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Charting the Future of College Affirmative Action: Legal Victories, Continuing Attacks, and New Research

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*Proyecto Derechos Civiles*

# **Charting the Future of College Affirmative Action:**

**Legal Victories, Continuing Attacks,  
and New Research**

Edited by  
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Foreword by Gary Orfield

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In 2003, The Civil Rights Project (CRP) at Harvard University released a series of reports addressing alternative admissions plans implemented in states prohibiting the use of race as a factor in college admissions, “*Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida*” and “*Percent Plans in College Admissions: A Comparative Analysis of Three States’ Experiences*.” This new report, a result of our 2006 roundtable, “Is Access to Higher Education Shrinking? Impacts of Shifts in Race-Conscious Policies & Their Alternatives,” builds on CRP’s previous research and addresses the aftermath of the 2003 U.S. Supreme Court cases that upheld the use of race in college admissions. This volume could not have been produced without the dedicated researchers who contributed its chapters, as well as roundtable attendees who offered their feedback. We are grateful to our roundtable collaborators, the UCLA Graduate School of Education & Information Studies (especially Mitchell Chang and Sylvia Hurtado) and The Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity, University of California, Berkeley, School of Law, as well as our colleagues at the NAACP-LDF who provided legal consultation. We thank the staff at The Civil Rights Project at Harvard University and UCLA and John T. Yun at the University of California, Santa Barbara for their assistance in completing this project. In addition, we gratefully acknowledge Carolyn Peelle, Jannet Kim, and Lori Kelley who provided editorial review for the report. Finally, we are indebted to The Ford Foundation for its generous support.

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## FOREWORD BY GARY ORFIELD

The right of universities to take race-conscious action to diversify their student bodies rested for a quarter century on a U.S. Supreme Court decision in the 1978 *Bakke* case, which left almost no one satisfied and many conservatives convinced that an increasingly conservative Supreme Court would outlaw affirmative action. After a huge national mobilization over two crucial cases against the University of Michigan which were decided in 2003, *Grutter v. Bollinger* and *Gratz v. Bollinger*, it seemed likely that the surprisingly positive decision from the Court's majority in *Grutter* would set a relatively clear path for the next quarter century. In that decision, from a Court much more conservative than the *Bakke* Court, Justice O'Connor, writing for the majority, solidified the rationale for affirmative action and expanded on its justifications. This seemed to produce a clear guideline in place of the *Bakke* decision, which lacked a clear majority rationale. In *Bakke* the Court had rested the continuation of affirmative action on a single rationale articulated by Justice Powell—that diversity produced better education for all students—which relied primarily on a report by a Harvard University faculty committee. In the *Grutter* decision, the Court took a much broader view of the justifications for affirmative action, citing the critical importance of training leaders from all racial and ethnic groups, as well as the importance of diversity for the functioning of major institutions such as the military. The decision also considered and rejected the idea that colleges must exhaust non-race-based strategies to obtain and maintain racial and ethnic diversity, and it showed deference to educators in making decisions about admissions policies. Overall, *Grutter* seemed to be a sweeping victory for supporters of affirmative action.

No sooner was the ink dry on the decision, however, that opponents of affirmative action, who happened to control the U.S. Departments of Education and Justice as well as the federal civil rights enforcement offices, began to narrow the interpretation of *Grutter*. Across the country conservative legal action groups wrote letters to leaders of higher education institutions threatening to sue them unless they stopped affirmative action measures. Federal civil rights officials strongly suggested that colleges were obliged to try non-racial strategies and claimed that such strategies were workable. In other words, the opponents of affirmative action attempted to interpret the law as if they had won the case.

Concern over the future of race-conscious policy was intensified in 2006 when Justice O'Connor, the author and the deciding vote on *Grutter*, resigned from the Court and was replaced by Justice Alito, whose record was strikingly conservative. Concern increased when the Supreme Court accepted for review two cases about voluntary integration policies in public K-12 schools in which the lower federal courts had relied on the *Grutter* decision to uphold race-conscious student assignment plans.

On June 28, 2007, the Supreme Court issued its ruling in the voluntary school integration cases (*Parents v. Seattle School District No. 1* and *Meredith v. Jefferson County*). Although the Court struck down the integration policies in these two cases, it acknowledged once again that universities have a compelling interest in a diverse student body—an important part of which is racial diversity—and that they may consider race as a factor in their individualized, multi-dimensional admissions decisions to further that interest. The Court's reaffirmation of the ruling

in *Grutter* spoke directly to and repudiated the efforts of conservative groups that had urged the Court to adopt a sweeping race-blind policy that would undermine *Grutter*.

Even with this recognition of the use of affirmative action in higher education admission policies from a more conservative Court than *Grutter*, we can expect ongoing controversy. It is unreasonable to expect a deeply divided country to come up with a clear and simple, lasting answer. It is obvious, however, from the national mobilization of university, business, and military leaders over the University of Michigan cases that there is a strong desire in universities and other major institutions to find ways to keep our campuses open to the increasingly diverse pool of high school graduates in a country in the midst of a rapid and profound racial transition. The lesson in those states where affirmative action has been outlawed is that institutions will try to find ways to pursue this goal and that it will be very difficult.

College officials, faculty members, program directors, and others must make decisions and take action in these difficult circumstances. Since their decisions will have important consequences for their campuses and institutions, and the sum of these decisions across the country will have major consequences for underrepresented minority opportunity and for realizing the goals that the Supreme Court recognized in 2003, it is important to have the most open and informed discussion of the issues and the situation. It is vital that these decisions not be framed by threats and fears and that the leaders of institutions of higher education not be forced into situations in which each institution is secretly limiting its actions and refusing to communicate with others in the educational community or with representatives of minority communities about probable outcomes.

This volume presents the views of leading scholars across the country on a variety of topics directly linked to the present situation, existing challenges, and the future of race-conscious policies in educational institutions across the country. As is our consistent practice, we have not sought and do not present a single position, but offer the interpretations of researchers who have discussed their work in a roundtable and have responded to questions raised in a peer review process. What we present is not a cookbook for college authorities but important perspectives for all engaged in this discussion to consider.

The volume begins with interpretations of the current state of the law from scholars from Santa Clara University School of Law and Stanford Law School. Both Angelo Ancheta, who authored one of the key briefs in the *Grutter* case, and R. Richard Banks, of Stanford University, present interpretations suggesting that the Supreme Court decision is much clearer in outlining the basic rules of admissions for selective institutions, that much is left undecided on other issues, but that reasonable inferences can often be made. These interpretations should be very helpful for college officials who are pursuing what they have been authorized to pursue yet face legal threats based on claims that the decision does not mean what it says. The chapters also deal with what is not known, which includes the exact legal status of many of the support and outreach programs and targeted financial aid that have been so strongly challenged by opponents of affirmative action. The chapters suggest that these programs are surely legal when participation is decided in a way that parallels admissions actions, but that because of key differences, especially between admissions and support or preparation programs, it may be significantly more permissible to operate race-conscious programs under some circumstances.

Much of the confusion about the *Grutter* decision and many of the more recent policy changes on college campuses are the direct result of a campaign of threats and intimidation and resulting decisions by some college administrators to make retreats not long after they joined in national alliances to urge the Supreme Court to uphold affirmative action policies. This campaign and its results, including the threats from federal civil rights officials of the Bush Administration and the ensuing secrecy of the campuses, are clearly presented in the chapter by Karen Miksch of the University of Minnesota. This original research, together with the chapters on the state of the law, should encourage leaders of higher education to consider whether it would be more effective to develop coordinated positions on these issues within the leadership of higher education rather than face challenges separately without support.

Victor Saenz, Leticia Oseguera, and Sylvia Hurtado take on the question of whether or not minority access to higher education has already been seriously declining. This would seem to be a straightforward issue, but very different claims often enter the public discussion, with one side claiming a serious loss of access and the other pointing out how some institutions have come back to something like the numbers or percentages of historically excluded groups that existed in affirmative action days. This chapter argues that when one takes into account the rapidly shifting demography of high school graduates, it is quite clear that blacks and Latinos are falling behind in access and that Asians are increasing their relative representation. The results for whites are uncertain, in part because of the increasing number of students—most likely white and multiracial students—who don't report their race or ethnicity. This analysis suggests that we are already seeing significant backward movement for underrepresented students even when all but a few states are maintaining affirmative action.

The chapter by Helen Hyun and the chapter by Kenneth Maton, Freeman Hrabowski, and Metin Ozdemir look at some of the worst and best results recorded after affirmative action policies were eliminated. The statistics for leading law schools have been particularly negative, even when they have made very vigorous efforts to admit students on other dimensions of disadvantage or to increase the pool through changes in academic content and programs. In one remarkable program at the University of Maryland, Baltimore County, a high prestige outreach effort for black students in science, technology, engineering, and mathematics (STEM) has been transformed into an integrated program while keeping a high black enrollment and doing very well in terms of student achievement. It turns out that this program has had very generous funding, including funds to considerably expand the program to accommodate other students; a very strong network and image in the African American community; and the active involvement of the college president, who is a nationally famous African American educator. In spite of all this, the program has had a significant loss in black participation. The Hyun chapter suggests that there are very severe limits to non-racial admissions policies in extremely competitive settings, particularly where standardized tests have a very heavy role in admissions. The Maton et al. chapter suggests that even under very favorable conditions, maintaining access with a non-racial policy is a very demanding goal.

Jorge Chapa and Catherine Horn remind us that there has been an important and somewhat successful effort to recover from an affirmative action ban on one campus in Texas, the University of Texas at Austin, where the Texas Ten Percent Plan for admissions has been combined with highly targeted outreach, scholarship, and transition plans for new students. (This

has not worked in the other state flagship campus, Texas A&M). They suggest that if California would adopt similar plans, it could help the recovery from the state ban on affirmative action, which has had a devastating effect on the far more competitive campuses in the UC system—Berkeley and UCLA.

Edward St. John, Britany Affolter-Caine, and Anna S. Chung of the University of Michigan add a vital element to the discussion, highlighting the issues of affordability and aid. It has been known for some time that cost and available aid are very important influences in college access and choice, particularly for minority and low-income students, yet many institutions and state governments have recently been following practices that make it less rather than more likely that minority students will enroll at their campuses. The law on racially targeted financial aid is very limited—one major federal court decision in the nation’s most conservative Court of Appeals—but the issues are of great importance. As colleges and policy makers consider their strategies for pursuing diversity in an era in which college costs are rising far more rapidly than family incomes and serious gaps have opened up between aid packages and the cost of college, decisions about priorities in distributing aid are decisions about who is going to come to your campus. Policy makers need to seriously consider whether or not aid strategies aimed at increasing prestige and selectivity must be balanced with policies of aid that make access a real and possible choice.

These chapters will not answer all of the questions of those who must make policy in the higher education community and interpret the actions of the nation’s colleges, but they do provide a richly informed public discussion of issues that have been too often glossed over in incremental decisions, often taken without adequate discussion, and sometimes under threat. Decision makers must realize that simple slogans like “admission by merit” contain highly uncertain assumptions and serious social and educational consequences. Ultimately, there is no real alternative to a much deeper multidimensional discussion if higher education is to realize its goal of serving all segments of American society and preparing educated people and leaders who can make a profoundly multiracial democracy and economy function effectively in a rapidly changing nation. Colleges and state policy makers have much more discretion than they are led to believe by those trying to roll back civil rights policy. In fact, they have a responsibility to consider the consequences of their action in terms of realizing vital goals outlined in the *Grutter* decision, all of which were cited with approval in the Court’s most recent voluntary integration decision.

American higher education has struggled now for nearly a half century to find ways to better serve and reflect the diversity of American society and to train leaders who can cross over the social divisions that have limited the American dream since its beginnings. We have learned that it can be done, that there are major benefits to the educational and research missions of our campuses, and that we know how to do it better. It is very important that our university faculties and leaders not give up on what has been a notable success but find the best ways to preserve it in a time of polarization and help to build a successful multiracial America. In the words of Justice Kennedy’s concurring opinion in *Parents v. Seattle School District No.1*, “This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all its children.” We will continue to work with scholars, educators and civil rights organizations from across the country to help make that happen.

## CHAPTER 1

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### ANTIDISCRIMINATION LAW AND RACE-CONSCIOUS RECRUITMENT, RETENTION, AND FINANCIAL AID POLICIES IN HIGHER EDUCATION



Angelo N. Ancheta





## INTRODUCTION

The United States Supreme Court's landmark 2003 decisions in *Grutter v. Bollinger*<sup>1</sup> and *Gratz v. Bollinger*<sup>2</sup> firmly established that university admissions policies which are designed to promote student body diversity and which employ race in a carefully crafted selection process can withstand constitutional challenge. The Supreme Court ruled that the creation of a diverse student body is a compelling governmental interest that can justify the flexible and modest use of race in admissions decisions. By upholding the diversity interest under the "strict scrutiny" test applied to race-conscious policies challenged under the federal constitution's equal protection clause, the Court issued an imprimatur on the use of race in a variety of diversity-based policies outside of admissions, including outreach and recruitment, financial aid and employment, and support and retention programs.<sup>3</sup>

Yet, the Supreme Court did not issue definitive guidelines on the constitutionality of non-admissions policies in higher education, and the lower courts have yet to address many of the legal questions that remain unanswered in the wake of the *Grutter* and *Gratz* decisions. For example, should race-conscious outreach and recruitment policies that expand the applicant pools to colleges and universities be subject to the same strict scrutiny standards as selective race-conscious admissions policies? Should *race-exclusive* financial aid or retention programs that limit eligibility to minority students be analyzed under the same legal framework as university admissions? If so, how might these programs fare under a *Grutter/Gratz* analysis? What laws should govern the race-conscious programs of private entities, such as nonprofit foundations that provide scholarships only to minorities or particular ethnic groups? How do other civil rights laws such as Title VII of the Civil Rights Act of 1964, which covers employment discrimination and to which the courts have applied different standards for affirmative action policies, affect race-conscious fellowships or graduate student hiring?

Without clear mandates from the courts, the legality of many race-conscious policies has been hotly contested. Government agencies such as the National Science Foundation and the National Institutes for Health have phased out most of their minority-targeted programs, after litigation was initiated in the late 1990s.<sup>4</sup> Even before the Supreme Court handed down its decisions in *Grutter* and *Gratz*, advocacy groups opposing race-conscious affirmative action, such as the American Civil Rights Institute and the Center for Equal Opportunity, threatened legal action against colleges and universities that offered minority-targeted retention and support programs; in time, a number of universities disbanded their programs or stripped their programs of any

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<sup>1</sup> 539 U.S. 306 (2003).

<sup>2</sup> 539 U.S. 244 (2003).

<sup>3</sup> As this chapter was going to publication, the U.S. Supreme Court issued a ruling in two cases that addressed the constitutionality of voluntary school integration policies which employed race as a factor in assigning students to K-12 schools. See *Parents Involved in Community Schools v. Seattle School Dist. No. 1* and *Meredith v. Jefferson County Bd. of Educ.*, 2007 WL 1836531 (June 28, 2007). In its decision, the Court reaffirmed its holding in *Grutter* and made clear that universities can continue to use race to further the compelling interest in student body diversity. Because of the timing of this publication, this chapter does not address any possible implications that the Court's ruling may have on diversity-based policies outside the university admissions context.

<sup>4</sup> See Peter Schmidt, *NIH Opening Minority Programs to Other Groups*, Chron. of Higher Ed., Mar. 11, 2005, at A26.

serious consideration of race.<sup>5</sup> Following the *Grutter* and *Gratz* rulings in 2003, the U.S. Department of Education began investigations into several programs, and many higher education institutions revised or eliminated their minority-targeted policies. In November 2006, the voters of the State of Michigan enacted Proposal 2, a ballot initiative similar to initiatives enacted in California and Washington in the 1990s that ban the use of race-conscious measures by state and local government; while Proposal 2 does not directly challenge the *Grutter* and *Gratz* rulings, as a matter of state policy it eliminates race-conscious affirmative action at the University of Michigan.<sup>6</sup> On the other hand, a number of higher education institutions have chosen to maintain and to defend their existing race-conscious policies, but such policies continue to rest on uncertain legal ground.<sup>7</sup>

This paper analyzes some of the major legal questions left unanswered by the Supreme Court's decisions in *Grutter v. Bollinger* and *Gratz v. Bollinger* and examines the role of law in the recent evolution of minority-targeted policies outside of admissions. Part I offers a brief review of the Supreme Court's *Grutter* and *Gratz* decisions and discusses various lower court decisions and federal statutes that affect the development of race-conscious policies in higher education. Part II examines a representative set of minority-targeted policies that are in use in higher education and applies the existing legal frameworks to these policies. Part III concludes with some suggestions for developing the law in this area, as well as directions for research and potential evidence to help justify existing race-conscious programs.

## I. LEGAL FRAMEWORKS

In *Grutter v. Bollinger*, the Supreme Court upheld the law school admissions policy at the University of Michigan, which employed race as a “plus” factor among several factors considered in a holistic admissions process that allowed all applicants to compete for places in the student body. In *Gratz v. Bollinger*, however, the Court struck down the University of Michigan undergraduate policy, which employed a point system that automatically assigned points to applicants who belonged to underrepresented minority groups; the *Gratz* Court concluded that the admissions policy lacked the necessary flexibility to comply with constitutional requirements and practically guaranteed admission to minority students. Together, the cases stand for the basic principle that an admissions policy designed to promote student body diversity should pass constitutional muster if it uses race flexibly via a competitive process that does not significantly disadvantage non-minority applicants.

The two University of Michigan decisions provide the basic framework for analyzing the constitutionality of higher education admissions policies that are predicated on promoting student body diversity, but the decisions do not provide definitive guidelines for the use of race

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<sup>5</sup> See Peter Schmidt, *Not Just for Minority Students Anymore*, Chron. of Higher Ed., Mar. 19, 2004, at A17.

<sup>6</sup> See Peter Schmidt, *Michigan Overwhelmingly Adopts Ban on Affirmative-Action Preferences*, 53 Chron. of Higher Educ., Nov. 17, 2006, at A23. Approved by a 58% to 42% margin, Proposal 2 states in part: “The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”

<sup>7</sup> See Peter Schmidt, *From ‘Minority’ to ‘Diversity’: The Transformation of Formerly Race-Exclusive Programs May Be Leaving Some Students Out in the Cold*, Chron. of Higher Ed., Feb. 3, 2006, at A24.

in areas such as financial aid, outreach and recruitment, and student retention and support. While non-admissions policies designed to promote student body diversity should satisfy at least one element of constitutional analysis – promoting a compelling governmental interest – it remains unclear whether specific policies, particularly those that weight race heavily or limit a scarce resource such as scholarship dollars or academic support only to minorities, would be upheld as constitutional. This Part examines the University of Michigan decisions; lower court decisions that have addressed race-conscious financial aid, outreach, and recruitment; and federal statutes that apply to a variety of institutional players, including private entities that provide scholarships and other assistance targeted to minority students.

### A. Constitutional Principles

Although the *Grutter* and *Gratz* decisions focused on university admissions policies, the decisions together established several general principles that apply to a wide variety of race-conscious policies in higher education. First, the Supreme Court reinforced the basic framework for analyzing race-conscious policies under the equal protection clause of the Fourteenth Amendment. Regardless of the level of government or whether a policy is designed to burden or benefit minorities, the courts must apply strict scrutiny – the highest level of judicial scrutiny – through a two-step test in which the underlying interest of a policy must be adjudged sufficiently important to be “compelling” and the policy itself must be ruled to be necessary and “narrowly tailored” to advance that interest.<sup>8</sup>

Second, the Court reaffirmed that higher education institutions are bound by strict scrutiny standards if they receive federal funding and are subject to the antidiscrimination mandates of Title VI of the Civil Rights Act of 1964. Because Title VI is “co-extensive” with the equal protection clause, any entity receiving federal financial assistance, even a private college or university, must comply with the constitutional standards that are applied to governmental bodies.<sup>9</sup>

Third, the Court indicated that context is important in any application of strict scrutiny and that the academic freedoms which the courts have historically extended to colleges and universities are central to a constitutional analysis of race-conscious policies in higher education.<sup>10</sup> Universities enjoy a higher degree of deference than many other governmental institutions when courts review policies designed to create student bodies and other institutional characteristics consistent with their academic missions. In *Grutter*, for instance, the Court did not require the University of Michigan to present a strong basis in evidence for its compelling interest in diversity (although the evidence available in the trial record and in *amicus curiae* briefs was extensive), deferring in large part to the University’s good faith judgments.

Fourth, the Court made clear that the remediation of an institution’s past racial discrimination is not the only interest that can justify a race-conscious policy; forward-looking interests that are non-remedial in nature can also be constitutionally compelling.<sup>11</sup> Thus, an interest in promoting

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<sup>8</sup> *Grutter*, 539 U.S. at 326-27.

<sup>9</sup> *Id.* at 343.

<sup>10</sup> *Id.* at 327-29.

<sup>11</sup> *Id.* at 328.

student body diversity is in fact compelling, as might be other non-remedial interests that the courts judge to be sufficiently important as a matter of law. Although the courts have not addressed the constitutionality of many potential governmental interests, parallel interests consistent with a university's academic mission, such as promoting diversity within an institution's faculty or staff, are likely to be upheld as constitutionally compelling.

Finally, the Court employed several of the narrow tailoring standards that have long been applied in remedial affirmative action cases and made them applicable to non-remedial cases.<sup>12</sup> Basic elements of narrow tailoring in future diversity-related cases should require documentation that a policy is flexible, that it does not unduly burden non-minorities, that it is necessary and the institution has considered (but not exhausted) workable race-neutral alternatives, and that a program be periodically reviewed or limited in time, so that it has some logical end point in the future. The *Grutter* Court concluded that the University's law school admissions policy complied with all of these requirements,<sup>13</sup> but the *Gratz* Court concluded that the undergraduate policy was not sufficiently flexible and that the automatic allocation of points to underrepresented minority applicants compromised the competitiveness of non-minority candidates' applications and functioned as a near-automatic guarantee of admission to minority candidates.

#### B. The Limits of *Grutter* and *Gratz*

In addition to these general constitutional principles, the *Grutter* and *Gratz* decisions provide both specific support for and potential obstacles to race-conscious policies outside of admissions. Building on Justice Powell's opinion in the 1978 case of *Regents of the University of California v. Bakke*,<sup>14</sup> the *Grutter* Court provided a strong foundation for the diversity interest and articulated important educational benefits that accrue from diverse student bodies, including the promotion of cross-racial understanding, improved classroom environments, and better preparation for a diverse workforce and society. The Court further identified the important roles of diversity in helping break down racial stereotypes and in helping develop leaders for an increasingly diverse American society. The *Grutter* Court approved the law school's interest in attaining a "critical mass" of minority students in order to promote all of these interrelated goals.<sup>15</sup>

The creation of a diverse student body through a race-conscious admissions process thus implies that other policies designed to create that diversity should be upheld if they also comply with the constitutional requirements of narrow tailoring. Outreach and recruitment programs, for example, provide the first step in students' gaining awareness of educational opportunities, and many minority applicants may apply to programs only after they have learned about the programs and have been actively recruited to apply for admission. Scholarship and financial aid packages provide the monetary support that enable students to attend undergraduate, graduate,

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<sup>12</sup> *Id.* at 334-42.

<sup>13</sup> The *Grutter* Court concluded that the law school's admissions policy was flexible, competitive, and did not establish a quota or separate track for minority students; that the law school engaged in a good faith consideration of workable alternatives to its policy; that the competitive nature of the admissions policy did not unduly burden non-minority applicants; and that the school's system of periodic review satisfied the requirement of time limitations on the program. *Grutter*, 539 U.S. at 337-42.

<sup>14</sup> 438 U.S. 265 (1978).

<sup>15</sup> *Grutter*, 539 U.S. at 335-36.

and professional school programs; without that aid, joining a student body might be impossible for many admitted applicants. Moreover, institutions that do not have exceptionally selective admissions policies may rely more heavily on the incentives created by minority-targeted scholarships and financial aid packages in order to develop diversity in their student bodies.

Further, the *maintenance* of a diverse student body goes hand in hand with its creation. The educational benefits of diversity and the training of future leaders would be severely compromised if attrition were to reduce the diversity of a student body. Financial aid packages and student employment, as well as support and retention programs, can provide essential resources for students who might transfer to another institution or leave school altogether if the resources were not available to them during their time at the university.

On the other hand, the narrow tailoring requirements established in *Bakke*, *Grutter*, and *Gratz*, if interpreted mechanically, may present significant impediments to certain types of race-conscious policies. In *Bakke*, the Court struck down a medical school admissions policy that established a set-aside program for minority applicants – one in which white applicants were ineligible to compete.<sup>16</sup> The University of Michigan decisions underscored the unconstitutionality of quotas and separate admissions tracks for minority students and stressed the importance of flexible and competitive admissions procedures that allowed race to be considered as one of many factors – and not the sole or dominant factor – in admissions decisions.

At first glance, therefore, the *Bakke* and University of Michigan cases suggest that a program that uses race as a plus factor – for example, a program that considers race among several factors in a competitive process for deciding whether to award a scholarship – should satisfy the flexibility requirement of narrow tailoring. However, race-exclusive programs such as minorities-only scholarships or minorities-only academic support programs may not comply with narrow tailoring because they exclude non-minority students from basic eligibility. The major question is whether the same flexibility analysis applied in the admissions process must necessarily be applied outside of the admissions process. Neither the *Grutter* Court nor the *Gratz* Court addressed this basic question.

### C. Lower Court Decisions

#### 1. Outreach and Recruitment

The lower courts have provided some guidance regarding race-conscious policies outside of admissions, but because of the paucity of post-Michigan litigation, the bulk of the federal case law predates the Supreme Court's *Grutter* and *Gratz* decisions. Nonetheless, the pre-Michigan cases are instructive because a number of them suggest that the strict scrutiny analysis applied in *Grutter* and *Gratz* to admissions need not necessarily apply in the context of university-based outreach and recruitment policies. As one court has proposed, there are fundamental differences between race-conscious recruitment policies that are “inclusive” and selection decisions that are “exclusive”:

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<sup>16</sup> Specifically, the challenged policy at the University of California, Davis medical school set aside 16 out of 100 positions in the entering first-year medical school class for underrepresented minority groups.

There are two basic ways to approach affirmative action: through inclusion or exclusion. Inclusive affirmative action techniques have as their purpose ensuring that the pool of candidates is as large as possible. For example, the primary inclusive form of affirmative action is recruitment, which generally attempts to expand the applicant pool to include more women or minorities. Recruitment and other techniques of inclusion do not affect the selection process for hiring or promotion. Rather, inclusive techniques seek to ensure that as many qualified candidates as possible make it to the selection process. In contrast, affirmative action through exclusion usually works to select some candidates rather than others from a pool. . . . These affirmative action techniques, to varying degrees, have the potential to help minorities and women actually be selected at the expense of someone else. Of course, selection by necessity requires excluding some people. The concern is discriminatory exclusion that causes harm to third parties . . . .<sup>17</sup>

Because outreach and recruitment do not typically impose the same level of burden that an admissions process can impose – compare a rejected admissions application and exclusion from the university with not receiving additional information through a race-sensitive outreach campaign – there may be no constitutional injury to trigger strict scrutiny. For example, in *Weser v. Glen*, a 2002 case in which a federal district court rejected a constitutional challenge to the race-conscious affirmative action program at the City University of New York Law School at Queens College, the court stated: “Racial classifications that serve to broaden a pool of qualified applicants and to encourage equal opportunity, but do not confer a benefit or impose a burden, do not implicate the Equal Protection Clause.”<sup>18</sup> Under the CUNY program, which focused on the use of race in recruitment and not on admissions, the court concluded that “even if the Law School’s recruitment and outreach efforts were ‘race-conscious’ in being directed at broader recruiting of minorities . . . such efforts would not constitute discrimination.”<sup>19</sup> In *Honadle v. University of Vermont*, a 1999 case involving the race-conscious recruitment of university faculty, the federal district court similarly concluded that “[a] public university may be racially ‘aware’ or ‘conscious’ by . . . encouraging broader recruiting of racial and ethnic minorities without triggering the equal protection clause’s strict scrutiny review. These activities do not impose burdens or benefits, nor do they subject individuals to unequal treatment.”<sup>20</sup>

Not all recruitment efforts necessarily escape strict scrutiny, however. Other federal courts have held in the context of public contracting and public employment that strict scrutiny may be triggered by recruitment programs that offer significant benefits to minorities but limit the information provided to non-minorities or influence selection decisions based on race. For instance, the U.S. Court of Appeals for the D.C. Circuit has struck down federal rules promoting equal employment opportunities in the broadcasting industry because of the pressure that federal agencies can bring to bear on businesses to limit their hiring pools.<sup>21</sup> On the other hand, broad forms of university recruitment that simply encourage minority applicants to apply may not create significant benefits or impose serious burdens on non-minority applicants to trigger strict scrutiny in the first place.

