. Sullivan, M. Maltese, and K. Lloyd, *Closing the Gap? Admissions and Enrollments at the Texas Public Flagships before and after Affirmative Action* (Princeton, NJ: Texas Top 10% Project, 2003).

30. McCormick, "Advancing Diversity."