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<sup>17</sup> *Shuford v. Alabama State Bd. of Educ.*, 897 F. Supp. 1535, 1551 (M.D. Ala. 1995).

<sup>18</sup> 190 F. Supp. 2d 384, 399 (E.D.N.Y.), *aff’d* 41 Fed. Appx. 521 (2d Cir. 2002).

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

<sup>20</sup> 56 F. Supp. 2d 419, 428 (D. Vt. 1999).

<sup>21</sup> *MD/DC/DE Broadcasters Ass’n v. FCC*, 236 F.3d 13 (D.C. Cir. 2001).

## 2. Financial Aid

University-sponsored scholarships and financial aid packages may pose a different set of problems. Financial aid can be a decisive factor in a student's attending a college or graduate school program in the first place, and the scarcity of dollars may make scholarships and other forms of aid highly competitive. Thus, financial aid policies may be tighter analogues to selective admissions procedures than outreach or recruitment. To date, however, the federal courts have only rarely addressed the legality of minority-only scholarships.<sup>22</sup>

In *Podberesky v. Kirwan*, decided in 1994, the U.S. Court of Appeals for the Fourth Circuit declared the Benjamin Banneker scholarship program at the University of Maryland to be unconstitutional because the program, which limited basic eligibility for a competitive selection process to African Americans, failed to satisfy strict scrutiny.<sup>23</sup> More specifically, the court ruled that the university had failed to provide sufficient evidence of the linkages between the university's past discriminatory practices and its contemporary problems – the university's poor reputation among African Americans, a racially hostile campus environment, and the contemporaneous underrepresentation of African Americans – in order to justify using the Banneker program as a remedy. The court also concluded that the scholarship program, which the university employed as a recruitment tool for high-achieving black students from both Maryland and outside the state, was not narrowly tailored to addressing the past discrimination committed by the university. The court indicated that only a more circumspect program which drew on a smaller pool of potential applicants (victims of past discrimination and Maryland residents in particular) would better fit the university's specific remedial interest.

The *Podberesky* ruling establishes thresholds for institutions seeking to establish and defend scholarship programs designed to remedy past discrimination, but the case is not likely to be a useful precedent for financial aid programs that are designed to promote the distinctly different interest in student body diversity. The *Podberesky* case focused on a remedial interest that was specifically linked to the past discrimination of the University of Maryland and was advanced through the Benjamin Banneker program. A non-remedial scholarship program designed to promote diversity could be distinguished on basis of the different underlying interests and the specific type of program being employed.

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<sup>22</sup> The case law involving race-conscious financial aid is indeed sparse. In a 1976 case predating the *Bakke* decision, *Flanagan v. President & Directors of Georgetown College*, a federal district court ruled that a race-conscious program at the Georgetown University Law Center designed to increase minority enrollment by offering 60% of the school's scholarship funds, which were need-based, to 11% of its students who qualified as minorities violated Title VI of the Civil Rights Act of 1964. 417 F. Supp. 377 (D.D.C. 1976). In *Pollard v. State of Oklahoma*, a case initiated in 1998, the plaintiff challenged the legality of a scholarship program at the University of Tulsa that based awards on differential test score standards for different racial groups. The case was settled, and the Oklahoma State Regents eliminated the race-conscious (and gender-conscious) elements of the scholarship program the following year.

<sup>23</sup> 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995).



D. Title VI of the Civil Rights Act of 1964 and the Department of Education Policy Guidance on Financial Aid

Title VI of the Civil Rights Act of 1964 provides an additional mechanism to ensure that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>24</sup> In particular, the administrative enforcement of Title VI mandates through the Department of Education’s Office for Civil Rights means that constitutional litigation need not be the only method of challenging race-conscious policies; indeed, many recent changes in university programs have occurred because of administrative complaints filed with the Department of Education and investigations conducted by its Office for Civil Rights.

A policy guidance issued by the U.S. Department of Education in 1994 is also an important and widely cited source for analyzing whether race-conscious financial aid programs comply with Title VI.<sup>25</sup> Although the policy guidance does not carry the force of law, and can be revoked or replaced by the administrative agency, it suggests principles that parallel the analyses established in *Grutter* and *Gratz*. For instance, in discussing race-conscious financial aid programs to create diversity, the guidance proposes that universities “may consider race or national origin with other factors in awarding financial aid if necessary to further the college’s interest in diversity”; the guidance further indicates that universities may use race or national origin “as a condition of eligibility in awarding financial aid if this use is narrowly tailored, or, in other words, if it is necessary to further its interest in diversity and does not unduly restrict access to financial aid for students who do not meet the race-based eligibility criteria to promote diversity.”<sup>26</sup> Thus even a minority-targeted scholarship may be legal under Title VI if it clearly promotes the diversity interest and does not overly burden the ability of non-minorities to obtain financial aid.

The policy guidance also proposes that “[a] college may make awards of financial aid to [socioeconomically] disadvantaged students, without regard to race or national origin, even if that means that these awards go disproportionately to minority students” – a proposal which suggests that facially race-neutral policies that have the effect of assisting minority students and adversely affecting non-minority students will not violate Title VI because awarding aid to disadvantaged students “provides a sufficiently strong educational purpose.”<sup>27</sup> Moreover, the guidance suggests that “Title VI does not prohibit an individual or an organization that is not a recipient of Federal financial assistance from directly giving scholarships or other forms of financial aid to students based on their race or national origin. Title VI simply does not apply.”<sup>28</sup> Thus private individuals and foundations that receive no federal funding may be immune from liability under the constitution and Title VI, even if they restrict scholarships to particular minority groups.

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<sup>24</sup> 42 U.S.C. § 2000d.

<sup>25</sup> 59 Fed. Reg. 8756 (Feb. 23, 1994).

<sup>26</sup> *Id.* at 8757.

<sup>27</sup> *Id.* at 8757-58.

<sup>28</sup> *Id.* at 8757.

## E. Federal Statutes: Section 1981 and Title VII of the Civil Rights Act of 1964

In addition to the mandates of the equal protection clause and Title VI of the Civil Rights Act of 1964, a number of federal civil rights laws can apply to race-conscious policies in higher education. In both *Grutter* and *Gratz*, the Supreme Court noted that 42 U.S.C. section 1981,<sup>29</sup> a Reconstruction-era statute designed to address racial discrimination in the making and enforcement of contracts, is, like Title VI, co-extensive with the equal protection clause. Thus an admissions policy that violated the equal protection clause would also violate section 1981, since “a contract for educational services is a ‘contract’ for purposes of § 1981.”<sup>30</sup> Similarly, many forms of financial aid, such as loan or grants, as well as participation in certain academic support programs, may be established through contractual agreements between students and universities, making section 1981 applicable to many programs outside of the admissions context.

Section 1981 can also be an important limitation on non-university entities that are involved in race-conscious financial aid and other diversity-related programs. Because it covers both governmental actors and private entities, even those that receive no federal funding, section 1981 can be applied to non-university-affiliated private foundations and organizations, so long as a contract is involved. (Some private scholarships might, however, be characterized as gifts, which are normally not treated as bases for enforceable contracts, and might therefore fall outside the reach of section 1981.<sup>31</sup>)

One legal question that has not been squarely answered by the Supreme Court is whether section 1981 necessarily imports the *constitutional* standard of strict scrutiny when entirely private entities are involved. Language in the footnotes of both *Grutter* and *Gratz* suggests that if section 1981 is fully co-extensive, the courts should impose constitutional standards even on private entities if section 1981 applies to them. But, at least one post-*Grutter/Gratz* court has proposed that section 1981 is only co-extensive with the equal protection clause in requiring proof of intentional discrimination; instead of tracking strict scrutiny, the standards for section 1981 liability involving an entirely private educational institution parallel the standards of Title VII of the Civil Rights Act of 1964, the primary federal statute addressing racial discrimination in employment.<sup>32</sup>

The standards for enforcement of employment discrimination claims under Title VII of the Civil Rights Act of 1964 are generally more relaxed than constitutional standards, but impose requirements that are similar to the tests of strict scrutiny. In a case involving intentional employment discrimination under Title VII, the plaintiff has the initial burden of producing

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<sup>29</sup> Section 1981 states in relevant part: “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens.” 42 U.S.C. § 1981(a). Although the language of section 1981 suggests that it is designed only to protect non-whites, the Supreme Court has upheld the use of section 1981 by white plaintiffs to sue for racial discrimination.

<sup>30</sup> *Gratz*, 539 U.S. at 276 n.23.

<sup>31</sup> Even if a contract is not involved, another Reconstruction-era statute that covers private entities, 42 U.S.C. section 1982, may apply to certain types of financial aid because property transfers are involved. The statute provides: “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” 42 U.S.C. § 1982.

<sup>32</sup> *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827 (9th Cir. 2006) (en banc), cert. dismissed, 127 S. Ct. 2160 (2007).

evidence that creates an inference of discrimination. If this burden is satisfied, the defendant must then articulate a legitimate nondiscriminatory reason – compared to a “compelling” reason under strict scrutiny – for an adverse employment decision. The plaintiff can then present evidence to rebut the employer and demonstrate that the proffered reason for its decision is pretextual and not its true reasons.<sup>33</sup>

Title VII case law also allows certain types of affirmative action programs to satisfy the defendant’s burden of articulating a legitimate nondiscriminatory reason for an employment decision. If the affirmative action policy is rationally related to addressing a manifest imbalance in the employer’s workforce, does not bar the advancement of a non-preferred group or unnecessarily trammel their rights, and does no more than is necessary to achieve a balance, it can justify the defendant’s burden.<sup>34</sup> Unlike the strict scrutiny standard applied to government, Title VII affirmative action law, which has been applied primarily to private-sector employers, only requires a “rational relationship” rather than “narrow tailoring,” and the interest in addressing a manifest imbalance in the workforce is legally sufficient and need not meet the high constitutional standard of being “compelling.”

To illustrate how a Title VII analysis might work in the context of a section 1981 claim in higher education, consider the following example. Suppose that a small private college which receives no federal funding decides to offer a set of scholarships covering a full year’s tuition at the school, but also requires students to perform extensive volunteer service during academic breaks and summers as a condition for receiving a scholarship. The college limits the competition for these scholarships only to Latino applicants, who are severely underrepresented at the college, but makes other scholarship dollars available to all students through a different application process. A non-Latino plaintiff challenging the Latino-only scholarship program under section 1981 might argue that because she was precluded from applying for the scholarship and ultimately entering into a contract for the scholarship, an inference of intentional discrimination has been created. The college’s response might be to argue that it is employing a legitimate affirmative action program that is designed to remedy the underrepresentation of Latinos in its student body; that it does not prevent non-Latinos from obtaining scholarship dollars, which are available through other sources, and thus does not trammel non-Latinos’ rights; and that the scholarship program only does what is necessary to help increase the number of Latinos attending the college. The plaintiff could then assert that the policy is pretextual – contending that it is merely racial balancing designed to obtain an ideal number of minority students – as well as arguing that her rights are sufficiently trammled because she has no real chance to enter into a contract to obtain the scholarship dollars. A court’s ruling would ultimately turn on the persuasiveness and weighting of these various arguments.

In addition to forming the basis for section 1981 analyses, Title VII can also be directly implicated if a race-conscious policy involves an adverse employment decision. For instance, graduate student financial aid packages often consist of fellowships in which students are employed by the university as researchers or instructors; a fellowship program that limited eligibility to minority students alone could be challenged under Title VII using the analyses

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<sup>33</sup> The three-part analysis is commonly known as the McDonnell Douglas test. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

<sup>34</sup> See *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

outlined above. Although a race-conscious employment policy might trigger a host of constitutional and statutory claims, plaintiffs often raise only Title VII claims because of the availability of administrative enforcement structures unique to Title VII or because they have an interest in shaping Title VII law, which applies to a wide range of both public and private employers.

## II. DIVERSITY PROGRAMS AND POLICIES

Higher education policies designed to promote student body diversity can be categorized along multiple dimensions. One dimension involves the type of program: admissions, financial aid, employment, recruitment, support, or retention. Another dimension involves the type of institutional actor: colleges and universities, governmental agencies, or private foundations and donors. Yet another dimension involves the degree and form of race-consciousness: race-exclusive (minority-only), race-as-a-plus-factor (employing race as one factor among several factors in a competitive process), or race-neutral (employing factors such as socioeconomic disadvantage that may correlate with racial minority status). Various permutations exist in both theory and practice; some should escape strict scrutiny by the courts (e.g., race-neutral university recruitment activities), and some are clearly illegal (e.g., admissions quotas or separate university admissions tracks for minorities).

Falling within the gray areas of legality are many commonly used programs, such as university-based scholarship and retention programs that are limited to certain racial or ethnic groups. Becoming more common – but less legally problematic – are financial aid and academic support programs that once targeted minority groups but now focus on assisting both minority and non-minority students who have faced significant social and economic disadvantages. It remains to be seen whether the programs that have shifted from being “strong” race-conscious programs to “weak” race-conscious programs or to purely race-neutral programs are as effective as they once were in assisting minority students. The basic goals of the programs have changed, as have their methods. What is clear, however, is that many university programs have either been revised or eliminated because of changes in the law and because of threats of government investigation and litigation by advocacy groups opposed to race-conscious affirmative action. This Part examines the legality of a representative sample of race-conscious programs designed to promote diversity in higher education: outreach and recruitment, academic support and retention, and scholarships and financial aid.

### A. University Outreach and Recruitment

Perhaps the most common form of race-conscious program employed by universities to promote diversity in their student bodies is minority-targeted outreach and recruitment. Many undergraduate programs employ multifaceted strategies that typically include sending recruitment and admissions officers to predominantly minority high schools (many with long-term relationships with the university) in order to publicize and discuss opportunities at their universities; developing minority-specific advertising and public relations materials; sponsoring fairs and open houses specifically for minority students; deploying minority alumni as volunteer recruiters; and relying on mailing lists and national databases such as the College Board database to target mailings to minority students. In addition to pre-admission outreach and recruitment

efforts, some universities also employ post-admission, on-campus recruitment programs that provide admitted minority students an opportunity to visit the campus and obtain a glimpse of college life, often with travel and housing expenses covered by the university.

In fields in which minority students are often the most seriously underrepresented, particularly in the sciences and engineering, many universities also sponsor pre-college programs targeting minority students in order to increase college preparatory skills and to strengthen pipelines leading to future recruitment to the university. For instance, at Carnegie Mellon University's Summer Academy for Math and Science, which employs race as a plus factor in selecting students and was formerly for minority students only, students with promise attend a six-week residential program in which they receive classroom instruction, assistance with standardized test preparation, and exposure to academic and social life in a university setting.<sup>35</sup> Similar programs operate at the graduate level as well, where minority undergraduate students may be invited to special programs that provide information on graduate opportunities in science and engineering. At the California Institute of Technology, for example, GradPreview@Caltech, which recently included white and Asian American students in addition to underrepresented minorities, offers a three-day on-campus program that provides opportunities for approximately thirty participants to interact with faculty and students from academic departments and schools, tour laboratories and investigate graduate options, preview summer research opportunities; and attend sessions on applying for graduate school and investigating financial aid resources.<sup>36</sup>

Although the constitutionality of minority-targeted outreach programs may be the least likely to be litigated among many diversity-related programs, some have already been challenged by advocacy groups and have been revised significantly. Outreach activities that simply provide information and encourage minority students to apply are the least problematic, presenting quintessential examples of "inclusive" activities that encourage equal opportunities and impose no real burden on non-minority students. As the case law outlined in Part I suggests, policies that provide limited benefits to minority students, such as knowledge of university opportunities, and pose no significant burdens for non-minority students should escape strict scrutiny altogether, even if the outreach efforts are limited to minority students.

Recruitment programs that provide specific benefits to minority students that are unavailable to non-minority students may raise different problems, however. Programs that employ race as a plus factor, such as the Carnegie Mellon summer program, should satisfy an analysis under *Grutter* and *Gratz*, assuming other narrow tailoring requirements such as time limitations and the consideration of race-neutral alternatives are met. But, if the narrow tailoring analyses of *Grutter* and *Gratz* cases are interpreted to prohibit any use of race beyond a simple plus factor, then any program that limits eligibility to minority students only or uses race as a predominant factor (i.e., much more than a plus) may fail to satisfy strict scrutiny because it lacks the flexibility to satisfy narrow tailoring. For instance, in response to a 2006 lawsuit filed by the Center for Individual Rights against the Dow Jones News Foundation, Virginia Commonwealth University, and Media General, Inc., a two-week summer program with the goal of inspiring minority high school students to pursue careers in print journalism was revised in February 2007 to include non-

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<sup>35</sup> See [http://www.cmu.edu/enrollment/summerprogramsfordiversity/sams\\_program.htm](http://www.cmu.edu/enrollment/summerprogramsfordiversity/sams_program.htm) (last visited on May 1, 2006).

<sup>36</sup> See <http://www.gradpreview.caltech.edu> (last visited on May 1, 2006).

minority students.<sup>37</sup> No case law was established through the litigation, but the changes to the Urban Journalism Workshop marked a significant shift in the character of summer programs that had been established at over 20 colleges and universities.

Nonetheless, if the Supreme Court's strict scrutiny analyses in *Grutter* and *Gratz* are interpreted to take into account context and variations in policy making, then it is possible to uphold even a minorities-only policy that does not overly burden non-minority students. One could argue that while the benefits obtained in special recruitment programs such as minority-targeted open houses and preparatory programs may be significant, the burdens imposed on non-minority students who are not able to enroll in these programs are actually minimal. Other opportunities to obtain the knowledge or the skills available in the special programs may be available through other university programs, and the skills themselves may not be so critical that a student who does not participate in the program cannot excel at the university.

## B. Retention and Support Programs

Closely related to many recruitment programs are academic support and retention programs that target minority students. Common examples of these programs are pre-registration summer programs that allow minority students to obtain classroom instruction, to become acclimated to a campus, to receive academic and social counseling, and to develop friendships and social networks that will ease the transition from high school to college. Many academic support programs targeting minority students continue after matriculation and typically include forms of academic assistance, counseling, peer support, and mentoring.

At Yale University, for example, the Cultural Connections program offers approximately 125 incoming students an introduction to academic and co-curricular resources, presentations on campus life by ethnic counselors and current students, visits to local points of interest, and events showcasing the talent of program participants.<sup>38</sup> The Cultural Connections program began as the Puerto Rican Orientation Program in the 1970s and was later renamed the Pre-Registration Orientation Program; in 1999, the pre-orientation program became Cultural Connections, and in 2004 the program was made available to all incoming students.

Programs that establish eligibility through socioeconomic disadvantage rather than race are far more likely not to trigger strict scrutiny, even if the impact of applying socioeconomic criteria disproportionately affects minority students. Programs that are restricted to minorities raise the same problems mentioned earlier regarding minorities-only recruitment programs; if a cabined interpretation of *Grutter* and *Gratz* is applied to an analysis of a minorities-only academic support program, then the program may fail to satisfy strict scrutiny because it limits eligibility by race. But if a less restrictive interpretation is applied to the problem, arguments in support of a race-exclusive program might be supported by the availability of alternative resources to non-minority students, as well as the uniqueness of the minorities-only program in providing benefits to minority students. One might argue – and empirical evidence substantiating the argument would be critical – that support programs which are limited to only minority students provide

<sup>37</sup> See Peter Schmidt, *Dow Jones Fund Opens Journalism Programs to White Students After Lawsuit*, Chron. of Higher Ed., Feb. 23, 2007, at A18.

<sup>38</sup> See <http://www.yale.edu/culturalconnections/aboutprogram.html> (last visited May 1, 2006).

unique benefits that are unavailable in programs that are not restricted to minorities. For instance, peer interactions, open discussions about race and minority status at a selective university, and mentoring relationships might be compromised within a program if it were not limited to members of specific minority groups.

### C. University Financial Aid

Minority-targeted financial assistance has inherent value for the students receiving the assistance but also provides important tools for the recruitment and retention of minority students. Financial aid offered by universities can take many forms, including scholarships, grants, loans, and campus employment. One example of a minority-targeted scholarship program is the University of Wisconsin's state-funded Ben R. Lawton Minority Undergraduate Grant Program, which limits eligibility to students who are African American, Latino, Native American, or whose families came to the United States as refugees from Cambodia, Laos, or Vietnam; the program offers grants of up to \$3,000 to students who have completed their freshman year at a University of Wisconsin campus to ensure that they will have sufficient money to finish their educations. In 2004, the program offered scholarships to over 2,700 students with average awards of about \$1,400.<sup>39</sup>

Many scholarship programs that were once limited to minorities have recently been revised to make non-minority students eligible but still place a strong emphasis on assisting minority students. For instance, the Annika Rodriguez Scholarship at Washington University was previously limited to Latino students but was opened to all students and makes awards based on academic performance, commitment to serving or working with underprivileged populations, and the ability to bring diverse people together.<sup>40</sup> Similarly, the John B. Ervin Scholars program at Washington University was previously limited to black students, but now focuses on academic excellence, leadership, commitment to community service, commitment to bringing diverse people together, and commitment to serving historically underprivileged populations.<sup>41</sup>

Minorities-only scholarships, such as the University of Wisconsin's Lawton Program, that are funded and administered by universities may be legally problematic because of their racial exclusivity. However, like other types of diversity-promoting programs that target racial minorities, it is possible to argue that because the burdens imposed on non-minority students may not be significant, a distinct analysis should be applied to them, rather than a rigid analogy to the admissions policy struck down in *Gratz*. For instance, if a university offers additional scholarship dollars that are available to non-minority students, that fact would militate against the argument that the burden on non-minority students rises to a level of constitutional injury. In addition, assuming that empirical evidence supported the argument, universities might contend that minorities-only scholarships serve as important incentive devices to recruit and retain

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<sup>39</sup> See Peter Schmidt, *U. of Wisconsin Vows to Defend an Aid Program Based on Race*, Chron. of Higher Ed., Apr. 22, 2005, at A29.

<sup>40</sup> See [http://admissions.wustl.edu/admissions/ua.nsf/3rd%20Level%20Pages\\_Scholarships\\_scholarship\\_Rodriguez.htm?OpenPage&charset=iso-8859-1](http://admissions.wustl.edu/admissions/ua.nsf/3rd%20Level%20Pages_Scholarships_scholarship_Rodriguez.htm?OpenPage&charset=iso-8859-1)

<sup>41</sup> See [http://admissions.wustl.edu/admissions/ua.nsf/3rd%20Level%20Pages\\_Scholarships\\_scholarship\\_Ervin.htm?OpenPage&charset=iso-8859-1](http://admissions.wustl.edu/admissions/ua.nsf/3rd%20Level%20Pages_Scholarships_scholarship_Ervin.htm?OpenPage&charset=iso-8859-1)

minority students and that opening the programs to non-minority students would undermine the effectiveness of the scholarships as incentives.

A related problem revolves around graduate fellowship programs that typically waive student tuition and provide stipends or employment opportunities through research positions or instructorships. For instance, until early 2006 three fellowship programs at Southern Illinois University – the Bridge to the Doctorate, the Proactive Recruitment and Multicultural Professionals for Tomorrow, and the Graduate Dean’s – focused on increasing the number of underrepresented minority graduate students by providing tuition waivers and stipends and were available only to minority students. In November 2005, the U.S. Department of Justice threatened legal action against Southern Illinois University if it did not revise the fellowship programs to allow non-minorities to apply, arguing that the fellowships violated Title VII of the Civil Rights of 1964; the University and the federal government later entered into a settlement agreement in February 2006 that, among other things, prohibited the “recruitment or employment of individuals in paid fellowship positions exclusively on the basis of race, nation origin, or sex.”<sup>42</sup>

Although Southern Illinois University reached a settlement with the federal government without admitting liability, universities that continue to use employment-based aid to help increase campus diversity might nonetheless argue that under Title VII affirmative action standards, which differ in important ways from strict scrutiny standards, they can employ a legitimate affirmative action program that is designed to address the underrepresentation of minorities in its student body; that they do not prevent non-minorities from obtaining scholarship dollars, which are available through other sources, and thus do not trammel non-minority students’ rights; and that the scholarship program only does what is necessary to help increase the number of minority graduate students. The counter to this argument would likely focus on the extent to which non-minorities bear the burdens of a racially exclusive program; if few other dollars or fellowship opportunities are available, then the burden on non-minority students may be unjustifiably high.

#### D. Private-Sector Aid

Because many minority-targeted scholarship programs are endowed by individual donors or foundations, universities might also contend that normal constitutional and Title VI standards should not apply to the administration of those programs; indeed, revising the programs would run counter to the donative intent of the benefactor and might ultimately lead to the cancellation or withdrawal of funds. It is unlikely that a university can shield itself entirely from Title VI or constitutional review simply because the source of the funding is private, particularly if the university is charged with administering the program and with selecting individuals to receive the funding. Even establishing a separate foundation or administrative body to administer the dollars might still be inadequate as a shield if the university exerts sufficient control over the separate entity.

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<sup>42</sup> See Dave Newbart, Dave McKinney & Carol Marin, *U.S. Accuses SIU of Anti-White Bias*, Chicago Sun-Times, Nov. 11, 2005; Press Release - Southern Illinois University, *Southern Illinois University and U.S. Department of Justice Reach Accord: Consent Decree to Be in Place for Two Years* (Feb. 8, 2006), available at <http://news.siu.edu/news/February06/020806dg6001.jsp>



However, an individual or private foundation that serves as the source of the funding and also administers the program should be able to escape Title VI coverage, as well as constitutional coverage, if it does not receive federal funding. Of course, any legal challenge to private-sector aid puts enormous amounts of dollars at risk. Indeed, billions of scholarship dollars are distributed by non-university-affiliated organizations ranging from corporate sponsors, private foundations, professional and academic associations, unions, and nonprofit groups. For example, the Gates Millennium Scholars program, which targets assistance for underrepresented minorities in both undergraduate and graduate education and assists approximately 1,000 students each year, is funded by a \$1 billion grant from the Bill & Melinda Gates Foundation and administered by the United Negro College Fund, with the assistance of the American Indian Graduate Center Scholars, the Hispanic Scholarship Fund, and the Organization of Chinese Americans in implementing the initiative.<sup>43</sup>

Section 1981 will no doubt apply to any university or privately funded program that creates a contractual relationship between the donor and the recipient. A major question that the courts must settle is whether the appropriate standard for addressing a potential violation of section 1981 by an entirely private donor is a constitutional one that applies strict scrutiny, a standard drawn from Title VII employment discrimination jurisprudence, or a third standard that may be unique to section 1981. Unlike Title VI, where a constitutional standard can be justified because of the close connection between constitutional limitations and the appropriate use of governmental funds, section 1981's focus is primarily on private sector behavior in economic markets. Thus, the analogies to Title VII, which focuses primarily on private sector employment discrimination, may be more apt. On the other hand, the good-faith deference to university decision making and academic freedoms, which the Supreme Court reaffirmed in the *Grutter* case, does not necessarily apply to non-university institutions providing financial assistance, so the relaxation of standards under Title VII may be countered by a more careful review of private donors' motives and activities.

In any case, in order to satisfy either of the existing legal standards, private foundations and donors should articulate and document that their interests in providing these funds revolve around promoting greater diversity in higher education, and that their scholarship programs, if race-exclusive, bear strong relationships to those interests, do not overly burden non-minority applicants, are superior to other methods of providing assistance, and are periodically evaluated or limited in scope and time.

### III. DIRECTIONS

As institutions of higher education move forward in an uncertain legal and political environment, it is clear that most colleges and universities have chosen to minimize the risks of legal liability and are revising their policies to align with the safest interpretations of recent Supreme Court decisions. Pressure from advocacy organizations and from an increasingly skeptical U.S. Department of Education has only accelerated the trend. Programs that adopt race-neutral measures and substitute socioeconomic disadvantage in place of race-conscious policies focusing on minority status are, without question, changing many of the basic characteristics of these programs – which is not to say that focusing on socioeconomic disadvantage is wrong or

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<sup>43</sup> See <https://www.gmsp.org> (last visited May 1, 2006).

unimportant. Indeed, the linkages between race, poverty, and social disadvantage are inescapable. But moving away from programs that were once minority-focused to ones that are entirely race-neutral may make these programs less effective and remove attention from ongoing problems of minority underrepresentation and the lack of racial diversity in institutions throughout the country.

For those institutions that choose to maintain and defend race-conscious policies, the role of the courts in establishing new legal guidelines and the role of academic institutions themselves, including educational researchers at those institutions, in establishing the factual predicates for upholding race-conscious programs will be increasingly important. The federal courts will no doubt play a central role in the resolution of many of the ongoing debates, and the courts would be wise to take lessons from the *Grutter* Court in analyzing problems contextually and with due deference to institutions of higher education.<sup>44</sup> An antidiscrimination jurisprudence that adjusts strict scrutiny analyses to address the nuances of higher education policies, and not one that simply applies mechanically the mandates of *Grutter* and *Gratz*, would offer more appropriate standards for the courts in their constitutional inquiries, and would do so without compromising doctrinal coherence.

For instance, the reasoning of the lower courts that have addressed questions of minority-targeted outreach and recruitment in higher education and have placed them outside the realm of strict scrutiny is fundamentally sound. By establishing a triggering inquiry into whether strict scrutiny should apply at all, the courts can initially determine whether the burdens on non-minority students even rise to the level of potential constitutional injury and need to be balanced against governmental interests in promoting diverse student bodies through policies that favor minority students. In most cases involving race-conscious recruitment policies that simply expand the pool of applicants for selective admissions or financial aid policies, strict scrutiny is unlikely to be invoked because the burdens borne by non-minority applicants are either non-existent or minimal.

Similarly, the narrow tailoring guidelines articulated by the *Grutter* Court provide the appropriate baselines for analyzing diversity-driven recruitment, retention, and financial aid policies that may be “exclusive” and limit the availability of scarce institutional resources such as transitional entry programs, academic support, and scholarship dollars. The core narrow tailoring inquiries of requiring sufficient flexibility, evaluating the burdens on non-favored students, examining the university’s good-faith consideration of race-neutral alternatives, and verifying the use of time limitations such as periodic evaluations or expiration dates suggest that the courts can find many race-conscious programs, including ones that target minority students, to be narrowly tailored to the compelling interest in student body diversity.

Key inquiries for a competitive program such as the awarding of scholarships should be the courts’ evaluation of the program within the larger context of a university’s overall allocation of scarce resources, as well as the balancing of minority benefits and non-minority burdens. Even if a competitive scholarship’s applicant pool is limited to minority students, the burden on non-minority students may not be onerous if there are sufficient opportunities to obtain scholarship

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<sup>44</sup> See Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 Loyola U. Chi. L.J. 21 (2004) (discussing importance of contextual analyses in post-*Grutter* strict scrutiny review).

dollars through other university programs. For the same reason, the flexibility inquiry under strict scrutiny should not necessarily prove fatal to minority-only or strong minority-targeted programs if there are adequate alternatives for non-minority students to compete for scarce resources such as scholarship dollars or retention assistance. The flexibility inquiry could thus tolerate some forms of minority-only programs if there are alternative options that allow non-minority students to gain similar benefits.

Moreover, the frontiers of federal civil rights law, such as the appropriate standards to apply in section 1981 cases and the role of Title VII law in assessing fellowship programs, will pose important challenges for the courts, but the jurisprudence of allowing modest race-consciousness adopted by the Supreme Court in recent years may ultimately provide the best solutions. Title VII affirmative action law already allows significant leeway for employers to incorporate race-conscious policies into their employment practices, and the emerging jurisprudence under laws such as section 1981 should attempt to parallel these standards.

It will also be incumbent upon institutions of higher learning and researchers focusing on higher education policies to substantiate many of the arguments that will be raised in the inevitable litigation that will arise over non-admissions policies. The necessity and effectiveness of minority-only support programs and scholarships should be thoroughly documented if they are to survive legal challenges; the benefits of minority-only programs relative to plus-factor selection procedures or race-neutral policies must be demonstrated in order to show that the alternatives to minority-only programs are not truly workable. In addition, the burdens and costs imposed upon non-minority students must be better understood and measured. If the costs of exclusion or relative disadvantage are not significant or burdensome, then race-exclusive programs have a much better chance of being upheld. Both program-specific and general research in these areas remain sparse and must be bolstered if existing programs are to be successfully defended.

Even if many of these legal and policy questions do become settled in the next few years, we can expect that the longstanding debate over the role of race in higher education – and in society as a whole – will not disappear anytime soon. Opponents of affirmative action will continue to insist on a color-blind civil rights jurisprudence and on race-neutral policy making, while proponents of race-consciousness will continue to seek redress for the corrosive effects of discrimination and the ongoing underrepresentation of minorities in higher education. Notwithstanding Justice O'Connor's admonition in *Grutter* that twenty-five years (and soon to be only twenty years) will be sufficient time to correct the unequal opportunities that make university-based affirmative action a necessity, progress toward that goal remains painfully slow and elusive.

## CHAPTER 2

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



R. Richard Banks



## 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.

## CHAPTER 3

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### STAND YOUR GROUND: LEGAL AND POLICY JUSTIFICATIONS FOR RACE-CONSCIOUS PROGRAMMING



**Karen Miksch<sup>1</sup>**

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<sup>1</sup> An earlier version of section one of this chapter was presented at the Institute for Higher Education Law and Governance (IHELG) Roundtable in May 2005. The author wishes to thank the discussants William Kaplin, Michael Olivas, and LeLand Ware for their helpful comments on the IHELG draft paper. In addition, the author would like to thank Claire Shin, J.D. and acknowledge her work as a research assistant on this project.



A study of legal challenges to race-conscious programs in higher education reveals that institutions appear to be responding to negative publicity and the threat of litigation without fully considering how current social science research and case law support their efforts. Indeed, the threat of litigation is based on arguments that contradict official policy and misinterpret U.S. Supreme Court holdings. Institutions that seek to increase diversity in their student body should continue to defend their efforts, and additional research can be conducted to assist them.

For many students in the K-16 “pipeline,” the transition to postsecondary education is more like a sieve than a pipeline. Although African American, Latino, and Native American students have made significant gains in college enrollment in the past two decades,<sup>2</sup> significant gaps remain.<sup>3</sup> Unequal college-going rates are particularly pronounced when all young adults between the ages of 18-to-24 are compared, not just those who graduate from high school. According to a 2005 Civil Rights Project report, one-third of all students and 50 percent of African American, Chicano/Latino, and Native American students will not graduate from high school this year.<sup>4</sup> Due to these low high school graduation rates, the higher education gap between white students and underrepresented students of color is widening.<sup>5</sup> Low-income student participation rates also lag behind middle and upper income students; this gap grows wider as tuition assistance does not keep up with tuition increases.<sup>6</sup> Structural barriers—policies or social structures that influence opportunity or access to higher education—impact low-income, first generation, and students of color disproportionately. Limited resources, poorly prepared teachers, tracking, and lack of pre-college curriculum in low-income, urban, and increasingly resegregated schools all combine to keep the doors to higher education closed to African American, Latino and Native American students.<sup>7</sup>

Postsecondary institutions have tried to increase access for low income, first generation, and underrepresented students of color through a variety of pre-college and retention programs. Examples of pre-college programs include: in-school tutorials and advising, out of school mentor programs, cultural awareness seminars, and summer bridge programs (intensive academic and

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<sup>2</sup> AMERICAN COUNCIL ON EDUCATION (ACE), MINORITIES IN HIGHER EDUCATION TWENTY-FIRST ANNUAL STATUS REPORT (2003-2004). According to ACE, college enrollment of students of color rose by nearly 1.5 million students (52 percent) to more than 4.3 million from the 1980s to the present.

<sup>3</sup> EDWARD P. ST. JOHN, THE ACCESS CHALLENGE: RETHINKING THE CAUSES OF THE NEW INEQUALITY 3 (Indiana Ed. Policy Ctr., Policy Issue Report, 2002-01, 2002). Low-income high school graduates also had lower participation rates in higher education than their upper-income peers.

<sup>4</sup> CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, CONFRONTING THE GRADUATION RATE CRISIS IN CALIFORNIA (2005) at <http://www.civilrightsproject.harvard.edu/research>.

<sup>5</sup> *Id.* See also, SAMUEL M. KIPP, III, DEREK V. PRICE & JILL K. WOHLFORD, UNEQUAL OPPORTUNITY: DISPARITIES IN COLLEGE ACCESS AMONG THE 50 STATES (Lumina Foundation New Agenda Series, Vol. 4, No. 3, 2002). For example, in 1998 40.6% of whites between the age of 18 and 24 were enrolled in postsecondary education as compared to 29.8% of blacks and 20.4% of Hispanics.

<sup>6</sup> SANDRA S. RUPPERT, EDUCATION COMMISSION OF THE STATES (ECS), CLOSING THE COLLEGE PARTICIPATION GAP: A NATIONAL SUMMARY 3-4 (2003).

<sup>7</sup> For further discussion of the link between segregation, concentrated poverty, and unequal education see, GARY ORFIELD & CHUNGMEI LEE, BROWN AT 50: KING’S DREAM OR PLESSY’S NIGHTMARE (Civil Rights Project, Harvard University, 2004) at <http://www.civilrightsproject.harvard.edu/research>. For a discussion of the disconnect between secondary and postsecondary institutions, see, ANDREA VENEZIA, MICHEAL W. KIRST, & ANTHONY L. ANTONIO, BETRAYING THE COLLEGE DREAM: HOW DISCONNECTED K-12 AND POSTSECONDARY EDUCATION SYSTEMS UNDERMINE STUDENT ASPIRATIONS. (Final Policy Report from Stanford University’s Bridge Project, 2004.)

advising programs where students typically reside on campus for a number of weeks). Pre-college programs primarily involve high-school students, although, increasingly, tutorials, mentor, and bridge activities enroll junior high and elementary students. Programs for parents increase opportunities for students who traditionally have lacked access to four-year institutions. These programs are often in conjunction with pre-college programs and provide information on financial aid. Scholarships for underrepresented students of color are also used to diminish the major structural barrier to attending four-year institutions: cost. Postsecondary institutions also utilize a number of programs to retain student diversity, including programs committed to increasing the number of underrepresented students of color in the sciences and engineering.

Several conservative organizations, in particular the American Civil Rights Institute (ACRI) and the Center for Equal Opportunity (CEO), argue that pre-college outreach and recruitment programs targeted to students of color are illegal.<sup>8</sup> Initially the groups based their arguments on Title VI of the Civil Rights Act of 1964,<sup>9</sup> which prohibits racial discrimination by any institution that receives federal funds. After the Supreme Court decided the Michigan affirmative action cases, the groups added the constitutional argument that individualized review is required when race is a criterion for participation in an outreach or recruitment program.<sup>10</sup> Admissions officers contend that these outreach and pre-college programs are legal because recruited students still must apply for college admission and are not guaranteed entry. Rather than risk litigation, however, many schools are altering or canceling programs. The CEO claims that of the 100 schools it contacted, roughly 70 have either ended the programs or amended language to make their programs more racially inclusive.<sup>11</sup>

Part One of this chapter will review current legal challenges to race-conscious programs and the effects of press coverage on such programs.<sup>12</sup> It analyzes documents obtained from a Freedom of Information Act (FOIA) request to the U.S. Department of Education Office for Civil Rights, along with results from a web and telephone survey. Part Two will provide suggested research questions to assist in the legal defense of programs designed to “fix the pipeline.”<sup>13</sup>

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<sup>8</sup> Peter Schmidt, *Not Just for Minority Students Anymore*. CHRONICLE OF HIGHER EDUCATION, March 19, 2004, at 17.

<sup>9</sup> Peter Schmidt, *Iowa State Changes Minority Program*. CHRONICLE OF HIGHER EDUCATION, March 28, 2003, at 24; CEO and ACRI letters obtained from FOIA request on file with author.

<sup>10</sup> Schmidt, *supra* note 8, at 17; CEO and ACRI letters obtained from FOIA request on file with author.

<sup>11</sup> *Id.*

<sup>12</sup> For the purposes of this chapter, the term race-conscious encompasses all race-based affirmative action programs, including race-exclusive (only one race or ethnic group eligible for the program), race-targeted (only underrepresented racial and ethnic minorities served), and race-plus (race and ethnicity one of many diversity factors considered for eligibility in the program). When only one type of race-conscious program is the subject of a challenge or legal argument, then the text will specify the type of race-based affirmative action program. Otherwise, the term race-conscious will be used to include all three types of race-based affirmative action eligibility criterion.

<sup>13</sup> See *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1* and *Meredith v. Jefferson County Bd. of Educ.*, 2007 WL 1836531 (June 28, 2007) (plurality). Five Justices agreed the student assignment plans were not narrowly tailored to achieve the compelling goal of diversity. In a concurring opinion that joined parts of the plurality opinion to make a five-member majority, Justice Kennedy outlined examples of when public schools may permissibly consider race without necessarily triggering strict scrutiny. 2007 WL 1836531, at 46. Because of the timing of this publication, this chapter does not consider arguments based on the Court’s analysis, in particular Justice Kennedy’s controlling opinion, supporting the constitutionality of race-conscious outreach and retention programs in the context of higher education. The opinion, however, unequivocally supports the use of race-based affirmative action in higher education designed to ensure a diverse student body.

## Part I. Current Legal Challenges

For the past thirty years, university sponsored programs have been creating opportunities and access for underrepresented students of color to postsecondary education. A variety of approaches have been used, including programs that work with students while they are still in junior high and high school, summer bridge programs on university campuses, university and private scholarships, and retention programs for students admitted to college. All of these approaches have several goals in common, including: targeting underrepresented students of color to promote access to college, diversifying college campuses, and narrowing the attendance gap.

### A. Press Coverage of Recent Changes in Race-Conscious Programs

In February 2003, the *Chronicle of Higher Education* began running a number of articles regarding challenges to race-conscious programs designed to ameliorate the college-going gap.<sup>14</sup> According to the *Chronicle*, the Office for Civil Rights in the U.S. Department of Education issued a statement in February of 2003 (five months prior to the U.S. Supreme Court opinions in the Michigan affirmative action cases). The OCR prepared statement claimed, “generally, programs that use race or national origin as sole eligibility criteria are extremely difficult to defend.”<sup>15</sup> By 2004, the Center for Equal Opportunity (CEO) and *Chronicle* reports interpreted the same statement to include not just “minority scholarships and fellowships—but also recruitment, orientation, and academic-enrichment programs.”<sup>16</sup>

The *Chronicle of Higher Education* reported in 2005 that the American Civil Rights Institute and the Center for Equal Opportunity claimed they had contacted roughly 100 institutions of higher education asking about race-conscious programs. According to Roger Clegg, general counsel of the CEO, the majority of colleges contacted have opened up racially exclusive programs to all students, regardless of race.<sup>17</sup> According to reports, programs began acquiescing after receiving letters from the CEO, agreeing to stop race-conscious programs even though formal complaints had not been filed. The Massachusetts Institute of Technology (MIT) and Princeton University

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<sup>14</sup> See, Peter Schmidt & Jeffrey R. Young, *MIT and Princeton Open 2 Summer Programs to Students of All Races*. THE CHRONICLE OF HIGHER EDUCATION, February 21, 2003, at 31; Peter Schmidt, *Iowa State Changes Minority Program*. CHRONICLE OF HIGHER EDUCATION, March 28, 2003, at 24; Peter Schmidt, *Not Just for Minority Students Anymore*. CHRONICLE OF HIGHER EDUCATION, March 19, 2004, at 17; Peter Schmidt, *From 'Minority' to 'Diversity': The Transformation of Formerly Race-Exclusive Programs May be Leaving Some Students Out in the Cold*, THE CHRONICLE OF HIGHER EDUCATION, February 3, 2006, at A24.

<sup>15</sup> See, Peter Schmidt & Jeffrey R. Young, *MIT and Princeton Open 2 Summer Programs to Students of All Races*. THE CHRONICLE OF HIGHER EDUCATION, February 21, 2003, at 31; Peter Schmidt, *Iowa State Changes Minority Program*. CHRONICLE OF HIGHER EDUCATION, March 28, 2003, at 24. Although the OCR statement is quoted in the *Chronicle* articles and in the CEO letters (on file with author), the agency would not provide a copy of the prepared statement to the author.

<sup>16</sup> Peter Schmidt, *Not Just for Minority Students Anymore*. CHRONICLE OF HIGHER EDUCATION, March 19, 2004, at 17.

<sup>17</sup> Roger Clegg, *Time Has Not Favored Racial Preferences*. CHRONICLE OF HIGHER EDUCATION, January 14, 2005, at 10. He specifically lists the following institutions: Carnegie Mellon University, Harvard University, Indiana University, the Massachusetts Institute of Technology (MIT), Northwestern University, Princeton University, the University of Illinois at Urbana-Champaign, Williams College, and Yale University.

were the first two institutions mentioned in the *Chronicle of Higher Education*.<sup>18</sup> The *Chronicle* reported that MIT officials originally refused to comply with the CEO's request, but decided in January of 2003 to change the eligibility criteria of a summer program to include applicants of all racial and ethnic backgrounds in response to a discrimination complaint being investigated by the Education Department's Office for Civil Rights.<sup>19</sup> Next, the *Chronicle* reported that Iowa State University agreed in 2003 to open the Iowa State College of Agriculture's Summer Research Internship Program to white applicants in response to pressure from conservative advocacy groups.<sup>20</sup>

A closer look reveals that, while Iowa State no longer considers race when admitting students, the challenged MIT summer programs continue to take the race and ethnicity of applicants into account, in keeping with their mission of bringing more African American, Latino and Native American students into the fields of science and engineering. But the programs have been expanded to look at factors related to "disadvantage." For example, MIT now also considers whether an applicant is part of the first generation in his or her family to attend college, or comes from a high school that does not send a large percentage of its students to four-year colleges.

The National Institutes for Health (NIH) also recently changed some of its programs for research fellows.<sup>21</sup> The *Chronicle* reported in March of 2005 that the NIH decided to include a "disadvantaged" category, along with considerations of racial and ethnic minorities. Included in the new category are researchers who are low-income, as well as those who come from rural or urban communities that have "inhibited their efforts to obtain the knowledge, skills, and abilities necessary to develop and participate in a research career."<sup>22</sup>

The Center for Equal Opportunity and the American Civil Rights Institute rely heavily on the February 2003 OCR statement in their letters to institutions claiming that race-conscious programs are illegal.<sup>23</sup> In addition, Roger Clegg, general counsel for the CEO, argues that the fact many institutions have stopped race-conscious programs makes it more difficult for other institutions to claim a necessity to consider race in their programs.<sup>24</sup>

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<sup>18</sup> Peter Schmidt & Jeffrey R. Young, *MIT and Princeton Open 2 Summer Programs to Students of All Races*, THE CHRONICLE OF HIGHER EDUCATION, February 21, 2003, at 31.

<sup>19</sup> *Id.* The two programs are Project Interphase, which helps incoming freshmen adjust to college life, and Minority Introduction to Engineering, Entrepreneurship, and Science, which enrolls high-school students, mainly between their junior and senior years. Both were previously open only to African American, Latino, or Native American applicants.

<sup>20</sup> Peter Schmidt, *Iowa State Changes Minority Program*, THE CHRONICLE OF HIGHER EDUCATION, March 28, 2003, at 24.

<sup>21</sup> Peter Schmidt, *NIH Opening Minority Programs to Other Groups*, THE CHRONICLE OF HIGHER EDUCATION, March 11, 2005, at 26.

<sup>22</sup> *Id.* Prior to the change in policy at the NIH, when Indiana University's Cancer Center was challenged over an NIH financed summer-research program for underrepresented students of color, the agency responded by giving Indiana and other grantees the option of applying the term "underrepresented minority" to subsets of the nation's white and Asian-American population that produce relatively few cancer researchers, such as those who are from low-income backgrounds or whose parents did not complete college.

<sup>23</sup> CEO and ACRI letters on file with author.

<sup>24</sup> Clegg, *Time Has Not Favored Racial Preferences*, *supra* note 17.

## B. Freedom of Information Act (FOIA) Request

To learn more about the American Civil Rights Institute, Center for Equal Opportunity, and the OCR strategy to require colleges and universities to use so-called “race neutral” approaches, I made a request for documents to the OCR in the U.S. Department of Education pursuant to the Freedom of Information Act (FOIA). (The FOIA request, dated April 27, 2005, is attached as Appendix A). I requested a variety of documents pertaining to the use of race in pre-college, summer bridge, scholarship, and retention programs. I received 290 pages of documents from the OCR in September 2005. As of January 1, 2005, only ten institutions of higher education had formal letters filed against them with the OCR.<sup>25</sup> In addition to complaint letters filed against colleges and universities, the FOIA documents also included the 2001 complaint filed against the Wisconsin Department of Public Instruction “Pre-College Minority Scholarship Program.” Financial aid/scholarship programs were the subject of all but one of the complaints.

### (1) Challenges to Race-Conscious Scholarship Programs

The Center for Equal Opportunity, American Civil Rights Institute, and the Center for Individual Rights are challenging race-conscious scholarships (the Center for Individual Rights is the conservative organization that challenged Michigan’s use of race-based affirmative action in admissions). Race-specific scholarships and scholarships designed to recruit more underrepresented students of color have been subject to a number of legal challenges, both prior and subsequent to the Michigan affirmative action cases. Most recently, in November 2004, after a complaint was filed with the Office for Civil Rights, the State of Wisconsin agreed to no longer limit a scholarship program to African American, Latino, and Native American students.

An analysis of the OCR correspondence obtained in the FOIA request revealed that the Department of Education is currently violating its own regulations and policy guidelines regarding race-conscious scholarships. Some background on Title VI of the Civil Rights Act of 1964 regulations, as well as the OCR’s interpretation of Title VI’s application to scholarship programs, will help to illustrate how the Department of Education is not following its own official policy.

The Title VI regulations permit a college or university to take voluntary affirmative action, even in the absence of past discrimination, in response to conditions that have limited the participation of students of a particular race or national origin.<sup>26</sup> In 1994, the U.S. Department of Education

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<sup>25</sup> The ten institutions are: Carnegie Mellon; MIT; Pepperdine University; Portland Community College; Portland State; St. Louis University; University of Cincinnati School of Law; University of Wisconsin, Platteville; Virginia Tech; and Washington University at St. Louis. The ACRI and CEO wrote the majority of the complaint letters: Carnegie Mellon, MIT, St. Louis University, Virginia Tech, and Washington University at St. Louis were all cited by the ACRI and CEO in complaint letters written to the OCR.

<sup>26</sup> 34 C.F.R. §100.3(b)(6).

34 C.F.R. 100.3 (b)(6)(i)

[i]n administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.



issued policy guidelines setting forth the circumstances under which race-conscious financial aid is permissible.<sup>27</sup> According to the 1994 OCR guidelines:

The Secretary of Education encourages continued use of financial aid as a means to provide equal educational opportunity and to provide a diverse educational environment for all students. The Secretary also encourages the use by postsecondary institutions of other efforts to recruit and retain minority students, which are not affected by this policy guidance.<sup>28</sup>

In addition to race-neutral policies, and race-based affirmative action to overcome past intentional discrimination, the guidelines also recognize diversity as a legitimate basis for the use of race-conscious policies to administer financial aid.<sup>29</sup> The 1994 guidelines clarify that race-based affirmative action is permissible to ensure a diverse student body. The guidelines acknowledge three ways in which scholarships can be used to diversify the student body:

First a college may, of course, use its financial aid program to promote diversity by considering factors other than race or national origin, such as geographic origin, diverse experiences, or socioeconomic background.<sup>30</sup> Second, a college may consider race or national origin with other factors in awarding financial aid if the aid is necessary to further the college's interest in diversity.<sup>31</sup> Third, a college may use race or national origin as a condition of eligibility in awarding financial aid<sup>32</sup> if this use is narrowly tailored, or, in other words, if it is necessary to further its interest in diversity and does

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34 CFR § 100.5 Illustrative application.

(h)(i) Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service.

<sup>27</sup> See 59 Fed. Reg. 8756 (Feb. 23, 1994).

<sup>28</sup> *Id.* Supplementary information. Although the guidelines specifically refer to scholarships and financial aid, the Secretary encouraged other types of race-conscious recruitment, outreach, and retention programs.

<sup>29</sup> 59 Fed. Reg. 8756 (Feb. 23, 1994):

*Principle 4: Financial Aid To Create Diversity*

America is unique because it has forged one Nation from many people of a remarkable number of different backgrounds. Many colleges seek to create on campus an intellectual environment that reflects that diversity. A college should have substantial discretion to weigh many factors—including race and national origin—in its efforts to attract and retain a student population of many different experiences, opinions, backgrounds, and cultures—provided that the use of race or national origin is consistent with the constitutional standards reflected in Title VI, *i.e.*, that it is a narrowly tailored means to achieve the goal of a diverse student body.

<sup>30</sup> According to the 1994 guidelines, *race-neutral* is defined as not based, in whole or in part, on race or national origin.

<sup>31</sup> The guidelines thus allow the use of race as one of several diversity factors in awarding financial aid and scholarships (this also includes programs that consider race as a plus factor).

<sup>32</sup> The 1994 guidelines define *race-targeted*, *race-based*, and *awarded on the basis of race or national origin* to mean limited to individuals of a particular race or races or national origin or origins.

not unduly restrict access to financial aid for students who do not meet the race-based eligibility criteria.<sup>33</sup>

The 1994 guidelines provide direction to colleges and universities on how to determine if a race-conscious scholarship is “narrowly tailored.” Whether an institution’s use of race-conscious financial aid is narrowly tailored to meet the compelling interest of student body diversity involves a case-by-case determination based on the particular circumstances involved. Among the questions that an institution should consider are:

- (1) Whether race-neutral means of achieving that goal have been or would be ineffective;<sup>34</sup>
- (2) Whether a less extensive or intrusive use of race or national origin in awarding financial aid as a means of achieving that goal has been or would be ineffective;<sup>35</sup>
- (3) Whether the use of race or national origin is of limited extent and duration and is applied in a flexible manner;<sup>36</sup>
- (4) Whether the institution regularly reexamines its use of race or national origin in awarding financial aid to determine whether it is still necessary to achieve its goal;<sup>37</sup> and
- (5) Whether the effect of the use of race or national origin on students who are not beneficiaries of that use is sufficiently small and diffuse so as not to create an undue burden on their opportunity to receive financial aid.<sup>38</sup>

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<sup>33</sup> 59 *Fed. Reg.* 8756 (Feb. 23, 1994).

<sup>34</sup> According to the guidelines,

[f]irst, it is necessary to determine the efficacy of alternative approaches. *United States v. Paradise*, 480 U.S. at 171. Thus, it is important that consideration has been given to the use of alternative approaches that are less intrusive (e.g., the use of race or national origin as a “plus” factor rather than as a condition of eligibility). *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. at 583; *Richmond v. J.A. Croson*, 488 U.S. at 507. Financial aid that is restricted to students of a particular race or national origin should be used only if a college determines that these alternative approaches have not or will not be effective.

<sup>35</sup> According to the guidelines:

[t]he extent of the use of the classification should be no greater than is necessary to carry out its purpose. *Richmond v. J.A. Croson*, 488 U.S. at 507. That is, the amount of financial aid that is awarded based on race or national origin should be no greater than is necessary to achieve a diverse student body.

<sup>36</sup> The guidelines explain:

[t]he duration of the use of a racial classification should be no longer than is necessary to its purpose, and the classification should be periodically reexamined to determine whether there is a continued need for its use. *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. at 594. Thus, the use of race-targeted financial aid should continue only while it is necessary to achieve a diverse student body, and an assessment as to whether that continues to be the case should be made on a regular basis.

<sup>37</sup> In addition, the guidelines clarify:

the use of the classification should be sufficiently flexible that exceptions can be made if appropriate. For example, the Supreme Court in *United States v. Paradise* found that a race-conscious promotion requirement was flexible in operation because it could be waived if no qualified candidates were available. 480 U.S. at 177. Similarly, racial restrictions on the award of financial aid could be waived if there were no qualified applicants.

<sup>38</sup> The 1994 guidelines provide information on how institutions should consider whether there is sufficient harm to non-minority students.

A use of race or national origin may impose such a severe burden on particular individuals—for example, eliminating scholarships currently received by non-minority students in order to start a scholarship program for minority students—that it is too intrusive to be considered narrowly tailored. *See Wygant v. Jackson Board of Education*, 476 U.S. at 283 (use of race in imposing layoffs involves severe disruption to lives of identifiable individuals). Generally, the less severe and more diffuse the impact on non-minority students,

The OCR guidelines recognize significant differences between admissions and financial aid. Unlike admission policies, financial aid does not exclude a student from attending college on the basis of race. The amount of financial aid is not fixed, unlike the number of seats in the freshman class. Thus, according to the OCR official policy, the harm to non-minority students is likely less than a race-conscious admission policy. If the use of race or national origin in awarding financial aid is justified under Principle 4 in the OCR guidelines (financial aid to increase diversity), the college may use funds from any source. **The 1994 guidelines remain official policy as they have never been amended or rescinded by the U.S. Department of Education.**

I analyzed the FOIA documents and determined that the OCR initially applied the Title VI regulations and 1994 guidelines to complaints regarding race-conscious scholarship programs.<sup>39</sup> In 1997, for example, the OCR investigated a complaint of discrimination from a white student based on a scholarship program at Florida Atlantic University.<sup>40</sup> The complaint argued that the Martin Luther King (MLK) Scholarship Programs were only available to African American students and thus violated Title VI of the Civil Rights Act. The OCR investigated the complaint and determined that the race-exclusive MLK Programs were legal and did not violate the Constitution or Title VI of the Civil Rights Act. Florida Atlantic and the OCR agreed, however, for the MLK Programs to begin to use race only as a plus factor. According to the OCR Letter of Resolution:

The MLK scholarship programs . . . were legally supportable as narrowly tailored means to pursue the University's interest in seeking a diverse student body. However, during the course of the investigation, OCR advised the University that using race as a plus factor, rather than an eligibility criterion, could—if it is successful in meeting the University's diversity interest—strengthen the legal support for these programs.

In the Florida Atlantic case, it is clear that the OCR official position mirrored the 1994 guidelines on the use of race to recruit and retain a diverse student body.<sup>41</sup>

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the more likely a classification based on race or national origin will address this factor satisfactorily.

However, it is not necessary to show that no student's opportunity to receive financial aid has been in any way diminished by the use of the race-targeted aid. Rather, the use of race-targeted financial aid must not place an undue burden on students who are not eligible for that aid.

<sup>39</sup> For example, in 1997, the OCR determined that a "minority scholarship" at a community college in Virginia was not legal because there was no demonstration that the scholarships were needed for recruitment and retention of underrepresented students of color. Complaint Against Northern Virginia Community College, OCR Docket No: 03962088 (1997) (on file with author).

<sup>40</sup> OCR Letter of Resolution to Florida Atlantic University dated Feb. 21, 1997 (on file with author).

<sup>41</sup> For an excellent discussion on the legal and policy considerations surrounding race-targeted and race-conscious scholarships, see ARTHUR L. COLEMAN, SCOTT R. PALMER, & FEMI S. RICHARDS, *FEDERAL LAW AND FINANCIAL AID: A FRAMEWORK FOR EVALUATING DIVERSITY PROGRAMS*. (The College Board, 2005). The federal courts have not ruled whether race-exclusive and race-targeted scholarship programs designed to diversify the student body are constitutional. There is, however a Fourth Circuit Court of Appeals decision on the use of a race-exclusive scholarship to remedy the current effects of past discrimination. In *Podberesky v. Kirwan*, 38 F.3d 147, 154 (4th Cir. 1994), the Fourth Circuit ruled that a scholarship for African American students violated Title VI and the Equal Protection Clause. In the case, a Latino student had challenged the University of Maryland at College Park African American Scholarship Program. The University argued that the program was needed to remedy the present day effects of previous intentional discrimination. (The campus did not admit African Americans until the 1960s.) The Fourth Circuit ruled that the program was not narrowly tailored and concluded the scholarship was unconstitutional.

Although the Title VI regulations and 1994 guidelines have not been changed, recent agency actions demonstrate that the OCR is not following its official policy. Several letters from the OCR obtained via the FOIA request illustrate the change in agency administration and enforcement. According to an OCR letter dated November 18, 2004, the Department of Education is taking the position that “narrow tailoring” requires adopting race-neutral alternatives. The letter to the Wisconsin Department of Public Instruction states:

A recipient of federal financial assistance from the U.S. Department of Education may not use race and national origin as eligibility criteria for the provision of aids, benefits, or services unless, consistent with Title VI strict scrutiny standards, such use is narrowly tailored to achieve a compelling interest. *Under Title VI, narrow tailoring standards include the central requirement that a recipient adopt alternatives to the use of race or national origin when they are workable and effective in achieving the recipient’s educational objectives.* (emphasis added)

The subject of the OCR investigation was a Wisconsin pre-college scholarship program for African American, Latino, Asian American, and Native American students. The goal of the program was to open up access to higher education for racial and ethnic groups in Wisconsin who were disproportionately impacted by lack of access to financial aid. Although, the Wisconsin “Pre-College Minority Scholarship Fund” had proven to be effective in increasing access for underrepresented students of color, the OCR settlement agreement required that Wisconsin rename the program and only consider the income of applicants in awarding scholarship funds in the future. The program is no longer race-targeted, nor is it race-conscious.

Another example involves an agreement between Washington University at St. Louis and the OCR. Washington University at St. Louis received a letter from the Center for Equal Opportunity challenging the John B. Ervin Scholars Program. The Ervin Scholars Program was exclusively for African American students and included a scholarship as well as orientation, academic support, and internship and research opportunities for the recipients. After the OCR began investigating the CEO complaint, the University agreed to no longer consider race or national origin as an eligibility factor. Rather, to meet its compelling interest of a diverse student body, the University agreed to the following selection criteria: academic achievement, leadership, service, and a demonstrated commitment to bringing diverse people together, and/or demonstrated achievement and determination in the face of personal challenges. The resolution agreement with Washington University is the most recent case obtained through the FOIA request. According to the OCR letter dated May 13, 2005:

If the University proposes to introduce race or national origin as an eligibility factor for the Ervin program, the University will provide OCR a written legal and factual demonstration that the proposed use of race or national origin will fully satisfy Title VI strict scrutiny standards, *particularly including a legal and factual explanation why the Revised Ervin Selection Criteria have not been workable in achieving the compelling interests identified by the University.* (emphasis added)<sup>42</sup>

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<sup>42</sup> Letter on file with author.

Requiring Washington University to provide legal and factual proof that the new race-neutral criteria are “not workable” appears to go well beyond the U.S. Supreme Court’s decision in *Grutter v. Bollinger*.<sup>43</sup> In the *Grutter* case, the Court determined that the U.S. Constitution does not require a college or university to exhaust every conceivable race-neutral alternative.<sup>44</sup> As long as an institution considers alternatives in good faith, there is no need to exhaust alternatives prior to utilizing race-conscious programs to meet the institution’s goals.<sup>45</sup> Applying the Court’s reasoning in *Grutter*, institutions that utilize race in pre-college programs and retention strategies should not be required to exhaust all race-neutral options. They must seriously consider the alternatives but should not be required to prove that alternatives are “not workable.”<sup>46</sup>

## (2) Challenges to Outreach, Recruitment, Summer Bridge, and Retention Programs

Other types of programs were also mentioned in the complaint letters, including: summer bridge programs that are either exclusively for underrepresented students of color or consider race and ethnicity as one factor for admission, and culturally conscious retention programs and programs with the goal of increasing underrepresented students of color and women in the sciences, engineering and health care fields. Often, in addition to receiving a scholarship, students also receive mentoring, tutoring, or the opportunity to attend a summer bridge program. Thus, when the CEO and ACRI letters challenge a scholarship program, the outreach, recruitment or retention program that accompanies the financial aid is also the subject of the investigation. It should be noted, however, that when the OCR investigates the CEO and ACRI complaint letters, the focus is only on the race-conscious programs that a particular institution has developed. The dozens and often hundreds of other scholarship, recruitment, outreach, and retention programs that are available to majority students are never considered. Thus, the context of race-conscious policies is never considered. Universities have developed race-conscious programs over the past 30 years, not in a vacuum, but within the context of the myriad other programs available on campuses.<sup>47</sup> This context is ignored by conservative advocacy groups and the OCR.

In addition to the CEO and ACRI complaint letters and the OCR settlement agreements, the FOIA request also included a copy of the Department of Education’s most recent publication dealing with race-neutral alternatives. The publication, “Achieving Diversity: Race-Neutral Alternatives in American Education,” offers no legal advice, but is intended as a “toolbox” containing an array of race-neutral alternatives to foster “innovative thinking” about alternative ways to achieve diversity.<sup>48</sup> Interestingly, the publication lists “recruitment and outreach” as

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<sup>43</sup> 539 U.S. 306.

<sup>44</sup> *Id.* at 339.

<sup>45</sup> *Id.*

<sup>46</sup> In addition to misinterpreting the *Grutter* decision, requiring an institution to prove that race-neutral policies are not workable also appears to violate Department of Education regulations and policy guidelines. See footnotes 28-40 and accompanying text for a discussion of the Title VI regulations and 1994 guidelines on the use of race-neutral and race-conscious scholarships and financial aid.

<sup>47</sup> The U.S. Supreme Court recognized the importance of context in the *Grutter v. Bollinger* decision. 539 U.S. 306 (2003). Most recently, the U.S. Supreme Court reiterated that in the higher education context, the use of race in admissions plans to ensure a diverse student body is constitutional. *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 2007 WL 1836531 (June 28, 2007) (plurality).

<sup>48</sup> In 2004, the Department of Education released the second of two publications dealing with race-neutral alternatives. The publication, “Achieving Diversity: Race-Neutral Alternatives in American Education,” does not

“developmental approaches” designed to diversify student enrollments in a “race-neutral manner” by enriching the pipeline of applicants equipped to meet achievement standards. Even though the publication is a “toolbox,” a review of the OCR settlement letters demonstrates that race-conscious recruitment and outreach programs designed to diversify the student body were required to become race-neutral.

### (3) Indications of a Close Relationship between the OCR and Conservative Organizations

The FOIA documents also demonstrated a close working relationship between the OCR and the Center for Equal Opportunity (CEO). The documents included a letter from the CEO and ACRI complaining about race-conscious programs at Virginia Tech University. The letter, dated April 16, 2003, enclosed two letters from the state Attorney General’s office in Virginia.<sup>49</sup> A subsequent June 10, 2003, letter from the CEO to the Office for Civil Rights, District of Columbia Office, states, “[a]s your letter indicated, OCR has agreed to investigate the following programs . . . .”<sup>50</sup> Included in the list are retention programs, scholarship programs, outreach, and summer bridge programs. The letter from the CEO further notes that the OCR declined to investigate a particular program but, “per our conference call, however, we request that OCR confirm that this program was in fact permanently suspended and not merely temporarily suspended or operating under another name.”

The CEO letter also states, “[y]ou requested that we inform you of any additional programs using race or ethnic preferences. . . attached is a list which highlights VT’s diversity programs.” On the list provided to the OCR are a number of weekend enrichment programs, scholarships, mentoring programs, pre-college initiatives, and campus visit programs for students and parents. Most of the programs on the list are for “underrepresented undergraduate or graduate students” and are not race-exclusive programs. The correspondence, referenced conference call, and requests from the OCR to the CEO to provide lists of programs for the OCR to investigate all show a close working relationship between the agency and the conservative advocacy group.<sup>51</sup>

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offer legal or policy advice, but instead lists a number of alternative ways to achieve diversity. The report lists targeted outreach, recruitment, and summer bridge programs as ways to achieve diversity in college admissions. U.S. DEPARTMENT OF EDUCATION, *ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION* (2004). The report is available on-line at: <http://www.ed.gov/about/offices/list/ocr/raceneutral.html>.

<sup>49</sup> One of the letters, dated April 3, 2003, is marked “CONFIDENTIAL—ATTORNEY-CLIENT COMMUNICATION” and is from the Office of the Attorney General to the Rector and Board of Visitors at Virginia Tech. The author received the letter from the OCR as part of the FOIA documents. The author is not publishing the content of the letter as it is marked confidential. How the CEO obtained the confidential document and why the OCR included it as a public document remain unclear.

<sup>50</sup> The letter from the OCR to the two conservative organizations was not included among the 209 pages of documents received from the OCR. The letter, however, should have been included because it clearly falls within the FOIA request. Numerous telephone calls and letters to the OCR have as yet not produced all of the requested documents.

<sup>51</sup> The fax cover sheet included with the correspondence is dated April 16, 2003, and addressed to Dan Sutherland. On that date, Mr. Sutherland was working at the Office for Civil Rights within the U.S. Department of Education. On that same day President Bush appointed Daniel W. Sutherland to be the Officer for Civil Rights and Civil Liberties at the U.S. Department of Homeland Security.

Perhaps most instructive of the FOIA request was what was missing among the 209 pages. During the entire Bush Administration, there have been no “dear colleague letters” and no guidelines regarding the use of race in pre-college, summer bridge, recruitment, scholarship, or retention programs.<sup>52</sup> Yet, when reviewing the settlement agreements the OCR has reached that were part of the FOIA documents, it appears that the Department of Education is no longer following the 1994 guidelines that allow the use of race-exclusive and race-conscious programs.<sup>53</sup> The OCR is also “quietly” disregarding the U.S. Supreme Court opinions in *Grutter v. Bollinger*<sup>54</sup> and *Gratz v. Bollinger*.<sup>55</sup> That is, contrary to the Court’s ruling, the OCR appears to require institutions to exhaust race-neutral alternatives. Furthermore, the OCR is not giving deference to the colleges’ and universities’ expertise in designing programs to deal with the achievement gap, nor their expertise in designing programs to recruit, admit, and retain a diverse group of students.<sup>56</sup>

### C. Survey Attempt and Follow-up Telephone Contacts

The CEO and ACRI contend that they have contacted 100 institutions and that in response, 70 institutions have “opened up” programs to students of all races. The FOIA request, however, yielded only ten letters to the OCR complaining about race-conscious programs. To learn more about what is actually happening in institutions of higher education I conducted a survey of program staff. (The survey is available on-line at: <http://app.gen.umn.edu/programs/asc/AHES.htm>.) The survey was designed to document the types of changes that have occurred due to the letters received from the CEO and ACRI, and complaints being filed with the OCR. In addition, I was interested in the staff’s assessment of whether the changes have reduced the effectiveness of the programs they administer.

In order to contact impacted programs, I reviewed the documents obtained in the FOIA request as well as news reports from the *Chronicle of Higher Education* and U Wire Service on Lexis/Nexis Academe. Many of the news reports did not list the specific programs that had been challenged. I utilized the search parameters listed on the CEO’s web site to search institutional web sites to discover the types of programs the CEO said it had contacted. Through this research, I was able to confirm that 53 institutions had been contacted by the CEO and ACRI. I was never

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<sup>52</sup> The only OCR publication referenced was the 2004 ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION, *supra* note 48.

<sup>53</sup> See 59 Fed. Reg. 8756 (Feb. 23, 1994).

<sup>54</sup> 539 U.S. 306 (2003).

<sup>55</sup> 539 U.S. 244 (2003). The NAACP Legal Defense Fund (LDF) issued a recent report coming to the same conclusion. See, NAACP LEGAL DEFENSE FUND, CLOSING THE GAP: MOVING FROM RHETORIC TO REALITY IN OPENING THE DOORS TO HIGHER EDUCATION FOR AFRICAN-AMERICAN STUDENTS (2005). Available on-line at: <http://www.naacpldf.org>. The LDF Report documents the OCR’s “singular pursuit” of race-neutral measures. According to the LDF, “to recognize that . . . the achievement gap is a national problem and to then intensify efforts to take race off the table and continue the onslaught against race-conscious strategies reflects a profound hostility towards the very goal of closing the gap.” *Id.* at 12.

<sup>56</sup> For a discussion of the importance of context and institutional deference in the *Grutter* case, see Leland Ware, *Strict Scrutiny, Affirmative Action, and Academic Freedom: The University of Michigan Cases*, 78 TULANE L.R. (6) 2097, 2108-2111 (2004) (noting outcome in *Grutter* heavily influenced by academic setting, deference to the institution’s expertise, and the Court’s reliance on academic freedom principles); *but cf.*, Richard H. Hiers, *Institutional Academic Freedom—A Constitutional Misconception: Did Grutter v. Bollinger Perpetuate the Confusion?* 30 J.C. & U.L. 531 (2004) (arguing that academic freedom is an individual right).

able to find the rest of the 100 institutions that the organizations claim they contacted, nor were they willing to provide the list.

My first challenge was getting staff to respond to the survey. Although most never responded to my request, those that did expressed nervousness about completing the survey. Past or on-going OCR investigations, negative publicity, fear of litigation, and fear of personal liability were the most common concerns. Such lack of access to institutions that have been affected is a critical concern. If education researchers do not have access, it becomes much more difficult to assess whether programs have become less effective when they no longer consider race to diversify the student body.

I was thus unable to rely on the survey to answer preliminary questions due to a low response rate. Therefore, I conducted extensive web research and placed follow-up telephone calls with pre-college, summer bridge, scholarship, and retention program staff. I was able to determine whether programs were in fact changed, when the changes occurred, why institutions changed the programs, and finally, how the programs were changed. Ultimately I was able to confirm that 71 programs at 53 institutions were changed or discontinued between 1995 to 2005.

For 47 of the race-conscious programs, I was able to confirm the exact dates each was changed. As Table 3-1 illustrates, the majority were changed in 2003. This is not surprising, considering 2003 was the year that the U.S. Supreme Court accepted the Michigan affirmative action cases on appeal and decided that the use of race in admissions was constitutional as long as it was narrowly tailored to meet the compelling interest of diversity. 2003 was also the year the *Chronicle of Higher Education* began reporting on the CEO and ACRI letter writing campaign. Of the 23 programs that changed eligibility requirements in 2003, 10 programs changed prior to the U.S. Supreme Court rulings on the Michigan affirmative action cases. These 10 programs changed after the *Chronicle* reported that the OCR asserted that race-conscious programs would be difficult to defend. There were only four programmatic changes made in 2005, but in the first 6 months of 2006, six race-conscious programs changed the eligibility criteria in some way. News reports in the *Chronicle* and *New York Times* may account for the modest increase in programs changing eligibility criteria in 2006.<sup>57</sup>

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<sup>57</sup> Peter Schmidt, *From 'Minority' to 'Diversity': The Transformation of Formerly Race-Exclusive Programs May be Leaving Some Students Out in the Cold*, THE CHRONICLE OF HIGHER EDUCATION, February 3, 2006, at A24; Jonathan Glater, *Colleges Open Minority Aid to All Comers*. NEW YORK TIMES, March 14, 2006, at A1.



Table 3-1: Years Race-Conscious Programs Changed

Year	No. of Programs
Before 2000	5
2000-2001	1
2003	23
2004	8
2005	4
2006	6
Date Unknown	24
<b>Total No. Changed</b>	<b>71</b>

In all, I was able to document 71 race-conscious programs at 53 separate institutions that had been changed. More importantly, I was also able to ascertain why these institutions changed or discontinued race-conscious programs. Some programs reported more than one reason for changes, and Table 3-2 includes up to two reasons for changing programs. The most common reason given for changing a program was an investigation by the OCR, or a perceived threat that the OCR would investigate the program. Nineteen percent of the programs provided “Pressure from advocacy groups” as a reason. In addition to the threat of an OCR investigation and pressure from advocacy groups, staff reported an overall feeling that there was a hostile legal environment regarding race-conscious programs. Internal review of programs was also a common reason for changing or discontinuing a race-conscious program. Also of note is the “unknown” category. Many staff members did not know why the program had been changed, nor was it apparent that the staff had been consulted prior to changing the eligibility criteria. Fear of publicity—based on reading about other programs being challenged—was also mentioned.

Table 3-2: Why Programs Were Changed

Reason Changes Made	No. of Programs
Agency Investigation or Threat	29
Pressure from Advocacy Group	19
Institutional Review of Program	15
Complaint by Individual	7
Hostile Legal Atmosphere	4
No Funding	3
Unknown	16

In press releases, as well as the *Chronicle of Higher Education* stories, the CEO and ACRI claimed that, of the institutions contacted, over 70 had “opened up” the programs. To determine how in fact the programs had changed, if at all, I also conducted on-line research and telephone follow-up calls with the 53 institutions that had changed a program in the past 10 years. I was able to find 71 programs at those institutions that had changed in some way. Some programs changed in multiple ways. For example, in some cases both the name and eligibility criteria of a program changed. I documented all changes, but limited consideration to the top two for data

analysis purposes. As Table 3-3 illustrates, the most common change, by far, was to “open up” the program.

Table 3-3: How Programs Were Changed

Type of Change	No. of Programs
Opened to all	50
Renamed the Program	14
Discontinued the Program	11
Unknown	10

It became apparent during follow-up telephone calls that “opened to all” meant different things to different program staff. Table 3-4 provides more specific information on the 50 programs that reported eligibility criteria had been “opened to all.” The majority of these programs (32) no longer consider race in any way, but rather look for students who are “committed to a diverse campus.” Another 11 programs no longer consider race but consider socio-economic factors as a way to ensure a diverse student body. Of the 50 programs that “opened up the program,” only 7 continue to consider race as one factor in ensuring campus diversity.

Table 3-4: Breakdown of “Opened to All” Category

Type of Change	No. of Programs	Percentage of Opened	Percentage of All Programs Changed
Committed to diverse campus	32	64	45
Socio-economic factors used	11	22	15
Race as a plus factor	7	14	9

It appears from this preliminary study that institutions are modifying their programs more than may be legally required due to fear of an OCR investigation or pressure from advocacy groups. The 2003 *Grutter* case, the Title VI regulations, and the 1994 OCR guidelines do not require colleges to halt race-conscious programs. In addition, the U.S. Supreme Court’s most recent opinion in the voluntary school integration cases unequivocally reiterates that institutions of higher education may consider race to ensure the benefits of a diverse learning environment. Yet, many institutions, out of fear, have halted race-conscious programs. The study also illustrates the power of utilizing the press to create a perception that programs will be sued if they do not comply with advocacy groups’ demands. Clearly, colleges and universities, and civil rights advocacy organizations must do a better job of proactively countering negative press coverage of race-conscious programs. In addition, there are ways in which social science and institutional research can aid in shaping the policy debate and combating fear of OCR investigations. The next section briefly discusses research needed to provide evidence to support existing legal arguments for the use of race-conscious programs.

## Part II. Future Research Questions and the Use of Race

Educational research has demonstrated the need for race-exclusive and race-targeted programs for underrepresented students of color.<sup>58</sup> Data also demonstrate that these programs work.<sup>59</sup> The *Grutter* and *Gratz* decisions, coupled with that research, provide a legal basis for minority programs in higher education that ultimately promote the compelling interests of access, admission, and retention of a diverse student body. Evidence also exists that race-neutral programs may not be as effective in promoting the compelling interests of diversity and access.<sup>60</sup> This is an area where additional research would be useful to support race-exclusive and race-targeted pre-college, summer bridge, and retention programs.

We need empirical data to support existing legal arguments, particularly to prove that the programs are narrowly tailored, that is, the program consideration of race ‘fits’ or promotes the compelling goal of diversity.<sup>61</sup> This section lays out the gaps in the current research needs and provides specific questions for future research projects. As the preliminary study demonstrates, however, it may be difficult for researchers to gain access to institutional data. Many institutions are afraid of lawsuits, publicity, or are still being investigated by the OCR. This makes it imperative that researchers and funding agencies provide assistance to institutions and program staff to ensure that rigorous institutional research is conducted.

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<sup>58</sup> See e.g., THE MAJORITY IN THE MINORITY: EXPANDING THE REPRESENTATION OF LATINA/O FACULTY, ADMINISTRATORS AND STUDENTS IN HIGHER EDUCATION (Jeanette Castellanos & Lee Jones eds., 2003); INSTITUTE FOR HIGHER EDUCATION POLICY, GETTING THROUGH COLLEGE: VOICES OF LOW-INCOME AND MINORITY STUDENTS IN NEW ENGLAND (2001) at 31-38; Laura Perna, *Pre-college Outreach Programs: Characteristics of Programs Serving Historically Underrepresented Groups of Students*, 43 J. OF COLLEGE STUDENT DEVELOPMENT 64 (2002); R. Simmons, *Pre-College Programs: A Contributing Factor to University Student Retention*, 17 J. OF DEVELOPMENTAL ED. 42 (1994).

<sup>59</sup> See e.g., Octavio Villalpando & Daniel Solorzano, *The Role of Culture in College Preparation Programs: A Review of the Research Literature In Preparing for College*, in PREPARING FOR COLLEGE: NINE ELEMENTS OF EFFECTIVE OUTREACH 13-28 (William Tierney, Zoe Corwin and Julia Colyar eds., 2005) (review of literature showing that transition to college for students of color is enhanced when they participate in pre-college outreach programs that include a focus on their culture).

<sup>60</sup> *Id.* See also, A. P. Jackson, et al., *Academic Persistence Among Native American College Students*, 44 J. OF COLLEGE STUDENT DEVELOPMENT 548, 553-554 (2003) (documents the importance of structural social support—including being involved in Native American clubs, multicultural offices, and other support groups for Native Americans); R. DENISE MEYERS, PATHWAYS TO COLLEGE NETWORK CLEARINGHOUSE, COLLEGE SUCCESS PROGRAMS 24-27 (2003) at <http://www.pathwaystocollege.net/pubs/index.html> (discussing race-conscious programs that exhibit best practices for recruiting and retaining a diverse student body); William G. Tierney & Alexander Jun, *A University Helps Prepare Low-Income Youth for College: Tracking School Success*, 72 J. OF HIGHER ED. 205 (2001) (analysis of a college preparation program that integrates the concept of cultural identity into the design to better serve urban youth).

<sup>61</sup> *Grutter*, 539 U.S. at 333.

Most importantly, we need empirical data on the question of race-neutral alternatives.<sup>62</sup> Opponents of race-exclusive, race-targeted, and race-conscious programs argue that race-neutral approaches can obtain similar results. Although there is research supporting the use of race-conscious programs, this is an area where more research is needed to shape the legal and policy debate. What, for example, is lost or gained when a college adopts race-neutral approaches in order to avoid OCR investigations? The following questions are designed to spark discussion among researchers and frame future research directions.

#### A. Is It Necessary to Use Race?

Institutional data, as well as rigorous social science research, is needed to assess whether race-conscious programs are necessary and effective. That is, do race-neutral programs achieve the same results? More research is needed to definitively answer this question. If the race-neutral approaches prove to be just as effective, it will be difficult to defend race-conscious programs. On the other hand, colleges and universities should not be required to exhaust all other alternatives if it is determined that the use of race is needed to meet the institution's goal of diversity. One way for institutions of higher education to demonstrate that they have seriously considered the alternatives is to evaluate existing programs. Another is to review research on race-neutral alternatives to see if they could be adopted and meet the educational goals of the institution. Thus, institutions and educational researchers should study programs that have recently changed their criteria due to pressure from conservative legal organizations to assess whether these alternatives are "viable."

#### B. Is Something Lost When a Race-Conscious Program Becomes Race-Neutral?

In addition to studying race-neutral programs, we also need to continue to assess the benefits of race-conscious programs. For example, are there unique benefits that would otherwise not be obtained in a program that is open to all students in a summer bridge program that allows underrepresented students of color to meet prior to classes starting at a predominantly white institution? The benefits of programs that stopped considering race should be evaluated in light of the benefits at the time that the program considered race. For example, an evaluation comparing the new race-neutral scholarship program in Wisconsin to the former targeted program is needed to inform other states and institutions of higher education before they change existing successful programs. The same is true for the STEM (science, technology, engineering, and math) programs that no longer consider race as part of their application process. Are they as effective in meeting institutional goals? These evaluations need to go beyond simple number counting to rigorous assessments of the new programs. The data also needs to be published so

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<sup>62</sup> Several comprehensive studies on pre-college, outreach, summer bridge and retention programs have called for more research. See, e.g., PATRICIA GÁNDARA, WITH JULIE MAXWELL-JOLLY, PRIMING THE PUMP: STRATEGIES FOR INCREASING THE ACHIEVEMENT OF UNDERREPRESENTED MINORITY UNDERGRADUATES (The College Board, 1999) (calling for more rigorous evaluations of programs, including research on the types of programs that impact underrepresented students of color); DENISE MEYERS, PATHWAYS TO COLLEGE NETWORK, *supra* note 60 (documenting the need for more rigorous evaluations); Laura Perna, *Pre-college Outreach Programs*, *supra* note 58 (noting that many programs do not publish evaluations and the need for more rigorous research on pre-college programs).

that it can inform other colleges and universities. Funding will need to be garnered to support these critical studies.

### C. What Is Lost or Gained When a Formally Race-Exclusive Program Includes Other Racial and Ethnic Groups?

In the past five years, a number of scholarship and summer bridge programs nationwide have terminated race-exclusive policies. Empirical data is needed to determine if there is a unique need for race-exclusive programs. For example, does no longer having a race-specific scholarship program dilute the effectiveness of the program? In addition to quantitative data, what message does a university send when it renames and changes a program? How do such perceptions impact applications from underrepresented students of color? If there is a chilling effect, is this enough of a concern for a university to reject race-neutral alternatives? Ultimately, the most important question is: Are these “new” programs as effective in meeting institutional goals? If not, then other institutions across the country should not be required to “try” these unworkable alternatives.

In addition to the questions outlined above, researchers must also consider whether their answers change depending on the type of program being studied. That is, do the benefits of race-conscious policies change depending on whether the study is of a summer bridge program versus a scholarship program? Context matters and certain types of programs may require race-exclusive or race-targeted approaches to be effective, whereas others may not. The necessity to use race may also vary depending on the geographic location of the institution and whether the college or university is highly selective in its admission process. These are the types of questions that institutions of higher education need to consider.

Finally, researchers will have to carefully consider how to measure the “benefits” of pre-college, summer bridge, and retention programs. For example, the number of underrepresented students who major in a STEM field may be an appropriate variable for certain types of STEM programs, but certainly would be an inaccurate measure for an outreach program geared towards junior high students.

## **Conclusion**

It is discouraging that programs designed to improve the education of all students and provide access to higher education are under attack. After watching the Michigan cases, it may be somewhat understandable that postsecondary institutions have been unwilling to engage in litigation to save race-conscious programs. Unfortunately, that caution has led to dismantling programs that may in fact be the best way to ensure that underrepresented students have access to higher education. Through research, educators will need to continue to document the benefits of outreach, recruitment, scholarship, and support programs and to hone in on the types of programs that enable first-generation, low-income and underrepresented students of color to attend and succeed in college. This task is made more difficult due to lack of access to institutional data. Legal advocates, policy makers and educational researchers must also work together to explore additional educational interests, beyond the diversity rationale, that will allow institutions to consider race when implementing programs and policies. Ultimately, a more proactive approach

is needed to combat the fear of litigation and publicity that has been fueled by press coverage of the CEO and ACRI letter campaign. Education researchers and policy makers must also utilize the press to document successful race-conscious programs, while continuing to bring public attention to the “pipeline” crisis.

## APPENDIX A

### Freedom of Information Act Request

Attn: FOIA Officer  
U.S. Department of Education  
Office of the Chief Information Officer  
550 12th Street, SW, PCP, 9th Floor, Room 9148  
Washington, DC 20202-4750

April 27, 2005

I respectfully request the following information:

- (a) Any complaints filed with the OCR in the past 5 years that allege that an institution of higher education is discriminating on the basis of race or sex in a pre-college, outreach, recruitment, summer bridge, retention, and/or scholarship program.
- (b) Any resolutions of the complaints referenced in (a).
- (c) Any voluntary compliance agreements of the complaints referenced in (a).
- (d) Any negotiated agreements for voluntary compliance of complaints referenced in (a).
- (e) Any violation letters issued within the past 10 years to institutions of higher education alleging race and/or sex discrimination in the way in which the institution conducted a pre-college, outreach, recruitment, retention, summer bridge, or scholarship program.
- (f) Any administrative complaints filed within the past 10 years against institutions of higher education alleging race and/or sex discrimination in the way in which the institution conducted a pre-college, outreach, recruitment, retention, summer bridge, or scholarship program.
- (g) Documents regarding any proactive initiatives OCR has conducted in the past 5 years regarding pre-college, outreach, recruitment, summer bridge, retention, and/or scholarship programs.
- (h) Any Policy guidelines, "Dear Colleague Letters," or position statements that OCR or the Department of Education have issued in the past 5 years regarding the use of race and/or sex in pre-college, outreach, recruitment, summer bridge, retention, and/or scholarship programs.
- (i) Any correspondence in the past 5 years to or from OCR requesting technical assistance regarding whether the use of race and/or sex in pre-college, outreach, recruitment, summer bridge, retention, and/or scholarship programs violates civil rights provisions.

Respectfully submitted,

## CHAPTER 4

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### LOSING GROUND? EXPLORING RACIAL/ETHNIC ENROLLMENT SHIFTS IN FRESHMAN ACCESS TO SELECTIVE INSTITUTIONS



**Victor B. Saenz**

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## Introduction

Affirmative action policies in higher education have come under increasing scrutiny and opposition over the last decade as evidenced by statewide initiatives (e.g., I-200 in Washington, Proposition 209 in California, Proposal 2 in Michigan), appellate court decisions (e.g., 4th Circuit Court in *Podberesky v. Kirwan*, 5th Circuit Court in *Hopwood v. Texas*), race-neutral policy responses (e.g., Top Ten Percent Plan in Texas, Eligibility in the Local Context in California), and two U.S. Supreme Court decisions in 2003 (*Grutter v. Bollinger*; *Gratz v. Bollinger*). This policy dynamic has created the most varied set of state policies in recent history, affecting primarily campuses that apply selective admissions criteria to admit their entering classes of students. It is important to note that these changes are occurring at the same time that America is experiencing a changing demographic landscape that portends continuing discussions of merit, equality, and access as issues in the forefront of social and political debate. At the heart of this complex debate remain many important and practical questions regarding how and whether we are achieving equitable access in higher education for all students. Most importantly, after almost three decades of affirmative action policies and a decade of tumultuous policy change, we wonder how these changes have affected racial minority students who are increasing in number in the nation's high schools. Are they losing ground in access to selective higher education institutions relative to their majority peers? This study seeks to address this important question by exploring national enrollment trends on entering college freshmen at elite higher education institutions across three time points (i.e., 1994, 1999, and 2004) over the last decade.

Given the changing policy dynamic for affirmative action, the last decade represents an important window for study. Throughout this decade, many scholars seeking to better understand the effects of affirmative action policies in higher education have engaged in a broad effort to contribute to the body of empirical evidence that assesses the educational benefits of racial/ethnic diversity on college campuses (see, for example, Allen, 1992; Antonio, 1998; Astin, 1993; Chang, 1999; Gurin, 1999; Hurtado, 2003; Milem, 2003; Pascarella, Edison, Nora, Hagedorn & Terenzini, 1996). Indeed, over the last decade, a plethora of research has investigated ways in which racial/ethnic diversity can be defined, theorized, measured, and assessed, all with the intent of advancing our understanding of the educational benefits of diversity for college students. The vast amount of empirical research and theorizing that such scholars have provided has proven most influential in the current policy debate over diversity in higher education, yet many practical questions remain unexplored, especially around how these policies have worked to increase—or diminish—access to elite higher education institutions. We seek to explore this particular question further by examining whether we are gaining or losing ground with respect to college access for racial/ethnic minority students at selective institutions.

### *Background*

Affirmative action, in the form of race-conscious college admissions policies, was initially seen as a strategy for reversing years of discrimination largely enacted against African Americans, although later debates and conceptualizations of affirmative action included other groups such as Latinas/os, American Indians, and women. Due in large part to policy innovations such as the 1964 Civil Rights Act as well as the emergence of affirmative action as a de facto public practice, the second half of the twentieth century witnessed important gains in enrollment for

historically underrepresented groups. Among African-American students aged 18-24, college-going rates increased from 21 percent in 1972 to 30 percent in the late 1990s (NCES, 2001). Similarly for Hispanics,<sup>1</sup> college-going rates increased from 17 percent in the early 1970s to 22 percent by 2000 (NCES, 2001). Overall, the proportion of non-White U.S. college students had increased from 16 percent in 1976 to 27 percent in 1996 (NCES, 2001). Despite these apparent policy successes, race-conscious admissions policies have been challenged almost from their inception.

One of the most important judicial challenges to race-conscious admissions policies was the 1978 *Regents of the University of California v. Bakke* decision, which allowed race to be considered as a plus factor in college admissions decisions and found diversity to be a compelling interest. While *Bakke* was regarded as ‘the law of land,’ controversy remained over its holding in light of the different rationales that formed the majority opinion as well as conflicting lower court opinions (e.g., *Hopwood v. Texas*, *Smith v. University of Washington*). The states of Texas, Florida, California, and Georgia all stopped or banned the use of race in higher education admissions at public institutions, implementing a variety of race-neutral strategies to preserve institutional commitments to diversity. Other institutions, perhaps in anticipation of the Michigan decisions, reconsidered or abolished altogether any race-based program or policy. Such reconsiderations of race-based policies by high profile institutions bred similar revisions across all types of institutions, heightening the stakes for the University of Michigan dual rulings.

In June of 2003, the U.S. Supreme Court issued its decisions in the University of Michigan Law School case *Grutter v. Bollinger* and the University of Michigan undergraduate college case *Gratz v. Bollinger*. Applying the 1978 *Bakke* decision, the Court reaffirmed that diversity did serve a compelling educational interest. Writing for the majority in the *Grutter* case, Justice O’Connor (joined by Justices Stevens, Souter, Ginsburg, and Breyer) upheld the University of Michigan Law School’s right to consider an applicant’s race as one of many factors in admitting a “critical mass” of diverse students.<sup>2</sup> Perhaps the most significant finding within Justice O’Connor’s majority opinion was her explicit acknowledgement of the educational benefits derived from diverse learning environments. About the educational benefits of diversity, she wrote that:

because universities ... represent the training ground for a large number of the Nation’s leaders, the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity. (*Grutter*, 539 U.S. at 332)

Interestingly, Justice O’Connor’s words point to the importance of the perception of a “clear path” to access for all at our nation’s universities. Indeed, this “clear path” has been seriously challenged and obscured for many students who remain underrepresented at our nation’s most elite institutions of higher learning.

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<sup>1</sup> The term Hispanic is used in this paper to describe persons of Latino heritage, including Mexican Americans, Puerto Ricans, Cubans, or other Latin-origin groups.

<sup>2</sup> The holding and rationale in the *Grutter* decision was most recently reaffirmed by the Supreme Court in *Parents Involved in Community Schools v. Seattle School Dist. No. 1* and *Meredith v. Jefferson County Bd. of Educ.*, which addressed the constitutionality of voluntary school integration plans.

## Theoretical Framework

In order to meet demand for mass access to higher education and maintain its elite status, the American higher education system has become more stratified in terms of resources, student preparation, socioeconomic status, and racial representation. The U.S. Census projects that by 2050, half of the population will be a racial/ethnic minority and 24 percent will be of Hispanic origin (U.S. Census, 2004). Many of the schools in particular states, and those in urban areas, already are extremely diverse and have a declining number of White students. Over 90 percent of high school seniors plan to pursue some type of postsecondary education (Hurtado, Inkelas, Kurotsuchi, Briggs, & Rhee, 1997). Demographic shifts in the population should begin to be reflected uniformly in college enrollment shifts, unless there are significant policy changes that will reverse the trend and privilege of White students in terms of access and representation. The Center for Individual Rights specifically targeted states in which they could find White students who felt “disenfranchised” in order to launch a campaign against affirmative action. They spent nearly three years searching for plaintiffs in the state of Michigan before moving forward with supporting the cases of *Gratz* and *Grutter*. From a theoretical perspective, the debate and resulting policies can be framed in terms of actions to protect the interests of those who have historically been privileged with access to and the benefits in attending the most elite institutions.

It is important to note that the concept of “losing ground” is both perceptual and may be founded in real numbers that influence policy or can counter existing policy viewpoints. Realistic group conflict theory suggests that the perception that one group’s gain is another group’s loss translates into group threat, as groups perceive that they are locked into a zero-sum game over a set of resources (Bobo, 1988; Campbell, 1965). This, in turn, causes negative stereotyping of the out-group, increasing prejudice and discrimination, and in the case of policy, lack of support for initiatives that may serve to redistribute resources based on race (Bobo & Kluegel, 1993). Because there are a limited number of places available each year at selective institutions, and competition continues to rise for access to these institutions, the study of admissions at selective colleges presents a relatively clear case for testing whether realistic group conflict is operating in the current context. The current study attempts to examine whether and which students are losing ground in actual and relative numbers, and whether recent policy changes have resulted in a redistribution of places at America’s most selective colleges.

## Methods

While the debate over affirmative action in college admissions influences a vast array of other issues in higher education, the crux of this debate is centered on admissions policies at academically selective colleges and universities. It is for this reason that we have chosen to focus our paper on the most selective of institutions, a precedent set by others that have done similar research on this topic (see, for example, Bowen & Bok, 1998; Carnevale & Rose, 2003; Massey, Charles, Lundy, & Fischer, 2003). Indeed, the benefits to students attending a selective institution are many, which is why this sector of higher education remains the most contested in terms of the affirmative action debate.

In general, selective institutions have access to vast alumni networks, large endowments, and other resources that help them to subsidize a significant portion of educational expenses for students. Further, Carnevale and Rose (2003) suggest that selective institutions spend as much as four times more per student as compared to less selective institutions, confirming that such institutions can be highly sought out by students in a competitive higher education marketplace. Other benefits to students at selective institutions include higher graduation rates as compared to similarly qualified students at less selective institutions, higher rates of educational attainment, and higher lifetime earnings (Bowen & Bok, 1998), and such effects have been proven over numerous empirical studies in higher education (Pascarella & Terezini, 1991). In addition, these disparate effects are intensified for economically disadvantaged students or minority students who perhaps would not have attended such institutions without targeted outreach, admissions officers that could recognize their potential for talent, and adequate financial support. Such documented benefits offer clear evidence for the highly competitive nature of selective admissions and further cement the reasons why admissions policies at such institutions continue to be closely scrutinized and challenged.

### *Analytic Strategy*

Our study posed a simple yet critical policy question: are racial/ethnic minority students losing ground in accessing the most selective higher education institutions relative to their peers? To assess this notion of losing ground, we utilized a variety of different national data sources to construct a multi-dimensional rubric which could test relative enrollment growth or decline for various student racial/ethnic groups at the most selective institutions. Focusing on selective institutions necessitates that we evaluate student enrollment trends by racial/ethnic group in order to assess whether racial minority students are losing ground or gaining greater access to this sector of higher education.

We first examined actual enrollment figures at the most selective institutions at three points over the last ten years for four racial/ethnic groups. We evaluated these enrollment figures based on proportional changes in representation for each student population using total first-time, full-time student enrollment as a denominator. This allowed us to better understand general enrollment shifts within selective institutions over the last decade. Next, we accounted for demographic shifts in the broader population by comparing enrollment numbers (at selective institutions) for each racial/ethnic group relative to the total number of high school graduates within a cohort group of similar age. Using this external point of reference allowed us to weigh true gains or losses relative to more general demographic trends among the prospective college applicant population.

We also employed a third rubric—using national normative survey data representing all entering first-time, full-time students at selective four-year institutions—that allowed for greater assessment of the losing ground hypothesis across racial/ethnic and socio-economic dimensions. In short, each of these rubrics was useful in assessing the notion of gaining or losing ground in access to selective institutions within each racial/ethnic group of interest. Each of these data sources is described in further detail below.

*Data Sources*

For purposes of documenting enrollment trends across selective institutions and for gathering comparative data on entering college freshmen, our methodological strategy involved reviewing several data sources available from the federal government and also from the Higher Education Research Institute at UCLA. Further, we examined these data disaggregated by four racial/ethnic groups, including: Hispanic, Black (non-Hispanic), Asian/Pacific Islander, and White (non-Hispanic). We also examined data for unknown race students as appropriate, as more and more students are responding to this category in recent years on college and financial assistance applications (Smith, Moreno, Clayton-Pedersen, Parker, & Teraguchi, 2005; Harvey & Anderson, 2005).

In our first set of analytic comparisons, enrollment and institutional selectivity data were obtained from the Integrated Postsecondary Education Data System (IPEDS), which is part of the U.S. Department of Education's annual data collection effort, a data system that was established to serve as the core postsecondary education data collection program for the U.S. Department of Education's National Center for Education Statistics (NCES). Student enrollment figures by racial/ethnic group were obtained from IPEDS for each of the three primary years under investigation (i.e., 1994, 1999, and 2004). These enrollment figures served as an important benchmark for this study since they represent the most objective information available on the number of first-time, full-time entering college students. Institutional selectivity data were also acquired from IPEDS, as only selective institutions were selected for purposes of this study. To achieve consistency in institutional comparisons over the decade, we decided to use institutional selectivity as of 2004. Although there are no doubt changes in any institution's selectivity from year to year, these changes tend to be quite small; and the relative ordering of institutions remains remarkably constant over considerable periods of time (Astin & Henson, 1977; McCormick, 2001). We established natural breakpoints that would identify the top 20 percent of the entire population of four-year institutions nationally (N=1,546 in year 2004). Subsequently, selective institutions included colleges or universities that had an average SAT composite score (math plus verbal) among their entering college freshmen class of 1140 or higher. Exactly 316 institutions fit these selectivity criteria. Institutions were further categorized as "very high" selectivity ( $SAT \geq 1300$ ), "high" selectivity ( $1210 \leq SAT < 1300$ ), and "medium" selectivity ( $1140 \leq SAT < 1210$ ) to correspond with the rubric of other researchers who designated the SAT of 1300 and above as the most highly selective institutions (i.e., top 4 percent; N= 68 schools); "high" selectivity represented the next 6 percent selective four-year institutions (N= 90 schools), and the "medium" selectivity range represented the next decile of selective institutions (N= 158 schools) (Astin & Oseguera, 2004; Bowen & Bok, 1998). These enrollment and selectivity data allow us to document enrollment figures across our primary racial/ethnic groups of interest as well as to deduce the changing proportional representation of each of these groups at the most selective institutions.

In our second set of analytic comparisons, U.S. Census data were also employed to establish a comparative basis with which to compare cohorts of entering college freshmen across the three years of interest. Specifically, we obtained school enrollment data from the Current Population Survey (CPS) for each of the three years (i.e., 1994, 1999, 2004) to ascertain the number of 18-19 year-olds with at least a high school diploma or GED. These data were gathered through the

CPS as part of a school enrollment supplement that has been collected annually since 1946 and reported in its regular publication series (U.S. Census Bureau, 1994; 1999; 2004). The school enrollment data are defined by enrollment in “regular school,” which includes nursery school, kindergarten, elementary school, high school, and college and professional school. The latter two categories were of primary interest for this study, as enrollment data were acquired both for the aggregate population and for each racial/ethnic group of interest. Disaggregating these census enrollment figures by racial/ethnic group allows for a more objective assessment of changing proportional representations for each group across the three time points. Indeed the denominator used in constructing these “equity” ratios is critical in understanding the entire picture of access to selective institutions.

In our third set of analytic comparisons we employed data from the Cooperative Institutional Research Program’s (CIRP) Freshman Survey. The Freshman Survey covers a wide range of student characteristics: parental income and education, ethnicity, and other demographic items; financial aid; secondary school achievement and activities; educational and career plans; and values, attitudes, beliefs and self-concept. Freshman Survey data results for the three primary years under investigation (i.e., 1994, 1999, and 2004) were used. These data are statistically adjusted to reflect the response of all first-time, full-time students entering the population of four-year colleges and universities as first-year students in a particular year (see Sax et al., 2004). Only freshman data from those participating institutions that fit the criteria established as selective institutions were included in the analyses. That is, 166, 170, and 162 institutions represented the top 20 percent most selective institutions in 1994, 1999, and 2004, respectively. One advantage to utilizing CIRP data is that repeat participation by institutions is high (ranging between 85-90 percent), thereby providing strong continuity in the sample over time. In order to more deeply delve into the picture of how access has changed for different student groups, we specifically evaluated changes in access among students from different parental income levels.

Students’ family income was divided into three distinct groups. The CIRP Freshman Survey collects these data using fourteen income ranges (e.g., \$20,000 to \$24,999; \$60,000 to \$69,999) rather than an actual dollar amount. These ranges were recategorized into quintile ranges based on distribution across the original categories, a common social science research metric for analytic purposes.<sup>3</sup> To compensate for changes in income each year, we also utilized the Current Population Survey to compute the quintile threshold and then applied them to the CIRP data for each year separately. For each of the three years of interest, these quintile ranges were then grouped as follows: the low income group includes students from reported family incomes below \$25,000 (lowest quintile); middle income denotes students from family incomes between \$25,000 and \$100,000 (middle 3 quintiles), and high income includes students with family incomes above \$100,000 (highest quintile). Again, these data were then statistically adjusted to reflect the response of the total first-time, full-time students entering the population of four-year colleges and universities as first-year students in 1994, 1999, and 2004. (For the complete weighting methodology, see Sax et al., 2004.) Using CIRP freshman survey weighted data, a

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<sup>3</sup> For purposes of this report, the lowest quintile range generally represents low-income families that do not have incomes in excess of 150 percent of the federally defined poverty level for a family of four for that given year. Poverty thresholds for 1994, 1999, and 2004 were obtained from Social Security Online (<http://www.ssa.gov/policy/docs/statcomps/supplement/2005/3e.html>). The federal poverty levels for families of four in 1994, 1999, and 2004 were \$15,141, \$17,029, and \$19,307 respectively.

series of cross tabulations and chi-square statistics were performed using the four racial/ethnic groups of interest to analyze the differences in the representation of students by family income and racial/ethnic groups across institutions of differing selectivity.

## Results

### *Enrollment Trends at the Most Selective Institutions*

The issue of increasing access is often centered on the sector of higher education that is the most selective in its admissions practices. The tumultuous policy environment over the last decade has focused intense scrutiny both on admissions policies at selective institutions and on actual enrollment trends between varying racial/ethnic groups. As aforementioned, the perception is that some groups may be “gaining ground” at the expense of others as a result of race-conscious admissions practices. This perception, whether real or not, seems to be partly influencing both rhetoric and policy viewpoints surrounding the continued use of race in admissions. Within such a politicized policy dynamic, it is most critical to examine actual, rather than perceived, enrollment trends at the most selective of institutions.

Table 4-1 displays a summary of enrollment figures for the most selective institutions in American higher education at three time points over the last decade. To reiterate, the most selective institutions are defined as four-year institutions that report an average SAT composite score (math plus verbal) among their entering college freshmen of 1140 or higher. IPEDS enrollment figures are reported for first-time full-time (FTFT) entering college students within each of the three time points examined. Total FTFT enrollment numbers at the most selective institutions have increased steadily over the last decade for each of the four racial/ethnic groups under investigation. This trend underscores the efforts of this sector of higher education to continue to expand its enrollment capacity in the face of increasing competition and the ever-increasing pool of high school graduates.

Table 4-1: Enrollment at Selective Institutions (N=316) by Race (1994-2004)

	Hispanic		Black (non-Hispanic)		Asian/Pacific Islander		White (non-Hispanic)		Unknown Race		Total FTFT Enrollment
	n	% of Total	n	% of Total	n	% of Total	n	% of Total	n	% of Total	n <sub>t</sub>
1994	16,391	(5%)	16,661	(5%)	30,223	(10%)	233,290	(75%)	5,517	(2%)	311,547
1999	17,538	(5%)	17,922	(5%)	33,528	(9%)	263,490	(74%)	14,049	(4%)	357,504
2004	22,604	(6%)	19,241	(5%)	38,378	(10%)	267,936	(70%)	21,238	(6%)	381,495

Note: Selective institutions include all four-year institutions with an average SAT score among entering college freshmen of 1140 or higher. “N” represents the number of institutions included in the selective group, while “n” represents the number of enrolled students within each racial/ethnic group by year. The “unknown race” category refers to students that an institution is not able to accurately categorize into any other racial/ethnic group, which can include students who do not report a race/ethnicity in their college applications, students who choose more than one racial/ethnic category, or students who choose “other.” FTFT refers to full-time, first-time entering college students.

Source: Student enrollment and institutional selectivity data were obtained from the Integrated Postsecondary Education Data System (IPEDS) of the National Center for Education Statistics, U.S. Department of Education.



A precipitous enrollment increase also occurred among students that reported no racial or ethnic group membership, a trend also noted in other recent reports (Harvey & Anderson, 2005; Smith et al., 2005). The number of students in this category nearly quadrupled in the ten-year period under investigation, surpassing the number of Black students and nearly surpassing the number of Hispanic students at selective institutions as of 2004. One recent report focusing on three different institutions found that a considerable portion of students in the unknown race category tend to be White or multiracial students (Smith et al., 2005), an interesting development that warrants further empirical inquiry. If an increasing number of White and multiracial students are choosing not to report their racial/ethnic status, this has implications on any attempts to accurately document the proportional representation of students by racial/ethnic group at the most selective institutions.

Indeed, while actual enrollment counts are increasing for each of the four racial/ethnic groups, the proportional representation of each of these groups relative to the total FTFT enrollment figure ( $n_t$ ) is not as consistent across the three time points. Using the total FTFT enrollment for each year as the denominator in constructing these proportions, the trends suggest that Hispanic students are “gaining some ground” relative to their peer groups while Black (non-Hispanic) students are remaining fairly static in their representation. Also, even as the number of White (non-Hispanic) students has increased over the last decade at these selective institutions, they nonetheless appear to be “losing ground” in their proportional representation compared to some of their peers over the course of the decade. Meanwhile, the representation of Asian/Pacific Islander students seems to be stable at each of the three time points. In the zero-sum context of selective admissions, one might conclude that Hispanic students are “gaining some ground” in accessing the most selective of higher education institutions while White students’ representational share may be diminishing. However, this apparent “drop” in proportional representation among White students may be partly explained due to their increasing tendency to withhold their racial status and thus be included in a separate “unknown” racial/ethnic category (Smith et al., 2005). More empirical scrutiny is necessary to test this hypothesis further, although preliminary evidence seems to indicate that this is indeed a fair assumption.

Table 4-2 further disaggregates these IPEDS enrollment figures by examining three distinct categories (i.e., very high, high, and medium selectivity institutions) within the selective group of institutions in the previous table. As before, each of the four racial/ethnic groups show increased FTFT enrollment numbers across each time point of interest and within each selectivity category. The one exception is for White (non-Hispanic) students at very high selectivity institutions, who show a drop in FTFT enrollment between 1999 and 2004. Once again, using the total FTFT enrollment figure ( $n_t$ ) for each year as the denominator to compare proportional representation across groups, the resulting trends show relative stability for Hispanic, Black (non-Hispanic), and Asian/Pacific Islander students across each selectivity category. For White (non-Hispanic) students, on the other hand, their proportional representation appears to be declining over time for each of the selectivity categories, especially within the very high and high selectivity institutions.

Table 4-2: Enrollment at Very High, High, and Medium Selectivity Institutions by Race (1994-2004)

Institutional Selectivity	Hispanic		Black (non-Hispanic)		Asian/Pacific Islander		White (non-Hispanic)		Unknown Race		Total FTFT Enrollment
	n	% of Total	n	% of Total	n	% of Total	n	% of Total	n	% of Total	n
<b>Very High (N=68)</b>											
1994	2,969	(5%)	3,842	(6%)	8,054	(13%)	42,767	(69%)	1,557	(3%)	62,105
1999	3,128	(5%)	3,829	(6%)	8,169	(12%)	44,512	(67%)	2,798	(4%)	65,959
2004	4,048	(6%)	4,284	(6%)	8,779	(13%)	42,338	(62%)	4,879	(7%)	68,501
<b>High (N=90)</b>											
1994	6,628	(7%)	4,601	(5%)	11,688	(12%)	70,754	(72%)	1,900	(2%)	98,571
1999	6,937	(6%)	5,039	(5%)	12,874	(12%)	77,608	(70%)	4,459	(4%)	110,165
2004	8,421	(7%)	5,420	(5%)	15,061	(13%)	78,445	(66%)	7,161	(6%)	118,287
<b>Medium (N=158)</b>											
1994	6,794	(5%)	8,218	(5%)	10,481	(7%)	119,769	(79%)	2,060	(1%)	150,871
1999	7,473	(4%)	9,054	(5%)	12,485	(7%)	141,370	(78%)	6,792	(4%)	181,380
2004	10,135	(5%)	9,537	(5%)	14,538	(7%)	147,153	(76%)	9,198	(5%)	194,707

Note: Very high selectivity institutions are those with average SAT scores among entering college freshmen of 1300 or higher. High selectivity institutions are those with average SAT scores of between 1210 and 1300. Medium selectivity institutions are those with average SAT scores between 1140 and 1210. "N" represents the number of institutions included in the three selectivity categories, while "n" represents the number of enrolled students within each racial/ethnic group by year. The "unknown race" category refers to students that an institution is not able to accurately categorize into any other racial/ethnic group, which can include students who do not report a race/ethnicity in their college applications, students who choose more than one racial/ethnic category, or students who choose "other." FTFT refers to full-time, first-time entering college students.

Source: Enrollment and Selectivity data were obtained from the Integrated Postsecondary Education Data System (IPEDS) of the National Center for Education Statistics, U.S. Department of Education.

These trends seem to indicate that White (non-Hispanic) students may be "losing ground" in terms of accessing selective institutions, yet there does not appear to be a concomitant enrollment "gain" for other racial/ethnic peer groups. Again, the most plausible explanation for this is that White students are in fact not "losing" any proportional representation to other racial/ethnic groups as they are simply being displaced into the unknown race category given the previously cited trends. In examining the rising proportional representation of the unknown race group across the three selectivity groups relative to the declining representation of White students, a compelling converse relationship appears to be most evident.

White students do appear to be losing some ground, but this loss does not come as a result of any gains by any other racial/ethnic minority group, as is evidenced in Table 4-2. Despite their apparent loss in proportional representation, White (non-Hispanic) students remain greatly represented within the most selective institutions, outnumbering Asian/Pacific Islanders by a better than 5 to 1 ratio and Hispanic and Black (non-Hispanic) students by a better than 10 to 1

ratio. This latter ratio represents a great disparity in access to the most selective of institutions between White students and their racial/ethnic minority peers, a ratio that is highly skewed as is evidenced by other available metrics that can more accurately gauge the question of who is indeed “losing ground.”

#### *Enrollments at Selective Institutions Per 1,000 High School Graduates*

Using total FTFT enrollment as a denominator represents only one rubric with which to compare proportional representation across selectivity categories and racial/ethnic groups. In order to be better attuned to the ongoing demographic shifts in the broader population, a more precise assessment for proportional representation may be to consider enrollment numbers for each racial/ethnic group as compared to the total number of high school graduates within a cohort group of similar age. To accomplish this, we utilized U.S. Census data gathered from Current Population Surveys (CPS) at each of the three time points of interest. Table 4-3 shows the results of these proportional comparisons by racial/ethnic group in which we used the convention of “per 1,000 total high school graduates” as our base unit of comparison due to the large denominator. This also allows for more accurate and refined comparisons of proportional representation both within and between groups, a key purpose of the present study. Data for unknown race students was not readily available in the CPS data as it was through IPEDS, so these numbers are not reflected in the tables or analyses that follow. Nonetheless, prior trends that were discussed about this group help to inform our interpretations of these data.

Table 4-3 displays the enrollment figures for selective institutions (i.e., very high, high, and medium selectivity) per 1,000 high school graduates within each racial/ethnic group. For every 1,000 Hispanic high school graduates that are either 18 or 19 years old, 37 attended one of the selective institutions among the three selectivity categories in 1994, falling to 31 per 1,000 in 2004. Similarly, for Black (non-Hispanic) students, 29 out of every 1,000 high school graduates within this group in 1994 attended one of the most selective institutions, falling to 26 per 1,000 by 2004.

In contrast, White (non-Hispanic) students number 71 per every 1,000 high school graduates (ages 18 or 19) in 2004, an increase from 64 per 1,000 in 1994. Meanwhile, Asian/Pacific Islanders show marked increases in their representation per 1,000 high school graduates (ages 18 or 19) between 1999 and 2004. Among the four groups, Asian/Pacific Islanders are most represented at selective institutions per every 1,000 high school graduates of the same background, numbering 122 per 1,000 in 1999 and 177 per 1,000 in 2004.

These trends suggest that Asian/Pacific Islanders are about twice more likely than their White counterparts and about six times more likely than their Hispanic or Black counterparts to be enrolled at the most selective institutions in 2004. This represents a sobering statistic which reinforces that the access gap between these racial/ethnic groups is widening over time. Overall, these data indicate that relative to the representation in their age-group population, Hispanics and Blacks are losing ground while Asian and White students are posting gains in access to selective institutions. This access gap is even more compelling when one considers that White students are under-reported given their increasing tendency to not report their racial status to their institutions (Smith et al., 2005). We acknowledge, however, that these generalizations in terms of who is

Table 4-3: Enrollment at Selective Institutions Per 1,000 High School Graduates Within Each Racial/Ethnic Group (1994, 1999, 2004)

	Enrollment per 1,000 high school graduates within racial/ethnic group (18-19 years old)		
	1994	1999	2004
Hispanic	37	28	31
Black (non-Hispanic)	29	24	26
Asian/Pacific Islander	--	122	177
White (non-Hispanic)	64	67	71

Note: Selective institutions are those with average SAT scores among entering college freshmen of 1140 or higher (N=316). Source: Enrollment and Selectivity data were obtained from the Integrated Postsecondary Education Data System (IPEDS) of the National Center for Education Statistics, U.S. Department of Education. Source: High School graduate data for 18-19 year-olds were obtained from the Current Population Surveys (1994, 1999, & 2004), U.S. Census Bureau. Data were not available for Asian/Pacific Islanders in 1994.

gaining or losing ground with respect to accessing selective institutions can vary substantially by income level, immigration status, and labor market opportunities (Kidder, 2006). We explore differences in access to selective institutions by income level and racial/ethnic group further in this report.

Table 4-4 disaggregates these enrollment figures by examining the three distinct categories (i.e., very high, high, and medium selectivity) within the selective group of institutions in the previous table. Examining college student enrollments by each selectivity category—and per 1,000 high school graduates (ages 18 or 19) within each racial/ethnic group—reveal comparable trends to the aggregate numbers.

For example, within the very high selectivity institutions in 2004, 6 out of every 1,000 Hispanic high school graduates (ages 18-19) are enrolled at such institutions, compared to 40 out of every 1,000 Asian/Pacific Islander graduates and 11 out of every 1,000 White graduates. This gap in proportional representation actually increased between Hispanics and Asian/Pacific Islanders between 1999 and 2004.

Among the high selectivity institutions, Hispanics and Blacks once again lost ground between 1994 and 2004 in their proportional representation per 1,000 high school graduates, while Asian/Pacific Islanders and Whites both saw gains. Parallel trends followed for each of these racial/ethnic groups at medium selectivity institutions.

Using the rubric of “per 1,000 high school graduates” within each racial/ethnic group makes one conclusion immediately clear: Whites and Asian/Pacific Islanders are gaining greater access to the most selective institutions, while their Hispanic and Black counterparts are indeed losing ground on this important trend. In simply recalibrating the appropriate population comparison across time and across groups, the reality of racial minorities losing ground in accessing the most selective institutions becomes abundantly clear. While Hispanic and Black (non-Hispanic)

Table 4-4: Enrollment at Very High, High, and Medium Selectivity Institutions Per 1,000 High School Graduates Within Each Racial/Ethnic Group (1994, 1999, 2004)

	Per 1,000 high school graduates within each racial/ethnic group, Enrollment at Institutions with:								
	Very High Selectivity			High Selectivity			Medium Selectivity		
	1994	1999	2004	1994	1999	2004	1994	1999	2004
Hispanic	7	5	6	15	11	12	16	12	14
Black (non-Hispanic)	7	5	6	8	7	7	14	12	13
Asian/Pacific Islander	--	30	40	--	47	69	--	46	67
White (non-Hispanic)	12	11	11	19	20	21	33	36	39

Note: Very high selectivity institutions are those with average SAT scores among entering college freshmen of 1300 or higher (N=68). High selectivity institutions are those with average SAT scores of between 1210 and 1300 (N=90). Medium selectivity institutions are those with average SAT scores between 1140 and 1210 (N=158).

Source: Enrollment and Selectivity data were obtained from the Integrated Postsecondary Education Data System (IPEDS) of the National Center for Education Statistics, U.S. Department of Education.

Source: High School graduate data for 18-19 year-olds were obtained from the Current Population Surveys (1994, 1999, & 2004), U.S. Census Bureau. Data were not available for Asian/Pacific Islanders in 1994.

students may appear to be making enrollment gains at such institutions (as seen in Tables 4-1 and 4-2), a more rigorous and demographically appropriate comparison suggests quite the contrary. The more stringent measure of per 1,000 high school graduates within a given racial/ethnic group allows for a more accurate, relevant, and compelling interpretation of the effects of policy changes over the last decade—they are simply not attuned to the demographic shifts occurring.

The perception that racial minorities are gaining greater access to selective institutions at the expense of their White or Asian/Pacific Islander peers is simply incorrect and unsubstantiated by these data. The trends shown in Tables 4-3 and 4-4 suggest that the reverse of this statement is much closer to reality. Moreover, due to the much lower high school graduation rates of Blacks and Hispanics (Harvey & Anderson, 2005), the data indicate that the disparities in access may be even greater for these groups. Such important and data-driven findings ought to play critical roles in the ongoing discourse and debate over race-conscious admissions policies. Our analyses continue with a more in-depth look at the enrollment trends of each of these four racial/ethnic groups at selective institutions disaggregated by parental income.

#### *CIRP Freshman Survey DATA: Parental Income Levels of Students Enrolled at Selective Institutions*

In addition to examining IPEDS and Census data on enrollment trends at selective institutions, we also utilized CIRP Freshman survey data to focus on more detailed characteristics of entering college students. Employing the national norms sample that is weighted up to the national population of entering full-time, first-time freshman students (Sax et al., 2004), we examined the measure of parental income across each racial/ethnic group cross tabulated by each of the three institutional selectivity categories.

Table 4-5 shows the parental income of students within institutions of differing selectivity. The trends across the ten-year span (1994 to 2004) consistently revealed proportional increases for students with high parental incomes across all selectivity levels. This proportional increase has partly displaced students from middle income families. Students from low parental income backgrounds have also shown some proportional declines over the ten-year period in their enrollment at very high, high, and medium selective institutions.

The growing affluent nature of the college-going student population was recently highlighted in a CIRP study of forty years worth of freshman survey trends (Pryor, Hurtado, Saenz, Santos, & Korn, 2007). The study noted that in the last 35 years, college student parental income rose from \$65,700 to \$76,400 (inflation-adjusted), representing a 16 percent increase. Meanwhile, the national median family income rose from \$44,900 to \$47,800 (inflation-adjusted), representing a 6.5 percent increase. From these data we can conclude that middle and low income students are being squeezed out of not only the more selective institutions but also all four-year institutions, a conclusion also reached in previous research using CIRP data (Astin & Oseguera, 2004).

Across all institutions, the proportion of high parental income students increased from 14.7 percent in 1994 to 29.2 percent in 2004—representing an absolute change of 14.5 percentage points but a proportional change of almost 100 percent in this time span. In comparison, for students from middle and low income households, we observed proportional declines of 13.4 percent and 32.9 percent, respectively, across all institutions. Similarly, at very high, high, and medium selectivity institutions, middle income and low income students lost ground in terms of their proportional representation at such institutions while high income students gained. In short, the figures in Table 4-5 reinforce our conclusion that there is an even greater concentration of students from high parental income backgrounds in the most selective institutions today than there was 10 years ago (from a 56.8% increase in very high selectivity institutions to a 90.0% increase in medium selectivity institutions). We delve further into racial/ethnic differences by parental income to see whether the distributions vary across groups (See Appendix 4A for tables).

#### *Parental Income Levels by Racial/Ethnic Group*

In 2004, the highest concentration of White students within the very high and high selective institutions was within the high income group (62.7 percent and 51.9 percent, respectively versus 33.3 percent high income across all institutions). This suggests that high income White students are disproportionately represented at the most selective institutions as compared to their middle and low income White peers. It is also important to note that the proportion of low income White students in very high selective institutions declined from 5.1 percent in 1994 to 2.7 percent in 2004, a proportional decline of almost 50 percent. This pattern holds for the high and medium selective institutions as well. As previously suggested, middle income and low income White students appear to be witnessing the biggest losses with respect to accessing the most selective institutions. Indeed, these same trends are evident across the other racial/ethnic groups in our analyses.

Table 4-5: Percentage of Students Entering Selective Four-Year Institutions by Parental Income

Institutional Selectivity	Parental Income Level			Parental Income Level		
	High Income	Middle Income	Low Income	High Income	Middle Income	Low Income
	<i>Row Percent</i>			<i>Percent Change (1994 to 2004)</i>		
Very High	N					
1994	61,874	35.3	56.6	8.2		
1999	55,664	45.9	48.5	5.6		
2004	49,258	55.3	39.2	5.5	56.8	-30.7 -32.6
High						
1994	105,985	23.8	66.2	9.9		
1999	91,041	35.1	57.2	7.7		
2004	130,084	44.4	48.0	7.6	86.2	-27.5 -23.6
Medium						
1994	192,888	20.2	69.4	10.4		
1999	194,193	26.2	66.0	7.8		
2004	207,439	38.6	54.7	6.6	90.9	-21.1 -36.1
Non-Selective						
1994	669,030	9.8	71.2	18.9		
1999	794,688	14.9	70.5	14.6		
2004	858,119	23.1	64.5	12.3	135.7	-9.4 -34.9
All Institutions						
1994	1,029,777	14.7	69.5	15.8		
1999	1,135,586	20.0	67.6	12.4		
2004	1,244,900	29.2	60.2	10.6	98.6	-13.4 -32.9

Note: Low income includes incomes of \$25,000 or less; Middle income includes incomes between \$25,000-\$100,000; High income includes incomes of \$100,000 or more. These parental income categories represent quintile ranges, which are explained in the methods section of this study.

Note: Very high selective schools have average SAT scores above 1300; high selective schools have average SAT scores of 1210-1300; medium selective schools have average SAT scores of 1140-1210; and non-selective schools have average SAT scores below 1140.

Note: The final three columns report proportional percent changes between 1994 and 2004 for the given institutional selectivity and parental income category.

Source: Cooperative Institutional Research Program (CIRP) Freshman Survey Data, 1994, 1999, and 2004.

The distribution of Black students across parental income ranges is dramatically different than for White students. By 2004, in the very high selective schools, 28.5 percent are high income with the majority of enrolled students hailing from middle income families. This pattern is the same in high and medium selective institutions. As we observed with their White peers, the proportional percent change for Black high income students increases over time across the very high, high, and medium selective institutions. With respect to the middle and low income groups, there has been some displacement across all three selectivity levels. It appears that the middle and low income Black students have lost access to selective institutions, while their more affluent counterparts have gained.

Hispanic and Asian college students follow a very similar pattern as compared to their Black peers. Within each of the selectivity categories examined, the highest concentration of students lies within the middle-income category. Middle income and low income Hispanic and Asian students appear to be losing some ground considering their overall enrollment proportions have declined considerably during the ten-year span. Low income Hispanic and Asian students appear to be losing the most ground with respect to accessing the most selective institutions. Parental income distributions for Asian students are only slightly higher than for Hispanic and Black students but remain below that of their White peers.

Overall, the story across the racial/ethnic groups by socioeconomic status is that there are a variety of losses and gains by parental income. Affluent families across all racial groups are able to maintain (or increase) their representation at selective institutions. High income families may be able to enroll their children in more selective schools while perhaps lower and middle income families choose alternative educational institutions because of cost, lack of accessibility, or other determining factors that warrant further exploration. Among selective institutions, generally the most costly schools are often the most elite.

### Conclusion

The modern policy debate around the issue of access to selective institutions is an ongoing struggle full of legal maneuverings, political wrangling, and the ambiguity of rhetoric filled with ideological bias. In spite of the larger drama surrounding this topic, the key issues of equity, access, and fairness lie directly at the heart of the debate. In the interest of seeking out these key issues, our study posed a simple yet critical policy question: are racial/ethnic minority students losing ground in accessing the most selective higher education institutions relative to their peers? By exploring national enrollment trends on entering college freshmen at selective institutions across three time points (i.e., 1994, 1999, and 2004), we found that racial/ethnic minority students are indeed losing ground. Despite the perception that these students are squeezing out more competent and qualified students, our findings suggest quite the contrary.

Overall, the pattern for White students is that they have regained a slight advantage in representation (relative to their high school graduate population) from the early stages of the controversy over affirmative action. This student group may have protected their share of the pie, in contrast to the general perception that they are losing ground as their representation (from an institutional perspective) appears to be declining in this new era of admissions and increasing demographic change that portends a shift in their majority status. Black and Hispanic students have experienced a decline in representation relative to their population of high school graduates, while their share of the selective college representation appears relatively static from an institutional perspective. It may be that particular institutions are more affected by the restricted use of racial criteria—especially schools in California—and that other similarly selective institutions are gaining strategically from the losses of these particular campuses. In contrast, Asian/Pacific Islanders have gained an advantage over the last decade in access to selective institutions and are more likely to be attending such an institution than students from other racial/ethnic groups. Clearly, students from high-income families from every racial/ethnic group are more likely to be represented on selective campuses. White students appear to continue their advantage over peers with comparable parental income levels.



From a realistic group conflict perspective, for the level of expense, debate, and efforts to characterize Black and Latinos as undeserving of consideration in admissions, these students are simply not gaining greater access to selective institutions as some might have expected. Other research has confirmed that White students are not likely to gain significantly in access to elite institutions when the numbers of African American and Hispanic students decline. In fact, several studies have shown that the elimination of considerations of race show substantial reductions of African American and Hispanic students at selective institutions (Bowen & Bok, 1998; Espenshade & Chung, 2005; Kane, 1998; Long, 2004). Indeed, White students gain roughly 0.5 percentage points in acceptance rates while Asian Americans gain nearly 6 percentage points when considerations for race are eliminated (Espenshade & Chung, 2005).

Given these projections, coupled with the data and trends shown in this study, it is simply inaccurate to presume that “undeserving” Black and Hispanic students are taking admissions places from more “deserving” students of other racial/ethnic backgrounds at selective institutions. In the competitive and zero-sum context of selective college admissions, it is impossible for all qualified students to be admitted. Increasingly, it is Black and Hispanic students that are “losing ground” in selective college admissions.

It is unlikely that the Supreme Court decisions on the use of race as a factor in admissions decisions (e.g., *Grutter v. Bollinger*, 2003; *Gratz v. Bollinger*, 2003) will bring an end to the ideological, judicial, and group conflicts that have characterized the battle over affirmative action. The recent passage of Proposal 2 by voters in Michigan—a statewide initiative which bans any preferential treatment to individuals based on their race, gender, color, ethnicity, or national origin—is only a harbinger of more challenges to come. Many expect that there will be continued affirmative action litigation in the post-*Grutter/Gratz* era, a portent of the continued controversy that race-conscious policies in higher education are sure to bring in the coming decades. In this high stakes context, it will be increasingly important to ask the question of who is “gaining ground” and who is “losing ground.” Evidence of the sort presented in this study can serve to inform this line of inquiry in ways that are meaningful, data-driven, and objective.

## APPENDIX 4A

Table 4A-1: Percentage of White Freshmen Entering Four-Year Institutions by Parental Income

Institutional Selectivity	Parental Income Level			Parental Income Level		
	High Income	Middle Income	Low Income	High Income	Middle Income	Low Income
	<i>Row Percent</i>			<i>Percent Change (1994 to 2004)</i>		
Very High	N					
1994	43,758	38.9	56.0	5.1		
1999	39,352	50.9	46.0	3.2		
2004	33,041	62.7	34.6	2.7	61.2	-38.2 -47.1
High						
1994	80,081	25.9	67.8	6.3		
1999	66,003	39.0	56.9	4.1		
2004	86,558	51.9	44.8	3.3	100.4	-33.9 -47.6
Medium						
1994	159,213	21.7	70.0	8.3		
1999	158,298	28.0	66.2	5.9		
2004	161,142	41.9	53.7	4.4	93.1	-23.3 -47.0
Non-Selective						
1994	495,526	11.0	75.2	13.8		
1999	568,614	17.3	73.1	9.6		
2004	606,843	26.8	65.5	7.6	143.6	-12.9 -44.9
All Institutions						
1994	778,578	16.3	72.3	11.4		
1999	832,267	22.7	69.2	8.2		
2004	887,584	33.3	60.2	6.4	104.3	-16.7 -43.9

Note: Low income includes incomes of \$25,000 or less; Middle income includes incomes between \$25,000-\$100,000; High income includes incomes of \$100,000 or more. These parental income categories represent quintile ranges, which are explained in the methods section of this study.

Note: Very high selective schools have average SAT scores above 1300; high selective schools have average SAT scores of 1210-1300; medium selective schools have average SAT scores of 1140-1210; and non-selective schools have average SAT scores below 1140.

Note: The final three columns report proportional percent changes between 1994 and 2004 for the given institutional selectivity and parental income category.

Source: Cooperative Institutional Research Program (CIRP) Freshman Survey Data, 1994, 1999, and 2004.

Table 4A-2: Percentage of Black Freshmen Entering Four-Year Institutions by Parental Income

Institutional Selectivity	Parental Income Level			Parental Income Level		
	High Income	Middle Income	Low Income	High Income	Middle Income	Low Income
	<i>Row Percent</i>			<i>Percent Change (1994 to 2004)</i>		
Very High	N					
1994	2,871	12.6	65.0	22.4		
1999	2,466	22.2	61.7	16.1		
2004	2,443	28.5	55.3	16.1	126.2	-14.9 -28.1
High						
1994	4,758	8.7	64.2	27.1		
1999	3,809	18.4	60.3	21.4		
2004	4,698	23.4	58.6	18.1	169.0	-8.7 -33.2
Medium						
1994	6,994	7.1	66.3	26.6		
1999	5,603	9.9	66.3	23.8		
2004	7,477	17.7	62.4	19.9	149.3	-5.9 -25.2
Non-Selective						
1994	88,455	4.9	56.9	38.2		
1999	89,471	6.7	62.0	31.3		
2004	91,485	10.3	61.2	28.5	110.2	7.6 -25.4
All Institutions						
1994	103,078	5.4	58.1	36.5		
1999	101,349	7.7	62.2	30.1		
2004	106,103	11.8	61.0	27.2	118.5	5.0 -25.5

Note: Low income includes incomes of \$25,000 or less; Middle income includes incomes between \$25,000-\$100,000; High income includes incomes of \$100,000 or more. These parental income categories represent quintile ranges, which are explained in the methods section of this study.

Note: Very high selective schools have average SAT scores above 1300; high selective schools have average SAT scores of 1210-1300; medium selective schools have average SAT scores of 1140-1210; and non-selective schools have average SAT scores below 1140.

Note: The final three columns report proportional percent changes between 1994 and 2004 for the given institutional selectivity and parental income category.

Source: Cooperative Institutional Research Program (CIRP) Freshman Survey Data, 1994, 1999, and 2004.

Table 4A-3: Percentage of Hispanic Freshmen Entering Four-Year Institutions by Parental Income

Institutional Selectivity	Parental Income Level			Parental Income Level		
	High Income	Middle Income	Low Income	High Income	Middle Income	Low Income
	<i>Row Percent</i>			<i>Percent Change (1994 to 2004)</i>		
Very High	N					
1994	3,072	18.9	59.9	21.2		
1999	2,678	29.3	56.5	14.3		
2004	3,098	38.5	49.2	12.4	103.7	-17.9 -41.5
High						
1994	5,145	13.3	59.3	27.4		
1999	4,891	21.4	57.7	20.9		
2004	8,560	27.2	54.5	18.3	104.5	-8.1 -33.2
Medium						
1994	6,922	12.1	60.4	27.5		
1999	6,760	17.7	60.7	21.5		
2004	10,644	25.7	57.6	16.7	112.4	-4.6 -39.3
Non-Selective						
1994	24,420	5.3	57.0	37.7		
1999	44,897	8.3	61.1	30.6		
2004	58,487	13.3	62.7	24.0	150.9	10.0 -36.3
All Institutions						
1994	39,559	17.7	59.5	22.8		
1999	59,226	11.4	60.6	28.0		
2004	80,789	17.3	60.6	22.0	-2.3	1.8 -3.5

Note: Low income includes incomes of \$25,000 or less; Middle income includes incomes between \$25,000-\$100,000; High income includes incomes of \$100,000 or more. These parental income categories represent quintile ranges, which are explained in the methods section of this study.

Note: Very high selective schools have average SAT scores above 1300; high selective schools have average SAT scores of 1210-1300; medium selective schools have average SAT scores of 1140-1210; and non-selective schools have average SAT scores below 1140.

Note: The final three columns report proportional percent changes between 1994 and 2004 for the given institutional selectivity and parental income category.

Source: Cooperative Institutional Research Program (CIRP) Freshman Survey Data, 1994, 1999, and 2004.

Table 4A-4: Percentage of Asian/Pacific Islander Freshmen Entering Four-Year Institutions by Parental Income

Institutional Selectivity	Parental Income Level			Parental Income Level		
	High Income	Middle Income	Low Income	High Income	Middle Income	Low Income
	<i>Row Percent</i>			<i>Percent Change (1994 to 2004)</i>		
Very High	N					
1994	8,743	34.2	52.8	13.1		
1999	7,344	39.3	50.6	10.2		
2004	7,793	43.1	46.5	10.4	26.0	-11.9 -20.6
High						
1994	11,017	22.7	58.2	19.1		
1999	10,415	26.9	54.8	18.2		
2004	23,096	30.0	52.8	17.2	32.2	-9.3 -9.9
Medium						
1994	10,210	17.5	62.6	19.8		
1999	10,643	21.2	63.0	15.8		
2004	16,752	30.2	55.9	13.9	72.6	-10.7 -29.8
Non-Selective						
1994	25,356	9.8	61.1	29.1		
1999	39,833	12.6	60.3	27.1		
2004	53,209	20.1	58.7	21.2	105.1	-3.9 -27.1
All Institutions						
1994	55,326	17.7	59.5	22.8		
1999	68,235	19.0	58.8	22.1		
2004	100,850	25.8	55.9	18.2	45.8	-6.1 -20.2

Note: Low income includes incomes of \$25,000 or less; Middle income includes incomes between \$25,000-\$100,000; High income includes incomes of \$100,000 or more. These parental income categories represent quintile ranges, which are explained in the methods section of this study.

Note: Very high selective schools have average SAT scores above 1300; high selective schools have average SAT scores of 1210-1300; medium selective schools have average SAT scores of 1140-1210; and non-selective schools have average SAT scores below 1140.

Note: The final three columns report proportional percent changes between 1994 and 2004 for the given institutional selectivity and parental income category.

Source: Cooperative Institutional Research Program (CIRP) Freshman Survey Data, 1994, 1999, and 2004.

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## CHAPTER 5

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### FALLING SKY: TRENDS IN MINORITY ACCESS TO LAW SCHOOLS, PRE- AND POST-*GRATZ* AND *GRUTTER*



Helen Hyun



## Introduction

In June 2003, affirmative action proponents lauded the U.S. Supreme Court's decisions in *Gratz v. Bollinger* and *Grutter v. Bollinger*, the latter of which upheld the diversity rationale in *Regents of the University of California v. Bakke* (1978) and allowed colleges and universities to continue using race both carefully and flexibly as a “plus” factor in admissions. Her majority opinion in *Grutter* notwithstanding, Justice O'Connor urged admissions officials at the University of Michigan Law School and elsewhere to adopt colorblind programs expeditiously while studying the race-blind “experiments” in California and Washington where voters had previously dismantled affirmative action programs.<sup>1</sup> Three years later, Justice O'Connor's prescience was realized when Michigan voters passed Proposal 2 in November 2006 thus ending race- and gender-based preferences in education, employment, and contracting in the state.

While it may be premature to fully explore the effects of *Grutter* and Proposal 2 on minority access to law schools—especially in Michigan—there are sufficient data (ten years' worth) to assess the deleterious impact race-blind measures have already had on underrepresented minority (URM) enrollment in states such as California and Washington.<sup>2</sup> A recent report by the Academic Senate Graduate Admissions Task Force at the University of California concluded that the “enrollment of historically underrepresented minority students at UC campuses remains alarmingly low” (Frank, 2005, p. 2). In fact, following the precipitous decline in URM enrollment in California in 1997 caused by Proposition 209, researchers aptly warned there were no viable alternatives to race-conscious tools in selective admissions for achieving a critical mass of URM students (Karabel, 1998; Orfield, 1998).

In the wake of Proposal 2 and the Supreme Court decisions in the University of Michigan cases, this study examines trends in minority applications, admissions, and enrollment from 1995 to 2005 at selective, public law schools in California, Washington, and Michigan. This chapter further examines patterns in college graduation rates—specifically for minorities in California—to assess demographic changes in the law school applicant pool at the state level. Lastly, this paper explores changes, if any, to minority access to U.S. legal education following the *Gratz* and *Grutter* decisions.

The main questions addressed in the study are the following: (a) How has the national pool of URM applicants to law schools changed since 1995? (b) How have state-level demographic changes and college completion rates affected the potential pool of URM law school applicants in California? (c) What have been the effects of abolishing race-conscious tools on minority access to selective, public law schools in California, Michigan, and Washington between 1995 and 2005? (d) What are the *perceived* effects of the 2003 *Gratz* and *Grutter* decisions on minority access to these law schools?

## Methodology

This study used a mixed methods design and descriptive time-series analysis to explore and examine outcomes and trends related to law school admissions. Quantitative data for the study included national application, admission, and enrollment data obtained from the Law School Admission Council (LSAC), college completion data from the National Center for Education

Statistics (NCES) and the Public Policy Institute of California, and institutional-level data from public law schools that comprised the study sample: UC Berkeley (UCB), UC Davis (UCD), UC Los Angeles (UCLA), UC Hastings College of the Law (Hastings), University of Michigan (UMI), University of Virginia (UVA), and University of Washington (UWA). Sample inclusion criteria supported the identification of possible trends among selective, peer institutions (UCB, UCLA, UMI, and UVA<sup>3</sup>) that vary in their use of colorblind or race-based decision making.<sup>4</sup>

The term “selective” was operationally defined by mean UGPA (undergraduate grade point average) greater than 3.6/4.0 and LSAT (Law School Admission Test) scores higher than 95th percentile for entering law students. Less selective public institutions (for example, UCD and Hastings) were also included in the analysis to explore differential impacts linked to selectivity.<sup>5</sup> Finally, a comparative analysis was conducted across all the law schools sampled to assess initial effects of *Gratz* and *Grutter* on URM outcomes.

Qualitative data for this study were obtained from in-person and telephone interviews with admissions officials from participating law schools excluding officials at UCLA and Hastings who declined to be interviewed. The qualitative inquiry was guided by two objectives: (a) to explore post-Michigan changes to diversity plans including admission and recruitment procedures at the law schools; and (b) to clarify and corroborate any patterns or trends that emerged from minority application, admission, and enrollment data. Additional information for the study was culled from university reports, memoranda, and admissions material provided either by individual law schools or obtained independently by the researcher.

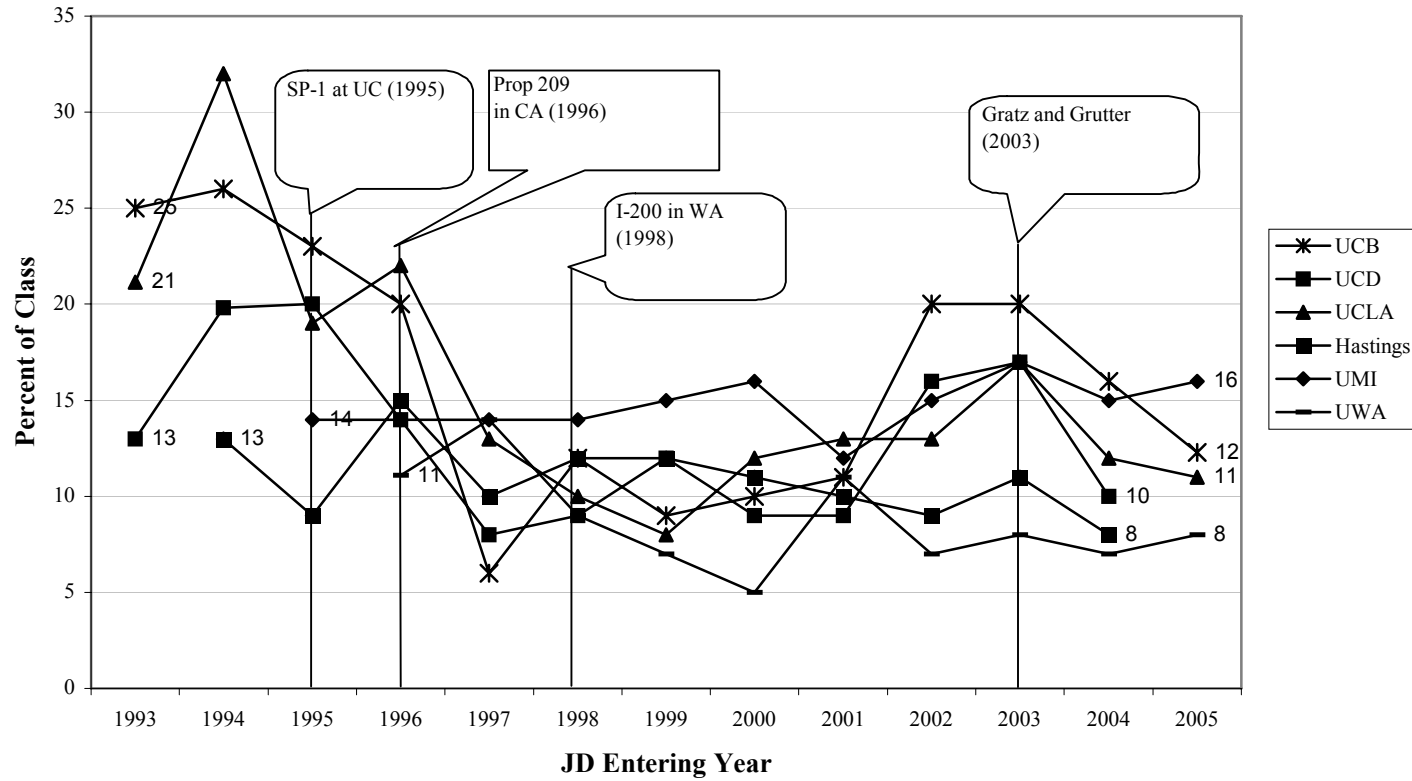
The study focuses mainly on events and institutions in California, but examines national law school data to assess changes in the makeup of the applicant pool. The rationale for examining national trends is due to the paper’s emphasis on selective, public institutions that draw from a national—rather than a state or local—pool of potential applicants. Analysis of state-level college graduation rates by race and ethnicity in California (to determine the pool of eligible URM students) was limited to secondary data analysis. Future research should take into account the changing demographics of the college going pool both at the state and national levels, and examine primary data on undergraduate completion rates by race and ethnicity for all colorblind states.

## Findings

### *National Law School Application, Admission, and Matriculation Trends: 1995-2005*

Despite the overall, post-affirmative action decline in URM enrollment at public law schools in California, Michigan, and Washington (to be discussed in the next section), a significant increase in URM enrollment occurred in 2002 and 2003 particularly at UC law schools. At Boalt Hall in Berkeley, UC’s most selective law school, URM students practically doubled from 11% of the entering JD class in 2001 to 20% in 2002 and 2003 (see Figure 5-1). UC Davis and UCLA also experienced increases in their URM enrollment during the same period. What factors contributed to increased URM enrollment at UC law schools in 2002 and 2003?

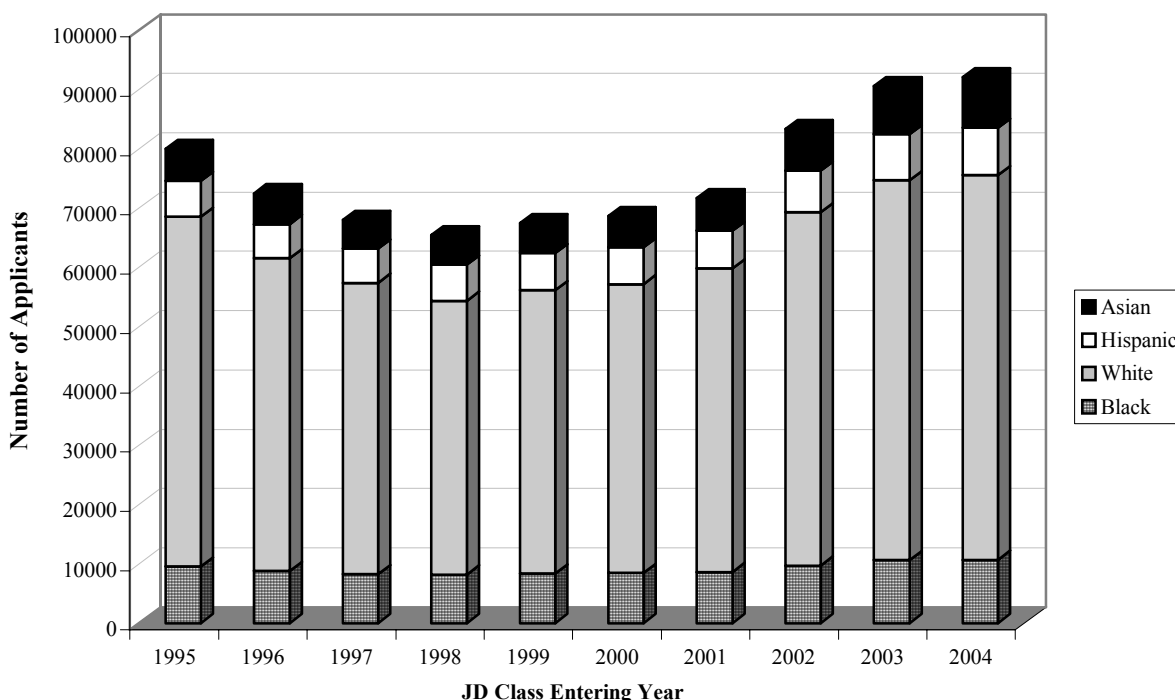
**Figure 5-1: URM Law School Enrollment, 1993-2005**



Source: Data obtained from Law Schools and Law School Admissions Council—National Statistical Reports, 1993-2005.

Examining national application, admission, and enrollment trends at U.S. law schools between 1995 and 2004 brings into relief some possible answers since the law schools in this study draw primarily from national applicant pools.<sup>6</sup> In 2002, LSAC reported an 18% increase in applicants (n=90,853) to the 178 ABA-approved law schools in the United States compared to the previous year (n=77,235); in 2003, there was an additional 10% (n=99,504) of applicants; and in 2004, over 100,000 applicants (+1%), a record-breaking number, submitted applications to J.D. programs in the U.S. (see Figure 5-2).

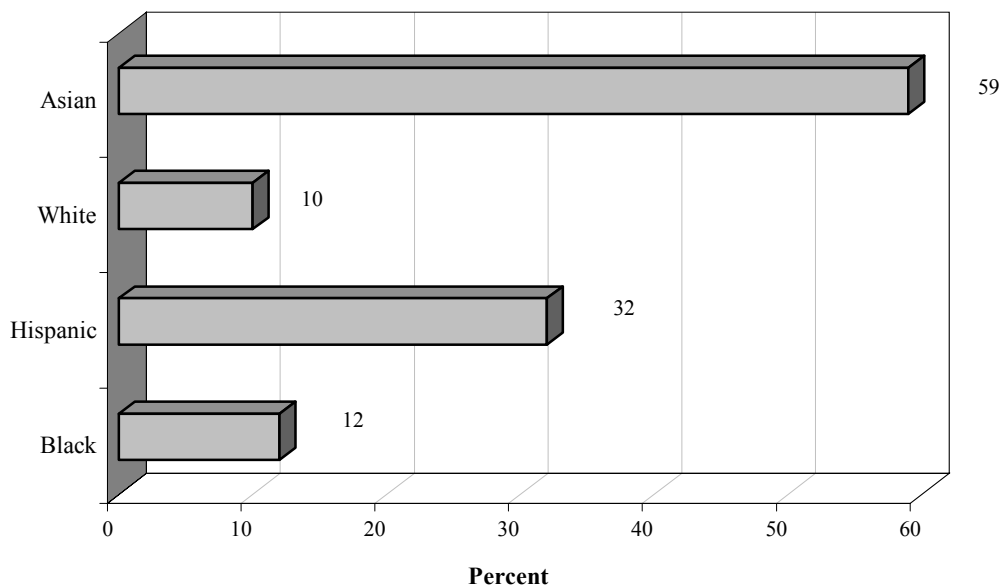
Figure 5-2: National Law School Application Rates, 1995-2004



Source: Data obtained from Law School Admissions Council—National Statistical Reports, 1995-2004.

Note: Application totals do not match text figures due to the elimination of racial and ethnic groups other than Asian, Hispanic, White and Black.

As a percentage of the applicant pool, URM representation has remained relatively constant between 1995-2004 at the following levels: approximately 1% for American Indians/Alaskan Natives, 11% for African Americans, and 8% for Hispanics. Conversely, White applicants have decreased as an overall percentage of the applicant pool from 70% in 1995 to 64% in 2004, while Asians have increased dramatically from 6% in 1995 to 9% of the applicant pool in 2004 (see Table 5-1A in Appendix 5A). In terms of raw numbers, the following relative changes occurred between 1995 and 2004: African American applicants increased by 12% (from 9,560 in 1995 to 10,674 in 2004); Latino applicants increased by 32% (from 6,018 to 7,969); White applicants grew by 10% (from 58,990 to 64,869); and Asian applicants increased most noticeably by 59% (from 5,402 to 8,568) (see Figure 5-3).

**Figure 5-3: Percentage Increase in Applications, 1995-2004**

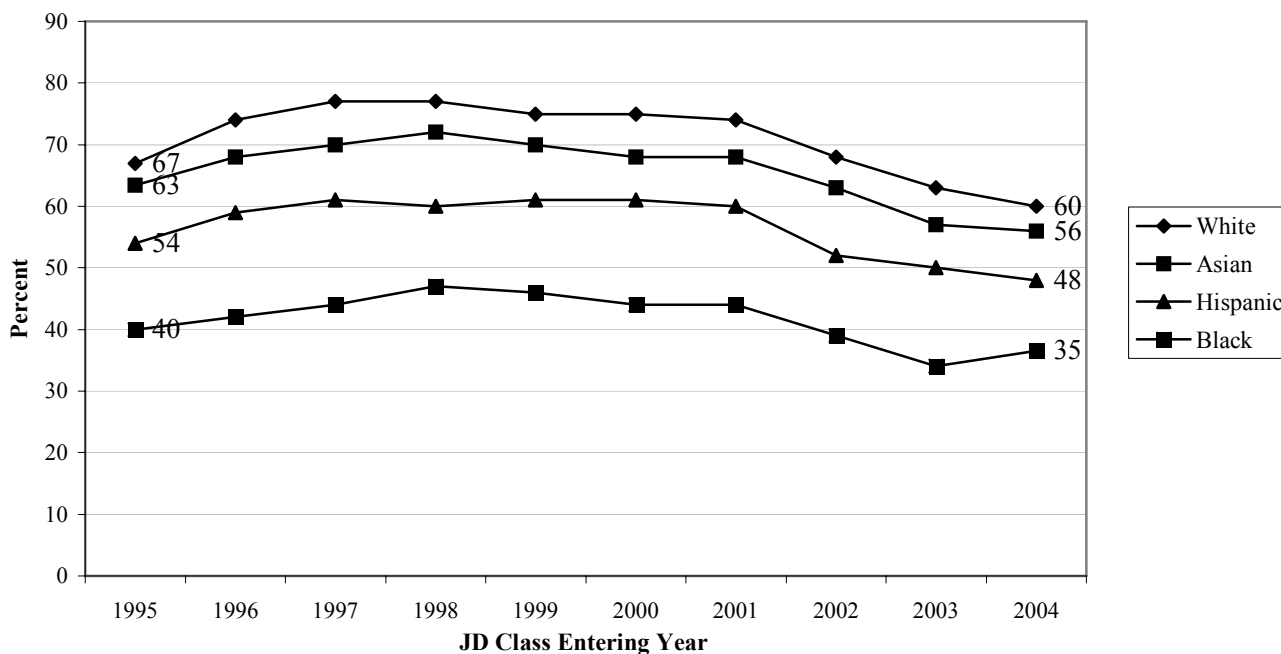
Source: Data obtained from Law School Admissions Council—National Statistical Reports, 1995-2004.

Beginning in fall 2000, the admission rate for all racial and ethnic groups has been declining due largely to increased competition resulting from a larger volume of applications submitted to U.S. law schools. Still, the admission rate for African American applicants, i.e., the number of African Americans admitted divided by the total number that applied to law schools in a given year, is almost half that for White applicants (see Figure 5-4). In 2004, the national admission rate for African Americans was 35% compared to 60% for White applicants. For Hispanics, the admission rate in 2004 was 48%, and for Asians that figure was 56%.

With the exception of African Americans, the matriculation rates (the percentage of admitted applicants who enrolled at a law school) for all racial and ethnic groups have increased or remained stable. For admitted African American applicants to U.S. law schools between 1995 and 2004, there has been a downward trend in their enrollment levels from 86% in 1995 to 83% in 2004 with a slight increase in 2003. Hispanic matriculation rates have fluctuated considerably between 1995 and 2004, with sizeable drops in 1996-97 and 2001-02, but returning to 82% in 2004 (the same enrollment statistic for 1995). For Whites and Asians, matriculation rates from 1995 to 2004 have increased slightly: from 80% to 81% for Whites, and 77% to 79% for Asians.



Figure 5-4: National Law School Admission Rates, 1995-2004



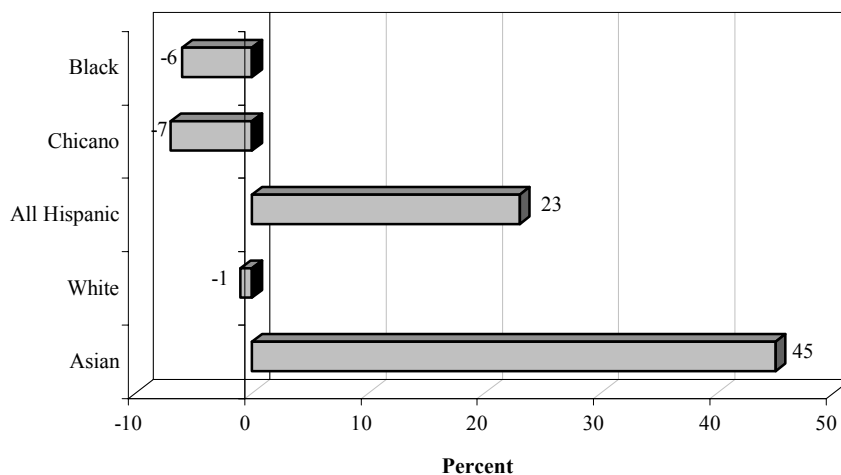
Source: Data obtained from Law School Admissions Council—National Statistical Reports, 1995-2004.

The following relative changes in law school enrollment counts occurred between 1994-2004 by race and ethnicity (see Table 5-2A in Appendix 5A): African American matriculants decreased by 6% (from 3,315 in 1995 to 3,101 in 2004); Hispanic enrollees increased by 23% (from 1,973 to 2,424)—however, if Chicano enrollees are viewed separately, their matriculation rate declined by 7% (from 701 to 652); White enrollees at U.S. law schools decreased by less than 1% (from 31,858 to 31,747); and, Asian matriculants to U.S. law schools increased significantly by 45% (from 2,614 to 3,797) (See Figure 5-5).

### Discussion

National data reveal the number of applicants to U.S. law schools reached record levels in 2004, increasing dramatically by 33% since 2000. During this period, increased interest in law schools is seen across all racial and ethnic groups, but is most apparent among Latino and Asian applicants who showed the largest gains between 1995-2004 with 32% and 59% increases, respectively. Demographic changes related to Hispanics and Asians in the college-going population have possibly fueled the trend (Chapa & De La Rosa, 2004; Hune & Chan, 1997). In terms of possible factors or events that contributed to increased URM enrollment at UC law schools in 2002 and 2003, the unprecedented volume of applicants in those years—reflected proportionately across all racial and ethnic groups with the exception of Asians—provided more eligible URM applicants to the pool. In effect, there were more URM applicants to select from than ever before.

Figure 5-5: Percent Change in Matriculation Rates, 1994-2004



Source: Data obtained from Law School Admissions Council—National Statistical Reports, 1994-2004.

In fall 2003, for example, there were 10,604 African American applicants to U.S. law schools (compared to 8,648 in 2001) and 7,780 Latino applicants (compared to 6,325 in 2001). Having 1,956 more Black and 1,455 more Latino applicants in the pool represented a significant increase in the number of potentially admissible URM candidates. And this was particularly true for Hispanic applicants. In 2002, Latino representation in the entering J.D. class at Boalt Hall doubled from 17 students in 2001 to 36 (Boalt Hall Annual Admissions Report, 2005, p. 13).

In general, application volume is positively correlated to selectivity: as the number of applications rise so does competition for admission. In selective admissions processes that rely substantially on traditional measures of merit, i.e., standardized test scores and GPA., the disparate impact on URM applicants is even more pronounced. From 1995 to 2004, national admission rates declined for Chicanos (-6%) and African Americans (-4%), although they remained virtually unaffected for White applicants (-1%). The admission rate for Asians, on the other hand, increased significantly by 42% in the same period. Holistic review processes that rely more on discretion, as is the case now at most of the UC law schools, may produce a mitigating effect (Hyun, 2000). This could explain the increase in Latino enrollment at Boalt Hall in 2002-03 despite the national decline in URM admission rates.

National enrollment rates at U.S. law schools by race and ethnicity reveal a declining trend for admitted URM applicants compared to that for Whites: African American and Chicano enrollment rates at U.S. law schools are down by 6% and 7%, respectively, while White rates are essentially the same (<-1%). Enrollment rates for Latinos varied enormously across the years, but increased, on average, by 23%. Not surprisingly, Asian enrollment rates have increased by 45% since 1995.

*Minority College Graduation Rates in California, 1970-2000*

In terms of state-level statistics on the pool of eligible minority applicants to law school, Census data suggest notable increases in college completion rates for all racial and ethnic groups across the United States since 1970. However, a recent study by the Public Policy Institute of California (PPIC) found significant gaps in the college graduation rates between Hispanics and Blacks born in California, compared to Whites and Asians. According to 2000 Census data, the college graduation rate for Hispanics and African Americans was 13% and 15%, respectively, compared to 31% for Whites and 62% for Asians. Moreover, the study's author suggested the widening gap in California's bachelor's degree attainment rates between Hispanics and Blacks, on the one hand, and Asians and Whites, on the other, was attributable to the demise of race-based admissions in the mid-'90s (Reed, 2005). In fact, between 1990 and 2000, the percentage increase in four-year college completion rates in California for California-born Hispanics and Blacks was 3% each, compared to 7% for Whites and 10% for Asians.

*Declining URM Enrollment in California: Fiction and Facts*

In his *Grutter* dissent, Justice Thomas opined on the obsolescence of overt race-based decision making in selective admissions. As an example, he pointed to UC Berkeley Law School and its ostensive success in restoring prior levels of underrepresented diversity to its student body despite its legally mandated colorblind approach:

The sky has not fallen at Boalt Hall at the University of California, Berkeley, for example. Prior to Proposition 209's adoption ... which bars the State from "grant[ing] preferential treatment ... on the basis of race ... in the operation of ... public education," Boalt Hall enrolled 20 blacks and 28 Hispanics in its first-year class for 1996. In 2002, without deploying express racial discrimination in admissions, Boalt's entering class enrolled 14 blacks and 36 Hispanics.... Total underrepresented minority student enrollment at Boalt Hall now exceeds 1996 levels. (Sec. IV, C, 2)

While affirmative action opponents like Justice Thomas claim the "chilling effects" of Proposition 209 have dissipated and that the number of underrepresented minority students at UC law schools have returned to pre-Proposition 209 levels, in fact, they have not. Further, race-based admission and recruitment policies at the University of California were dismantled prior to Proposition 209: In 1995, the UC Board of Regents passed a landmark resolution titled "SP-1" that prohibited system-wide use of race, religion, sex, color, ethnicity, or national origin in admissions considerations.<sup>7</sup> Citing URM enrollment data for UC law schools in 1996—as Justice Thomas did—presents an inaccurate picture of pre-Proposition 209 URM levels due to the highly publicized, controversial adoption of SP-1 in 1995.

By examining minority enrollment data from 1993, to glean a more accurate account of pre-SP-1 and pre-Proposition 209 URM enrollment levels, it is clear that URM representation has dropped markedly at UC law schools (see Figure 5-1). At Boalt Hall, the number of American Indian, African American, and Latino students (as a percentage of all first-year enrollees) has declined by more than one-half since 1993. URM students represented 25% of the entering class in 1993

(a figure more consistent with URM enrollment trends at Boalt Hall in the 1980s and early 1990s before affirmative action was banned); by the fall of 2005, that figure dropped to 12%. At UCLA Law School, URM enrollment reached a high of 32% in 1994, but has fallen to just 11% in 2005 despite numerous attempts to counter the effects of Proposition 209 including a failed class-based admissions model that unintentionally increased its Asian and White student enrollment, programmatic and curricular offerings rooted in equity and social justice, and other innovative recruitment efforts. Less selective UC law schools including UC Davis—and to a smaller extent Hastings College—have also seen major declines and fluctuation in their URM enrollment between 1994-2004—from 20% to 10% at UCD, and 13% to 8% at Hastings.

At all the UC law schools, URM enrollment fell dramatically in the fall of 1997, the year SP-1 took effect and one year after Proposition 209 was passed by California voters. The impact of Proposition 209 was most pronounced at Boalt Hall and UCLA, the premier law schools in the UC system. In 1997, Boalt Hall enrolled just one African American student in its entering J.D. class compared to 20 in 1996 (Boalt Hall Annual Report, 2000, p. 11.). Similarly, since Initiative 200 (I-200) passed in Washington in 1998, the percentage of URM in each first-year class at UWA, the state's top public law school, has also dropped from an average of 11% in 1996 to about 7% in 2004.

The relationship between legally mandated race-blind admissions and long-term decline in URM enrollment was corroborated in interviews with admissions officers and committee members at law schools in California and Washington. At UC Berkeley, the admissions committee chair stated that despite the pro-affirmative action outcome of *Grutter*, the Law School had little to celebrate since they were still “bound by 209” which has produced considerable decline and variation in its URM enrollment over the past ten years (A. Petersen, personal communication, November 3, 2005). At UC Davis, the admissions director likened compliance with colorblind mandates in admission and recruitment to “having your hands tied” when it comes to enrolling URM students, and African Americans in particular (S. Pinkney, personal communication, December 5, 2005). An admissions officer at the University of Washington also stated that since the passage of I-200 by voters in 1998, URM enrollment has declined visibly (K. Swinehart, personal communication, November 16, 2005).

#### *Perceived Outcomes of Gratz and Grutter*

In November 2005, Dr. Jordan Cohen, head of the American Association of Medical Colleges, stated explicitly that the increase in the number of Black and Hispanic students enrolled in medical schools in 2004 was directly related to the Michigan cases in 2003. “Now that the Supreme Court has clarified that issue, it has allowed our admissions committees to accept minority applicants who might not have had the same academic credentials, but who demonstrated other indicators of success” (Mangan, 2005, p. 2). When the question of how, if at all, *Gratz* and *Grutter* affected diversity plans and URM enrollment at their institutions, admissions officers at race-blind schools in this study were quick to report the effects were negligible due to legal prohibitions on race-based decision making. “Status quo” was the response most commonly provided by admissions officials including those at UVA and UMI law schools.

### *Explanatory Model for Declining URM Enrollment*

What factors or events have contributed to declining admission and enrollment trends for African American and Hispanic applicants at U.S. law schools? Through an analysis of extant research literature and qualitative data obtained from interviews with admissions officers, four explanatory propositions emerged: (1) Increased competition—exacerbated by the importance of the *US News and World Report* rankings of ABA-accredited law schools—has worsened the disparate impact that traditionally selective admissions have on URM applicants; (2) Rising tuition costs at public law schools and undergraduate institutions have had an adverse effect on URM matriculation rates; (3) The “chilling effect” of anti-affirmative action measures has made law school officials at race-blind institutions more cautious in their approach to URM admission; (4) The stigmatized affiliation of affirmative action tied to high-profile legal and political challenges has dissuaded URM students from enrolling at certain law schools.

### *Increased Competition, Selectivity, and the U.S. News and World Report Rankings*

Since 2002, J.D. applications have soared to record levels: in fall 2004, there were over 100,000 applicants to U.S. law schools compared to 84,000 in 1994. Law school officials surmise that cyclical increases in applications to graduate and professional schools are related to public perception of a weaker U.S. economy. Nevertheless, the increase in volume of applications exacerbates competition particularly in selective admissions. It has also been well documented that when traditional measures of merit, i.e., standardized test scores and GPA., are over-relied upon to sort and admit applicants in selective processes, there is a disparate impact on URM applicants (Bowen & Bok, 1998; Gunier & Sturm, 1996). Yet selective law schools including Boalt Hall and UCLA continue to rely heavily on quantitative measures of merit to choose from among qualified candidates. Anecdotal evidence from admissions officers interviewed for the study suggest they are concerned about how the increased importance of published annual rankings—specifically from the *U.S. News and World Report* magazine—drives their continued reliance on the LSAT as a selection tool. Some admissions officials have stated publicly that improving their national law school ranking and increasing student diversity are competing interests, but that heavy pressure from faculty, alumni, and even students to increase their law school’s standing comes at the cost of enrolling more URM students (Garret, 2005; Rindskopf Parker, 2006).

The impact of numbers-driven admissions on URM representation is apparent in the UC system where post-Proposition 209 URM levels have fallen more precipitously at Boalt Hall and UCLA than at other UC law schools (i.e., UC Davis and Hastings). A numbers-driven approach tends to reduce the eligible pool of URM applicants since, on average, URM students perform less well than their White and Asian peers on standardized measures. The reasons for underperformance are beyond the scope of this paper, but have been attributed largely to persisting structural inequality (Orfield & Lee, 2005) and psychosocial factors (Steele, 1997) among others.

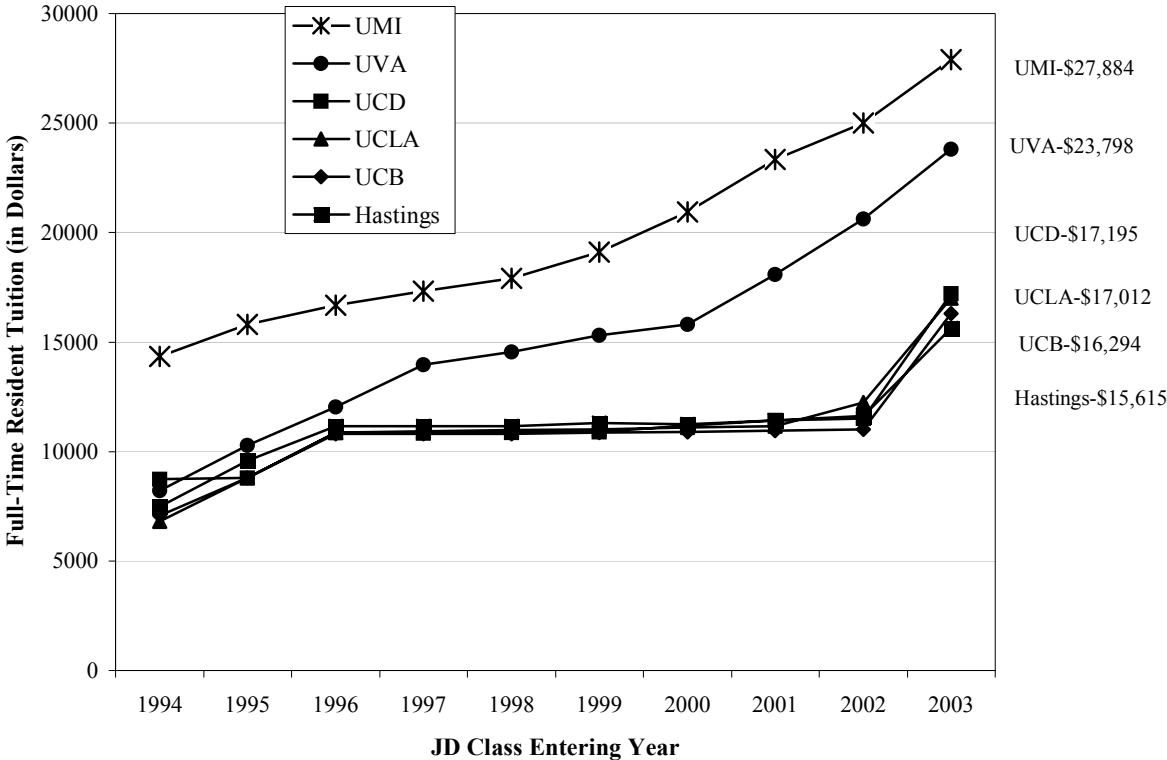
What colorblind strategies have been effective in yielding higher URM presence at UC law schools? Since Proposition 209 and I-200, most of the race-blind law schools sampled adopted a holistic review process combined with increased outreach and recruitment efforts, as well as programmatic and theme-based approaches to attract qualified URM applicants. While this

multi-pronged approach is more receptive to URM admission than singular strategies, it has been relatively ineffective in restoring pre-Proposition 209 URM levels. Nevertheless, law schools that employ discretionary review are more likely to enroll greater numbers of URM students, although obtaining a critical mass is unlikely in the absence of race-based tools (Hyun, 2000).

*Rising Tuition Costs*

Heller (2002, 2005) found that escalating tuition costs are contributing to the growing, color-based gap in higher education. Since 1994, resident tuition fees at public law schools have skyrocketed. The full-time, resident tuition at the University of Virginia tripled from \$8,206 in 1994 to \$23,798 in 2003, and doubled at the University of Michigan Law School—from \$14,334 to \$27,884 in 2003 (see Figure 5-6). Resident tuition fees at UC law schools have also increased significantly by almost 150%—from a system-wide average of \$7,000 in 1994 to \$17,000 in 2003. In a single year (2002), tuition at UC law schools increased from an average of \$11,000 to \$17,000.

**Figure 5-6: Law School Annual Tuition, 1994-2003**



Source: Data obtained from ABA LSAC Official Guide to ABA-Approved Law Schools, 1994-2003.

The director of admissions at Boalt Hall attributed the decline in URM enrollment in 2004 to escalating tuition costs (E. Tom, personal communication, November 3, 2005). At UC Davis, the admissions director felt the Law School was losing applicants to its private law school

counterparts where tuition is now comparable, and where they have access to scholarship funding (S. Pinkney, personal communication, December 5, 2005).

At undergraduate institutions, the college participation rates of low-income minority students continues to lag, particularly in California where demographers estimate that by 2015, minorities will comprise over 65% of 18 to 24 year olds (Swail, Gladieux, & Lee, 2001). Fitzgerald (2006) reports that “financial barriers represent key factors in determining whether academically prepared low-income students have access to a four-year public institution and a bachelor’s degree” (p. 62).

### *The Chilling Effect of Anti-Affirmative Measures*

Following the landmark ruling in *Bakke* (1978), affirmative action experts predicted a decline in minority applications to graduate and professional schools. However, as Welch and Gruhl (1998) observed, the phenomenon dubbed “the chilling effect” (in graduate and professional school admissions) expected after *Bakke* never happened. The researchers theorized public confusion surrounding the interpretation of the Powell decision may have obviated any decline in minority application rates following the highly controversial Supreme Court decision. Yet in their study of law and medical schools post-*Bakke*, they found admissions officials interpreted the decision as confirmation to continue race-based decision making rather than retreat from it.

In states where affirmative action has been banned, there were immediate declines in URM enrollment. The experience in California following Proposition 209 is the classic example. However, a qualitative finding that emerged in this study is that “the chilling effect” can apply not just to prospective applicants, but also to law school officials reticent to expose their institutions to potential legal challenges and unwanted public scrutiny. Law school admissions officers from race-blind institutions interviewed for this study appeared more reticent and cautious in their responses, and less willing to express on record their reaction to the pro-affirmative action outcomes of the Michigan cases.

### *Stigmatized Perceptions of Affirmative Action*

Counter to the declining trends at selective, race-blind law schools in California and Washington, the University of Michigan Law School—which never discontinued its use of race-based affirmative action—increased its URM enrollment slightly from 14 percent in 1995 to 15 percent in 2004 (see Figure 5-1). However, the dean of admissions speculated that URM representation had been negatively affected by *Gratz* and *Grutter* since “now we’re [UMI Law School] forever associated with affirmative action.” The dean also stated that some employers have even questioned the qualifications of UMI law school graduates because “we are perceived as doing something different in our admissions process” (S. Zearfoss, personal communication, November 9, 2005). Through qualitative reporting, the University of Virginia Law School, considered a peer institution to UMI and Boalt Hall, stated their enrollment of African American students has risen steadily in the past ten years including the year following *Gratz* and *Grutter* (S. Palmer, personal communication, October 26, 2005).

Thus declining URM matriculation rates at selective, public law schools in California and Washington may be due, in part, to the perception by prospective students that racial stigma and negative political rhetoric at schools readily associated with affirmative action may be detrimental to their law school experience and legal careers.

### Conclusion

As next steps, Ancheta (2005) proposed long-term studies to add to the growing body of empirical research on race-neutral alternatives and their effects on student diversity in race-blind states. To date, there are no truly effective, race-blind strategies for enrolling a critical mass of URM students, nor are there adequate proxies for race and ethnicity that produce positive diversity outcomes. Yet in the short term, a holistic process that incorporates discretionary review—where a wide range of factors and characteristics are considered—is a more effective approach for increasing URM representation than a traditional, numbers-driven approach. In the long term, as Orfield (1998) recommended, affirmative action in selective admissions must be reconceptualized to take into account attributes and characteristics of applicants correlated not just to educational achievement, but also to professional success and service.

In the meantime, URM access to higher education has lost ground since the mid-1990s within the context of legally mandated colorblindness, an unprecedented increase in admission applications, unrivaled preoccupation with published law school rankings, and skyrocketing tuition costs at major public law schools and undergraduate institutions across the country. In addition, conservative decisionmaking by admissions officials as well as negative perceptions of affirmative action by prospective students and employers may also be influencing declining trends in admission and matriculation rates for URM applicants. Without race-based tools in admissions and recruitment, URM enrollment rates will continue to vary from year to year at selective public law schools thereby producing large fluctuations in matriculation patterns and entering classes dominated by Whites and Asians. How these enrollment trends compromise the mission of state institutions of higher education requires immediate examination, especially if, as Justice O'Connor warned in *Grutter*, the demise of affirmative action is expected in the next twenty-five years.



## Notes

<sup>1</sup> In 1996, California voters passed Proposition 209 eliminating affirmative action in education, employment, and contracting throughout the state. In November 1998, Washington voters passed Initiative 200 restricting the use of race and ethnicity in employment, education, and contracting decisions.

<sup>2</sup> The term “underrepresented minority” used in this paper refers to individuals from racial and ethnic groups historically underrepresented in higher education including African American or Black, Latino or Hispanic, and American Indian. Due to the relatively small number of American Indians (<1%) in the sample, this study focuses primarily on African Americans and Latinos. Also, the terms “Latino” and “Hispanic” are used interchangeably and include individuals who self-identify as Chicano, Latino, and/or Hispanic.

<sup>3</sup> The rationale for including UVA Law School is that it serves as an analytic “control” group for its peer institutions—UCB and UMI law schools—since it continues to employ affirmative action admissions.

<sup>4</sup> Notwithstanding the importance of *Hopwood v. Texas* (1996) on race-based admissions policies in higher education, this study excluded the University of Texas Law School in its analysis for two reasons: (1) the study focuses on public law schools bound by legislative—rather than court-ordered—bans on affirmative action; (2) *Gratz* and *Grutter* rendered *Hopwood* legally void.

<sup>5</sup> Hastings College of the Law, a University of California affiliated, public law school not governed by the UC Regents, is frequently excluded from analyses related to SP-1 and Proposition 209 outcomes. The decision to include Hastings in this study was based on the following rationale: (1) the premise that Hastings, a popular California law school with a sizeable minority student body, is perceived by most applicants as a UC law school, rather than just an “affiliate”; (2) the tuition cost at Hastings is identical to that for Boalt, UCLA, and UC Davis law schools.

<sup>6</sup> The Law School Admissions Council (LSAC) provided national application, admission, and enrollment data for this study. LSAC employs slightly different racial and ethnic categories than those used in this paper. For example, LSAC reports Mexican Americans, Puerto Ricans, and Hispanics as distinct ethnic groups. For a complete list of racial and ethnic groups used by LSAC, see the *ABA-LSAC Official Guide to ABA-Approved Law Schools 2006* or visit <http://www.lsac.org>. In some graphs, application totals do not match figures reported in text due to the elimination of racial and ethnic groups other than Asian, Hispanic, White, and Black.

<sup>7</sup> The University of California was the first institution of higher education in the nation to abolish race-based tools in admission and recruitment. In 2001, the UC Regents voted to rescind SP-1 although Proposition 209 remains in effect.

Appendix 5A

**Table 5A-1: National Law School Application Rates by Race/Ethnicity**

Data Obtained from Law School Admissions Council (LSAC)—National Statistical Reports, 1994-2004

[Note: In 2000, LSAC altered its reporting format from academic year to entering year for JD programs.]

Applicant Group	1994-95	1995-96	1996-97	1997-98	1998-99	Fall 2000	Fall 2001	Fall 2002	Fall 2003	Fall 2004
All	84,305	76,687	72,340	71,726	74,380	74,550	77,235	90,853	99,504	100,604
Percent change	--	-9%	-5%	0%	0%	0%	4%	18%	10%	1%
American Indian/ Alaskan Native	814	706	642	601	644	609	577	637	737	781
Percent of pool	1%	1%	1%	1%	1%	1%	1%	1%	1%	1%
Black/ African American	9,560	8,830	8,273	8,216	8,375	8,503	8,648	9,703	10,604	10,674
Percent of pool	11%	12%	11%	11%	11%	11%	11%	11%	11%	11%
Caucasian/ White	58,990	52,725	49,101	46,170	47,787	48,684	51,190	59,573	64,106	64,867
Percent of pool	70%	69%	68%	64%	64%	65%	66%	66%	64%	64%
All Latino	6,018	5,761	5,770	6,076	6,207	6,219	6,325	7,066	7,780	7,969
Percent of pool	7%	8%	8%	8%	8%	8%	8%	8%	8%	8%
Asian/ Pacific Islander	5,402	5,157	4,866	4,942	5,074	5,278	5,527	6,965	8,059	8,568
Percent of pool	6%	7%	7%	7%	7%	7%	7%	8%	8%	9%

**Table 5A-2: National Law School Matriculation Rates by Race/Ethnicity**

Data Obtained from LSAC—Individual Year National Decision Profiles, 1994-2004

[Note: In 2000, LSAC altered its reporting format from academic year to entering year for JD programs.]

Matriculant Group	1994-95	1995-96	1996-97	1997-98	1998-99	Fall 2000	Fall 2001	Fall 2002	Fall 2003	Fall 2004
All	42,151	42,071	41,568	41,523	42,163	41,227	42,719	45,992	46,176	45,388
All - matr rate	80.7%	81.5%	82.5%	82.6%	82.3%	82.0%	82.5%	81.4%	81.3%	81.1%
American Indian/ Alaskan Native	389	360	324	323	309	310	304	295	323	350
Am Ind - matr rate	84.4%	85.7%	80.2%	82.6%	80.1%	80.9%	82.6%	78.0%	81.8%	82.2%
Black/ African American	3,315	3,122	3,027	3,262	3,192	3,096	3,110	3,088	3,040	3,101
Black - matr rate	86.0%	84.7%	83.9%	84.2%	83.2%	83.3%	82.5%	82.0%	83.8%	83.4%
Caucasian/ White	31,858	31,653	31,040	29,395	29,657	29,853	31,236	33,411	32,707	31,747
White - matr rate	80.4%	81.3%	82.7%	82.7%	82.5%	82.3%	82.9%	82.2%	81.3%	81.1%
Chicano/ Mexican American	701	751	737	860	786	711	701	697	702	652
Mex Am - matr rate	87.2%	86.2%	84.6%	85.2%	84.0%	83.9%	83.1%	83.5%	86.0%	86.0%
Hispanic/ Latino	1,272	1,323	1,406	1,373	1,497	1,490	1,510	1,543	1,742	1,772
Hisp - matr rate	82.3%	84.4%	85.9%	84.2%	83.4%	82.8%	83.5%	80.2%	80.7%	81.6%
Asian/ Pacific Islander	2,614	2,781	2,677	2,856	2,835	2,875	2,996	3,456	3,682	3,797
Asian - matr rate	77.4%	79.6%	78.7%	80.4%	80.2%	80.1%	80.0%	79.1%	79.9%	79.0%
Puerto Rican	587	552	569	431	615	576	789	741	778	767
PR - matr rate	83.4%	80.5%	86.2%	83.2%	82.4%	81.5%	84.5%	86.2%	86.9%	86.4%

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## CHAPTER 6

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**OPENING AN AFRICAN AMERICAN STEM PROGRAM  
TO TALENTED STUDENTS OF ALL RACES:  
EVALUATION OF THE MEYERHOFF SCHOLARS PROGRAM, 1991-2005**



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## Introduction

The Meyerhoff Scholars Program at University of Maryland, Baltimore County (UMBC) was developed in 1988 in response to the low levels of performance of well-qualified African American science, technology, engineering and mathematics (STEM) majors, with a special interest in enhancing the performance of African American males. Baltimore philanthropists Robert and Jane Meyerhoff provided initial program funding, and have continued to contribute over the years. Other funding has come from national agencies, foundations, corporations, and individual donors. The program developers, led by UMBC's then Vice-Provost (and since 1992 UMBC's president), sought to develop a comprehensive, multi-component program that addressed the broad range of factors linked to minority student STEM success (cf. Maton & Hrabowski, 2004). Letters soliciting nominations were sent to principals and guidance counselors throughout Maryland requesting their "best and brightest" African American males; even among this group, relatively few had succeeded in STEM fields on the UMBC campus, or nationally. Forty nominations were received that year, and 19 African American males became the first Meyerhoff Program students in 1989. In 1990, the program admitted 15 African American males and females. During the next five years, 1991-1995, as funding availability increased, between 34 and 47 African American students were admitted each year. However, in 1996, in a political climate of lawsuits related to the use of race in scholarship programs and college admissions, and in particular the landmark lawsuit challenging the University of Maryland, College Park's Banneker Scholarship, the university opened the program to students of all races—those with an interest in the advancement of minorities in STEM fields.

The Maryland Attorney General's Office provided feedback on the proposal to open admissions to applicants of all races interested in working with underrepresented minority groups. The proposed change was a direct response to the *Podberesky v. Kirwan* (1994, 1995) rulings, in which the United States Supreme Court let stand the decision of a Federal Appeals Court which struck down the race-exclusive admissions policy of the Banneker Scholarship Program for talented African Americans. Following the court decision, UMBC made a strategic, conscious decision to open Meyerhoff Program admissions, even though some on campus, including various minority groups, wanted to continue to have a race-exclusive program on the grounds that national agencies continued to provide funding only for minorities and because of the pride associated with a program for African Americans known for its excellence. However, the University chose not to engage in a legal battle to avoid negative publicity and confusion about who could be in the program.

The decision process was not easy. Discussions were held with faculty, students, and staff about the pros and cons of bringing students from other racial groups into the program. The most compelling argument was that the underrepresentation of minorities in science was a national issue—not solely a minority issue—and that it was necessary to prepare many more Americans of all races both to understand the issue of underrepresentation and to develop skills in order to address this national challenge. Thus, while some argued opening admissions was akin to letting others "take over their program," the case was made that UMBC would continue to focus on the primary goal of producing minority scientists, especially African Americans (given the historically low number of members of other underrepresented groups in the Baltimore region), while also producing European American and Asian American scientists with a commitment to



supporting minority students aspiring to become researchers, physicians, and engineers.

Discussions next focused on strategies for determining non-minority students' interest in the underrepresentation of minorities in STEM fields. The program developed 1) language to include in recruitment materials focusing on the new criterion, and 2) questions to help the Meyerhoff selection committee assess students' interest in the underrepresentation issue. Indices used for determining the interest of non-minority students based on their application materials included: willingness to discuss issues of race, poverty and academic performance; involvement with activities and organizations that were (likely) ethnically diverse (e.g., multicultural clubs, athletic teams); tutoring minority children; and related activities.

The decision to integrate the program also meant an additional commitment by the University to find resources for scholarships for European American and Asian American students and to support these students financially in the Meyerhoff Program. A critical issue was to ensure that there was no difference of treatment between minority and non-minority students. Although the national agencies and a number of foundations were willing to provide funding for minorities, the campus reallocated money internally to support the students from other racial/ethnic groups. The leadership of the campus (e.g., budget committee and the president, working in conjunction with other leaders of the campus) came to this understanding. Scholarship funds, thus, for African American and Hispanic students primarily come from the federal government, corporations, and private foundations. Scholarship money for Asian American and European American students primarily comes from the University budget.

Currently, between 45 and 65 Meyerhoff students are selected each year. The number is directly dependent on the amount of available funding. The majority (55-65%) of entering students each year are African Americans. The program is situated on a predominantly white campus (34% minority), with more than half of the undergraduates and 60 percent of the doctoral students pursuing STEM degrees.

The primary purpose of the current paper is to examine the impact of the opening of the admissions process to talented students of all races, resulting in a change from a race-exclusive to a race-integrated (i.e., multi-racial) program. Specifically, the program impact in five areas is addressed: 1) the number of entering African American students, 2) the quality of entering African American students; 3) the program experience of students; 4) the perspective of African American Meyerhoff students about the integration of the program, and 5) program outcomes (i.e., entrance into STEM Ph.D. programs). The findings are relevant to the larger issue of what adaptations and changes can be made to race-specific programs in this anti-affirmative action era; the design of the research has relevance to future attempts to evaluate changes in this arena.

### *Historical and Policy Context*

The long history of racism in the United States has segregated racial and ethnic groups in many ways. Although constitutional rights were strongly defended by the majority group, minorities were systematically excluded from many opportunities throughout our history. This exclusion created social inequalities that have proved difficult to resolve. The public policy of affirmative action in the 1960s represented an attempt to address the history and thereby the destiny of

historically oppressed minorities through abolishing race- and gender-based discrimination in such processes as employment and admission to colleges and universities (Crosby, Iyer, Clayton, & Downing, 2003). It was proposed as a response to the need for equal representation of minorities and an attempt to eradicate racism from all social institutions. Nevertheless, in recent years this policy has received strong criticism and resulted in divisive debates.

One aspect of the remedy to increase diversity and equalize representation was setting aside quotas for underrepresented ethnic minorities applying to college. Opponents of affirmative action argued that these quotas were another version of discrimination. The first major lawsuit, the *Regents of the University of California v. Bakke* case, outlawed this practice. While the Supreme Court struck down the use of quotas, universities were allowed to use race as an admission criterion. Moreover, race-exclusive or race-conscious scholarship and fellowship programs were created to increase the ethnic diversity at colleges and universities. Nevertheless, these programs were subjected to controversial debates as well. Ultimately, many have been restructured to be inclusive of all races and ethnic groups following counterarguments and court cases outlawing affirmative action policies (Hebel, 2003; Schmidt, 2005a).<sup>1</sup>

Increasing diversity in higher education is thought to have multiple benefits for the whole society and for underrepresented ethnic groups in particular (Bowen & Bok, 1998; Cohen, 2003; Crosby, Iyer, Clayton, & Downing, 2003; Gurin, Nagda, & Lopez, 2004). Since the inception of affirmative action policies, the number of minorities granted admission to colleges and universities has increased significantly, increasing from 16 to 27 percent from 1976 to 1996 (National Center for Educational Statistics, 2001). However, the abandonment of affirmative action in some states reversed this effect (Bok, 2003; Cohen, 2003; Horn & Flores, 2003; Marin & Lee, 2003), although the proponents of the new policies claim the opposite. For example, in Florida, the Talented 20 program was adopted, which eliminated race-based admissions in favor of merit-based admissions to students in the top 20% of their high school classes. The number of minority admissions to top-tier universities decreased while there was a slight increase in admissions to historically Black and historically Hispanic universities (Marin & Lee, 2003). Card and Krueger (2004) analyzed the impact of the elimination of affirmative action policies in California and Texas, two of the nation's largest states. They found that after these policies were abolished in 1996 and 1997, the overall admissions rate for African Americans and Hispanics decreased about 30 to 50 percent in both states.

Although percent plans, granting admission to high-achieving graduates of high schools (e.g., the top 10 or 20 percent), devised after the elimination of race-based admission programs increased the rates of admission and enrollment to undergraduate programs for some minorities, they have not proven to be a positive change overall, and especially for the African American population. Highly selective institutions in these states have generally seen declining enrollments. In Texas, a decline in the enrollment of underrepresented minorities has been observed in spite of the percent plan after the elimination of competitive minority scholarships in 1999 (Card & Krueger, 2004). Most important, one has to question the level of academic preparation of the top subset of students in poorly funded and low-achieving schools.

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<sup>1</sup> See chapters by Ancheta and Banks in this volume for further discussion of these issues.

A recent dramatic change has been observed in many universities following the Supreme Court decisions on two cases involving the University of Michigan, Ann Arbor. Specifically, a 2004 survey showed that 11 of the 29 surveyed universities had declines in their admission of African American or Hispanic students (Selingo, 2005). For example, at the University of Michigan, where these 2003 Court cases emerged, African American enrollment declined from 2002 to 2004 by 7.9% and Hispanic enrollment by 15.6%. Since early 2003, almost 70 universities have changed their policies regarding race-conscious programs and opened such programs to non-minority students as a result of complaints and threats of legal action from advocacy groups (Schmidt, 2005b). This occurred in spite of the positive ruling of the Court, reflected in Justice Sandra Day O'Connor's powerful statement on the value of diversity: "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 and qualified individuals of every race and ethnicity" (*Grutter v. Bollinger et al.*, 2003). Justice O'Connor's expectation that "25 years from now, the use of racial preferences will no longer be necessary" (*Grutter v. Bollinger et al.*, 2003) underscores the time urgency of work to enhance the recruitment and achievement of minorities in higher education, including the effort examined in this paper.

Contentious arguments between the proponents of the new policy and advocates of affirmative action continue to lead to controversy, with conclusions often based on values rather than evidence. Research is sorely needed to examine the changes in the aftermath of abandoned affirmative action policies and changes in scholarship and fellowship programs designed to increase minority admissions to higher education institutions. In this chapter, the focus is not on changes in statewide and general university admissions policies for freshman, the area of most of the research to date. Rather, it is on the opening of the admissions process at one university to talented students of all races in a comprehensive scholarship and support program for students with career interests in the STEM area.

#### *Underrepresented African American Students in the Sciences, Technology, Engineering and Mathematics: The Meyerhoff Scholars Program*

The primary goal of the Meyerhoff Scholars program is to help African American students achieve at the highest levels in STEM areas and go on to STEM Ph.D. programs, in which they are dramatically underrepresented. Research has indicated that the low rates of success of underrepresented minority (URM) students in the sciences at the undergraduate level appear due to four sets of factors. These include academic and social integration, knowledge and skill development, support and motivation, and monitoring and advising (cf. Maton & Hrabowski, 2004). The Meyerhoff Program was developed with the specific intention of comprehensively addressing these needs, with an initial, exclusive focus on African American students. The focus of the current study is the viability of the strategy of responding to the anti-affirmative action climate by maintaining a primary focus on African American (and other URM) students, while opening the admissions process to include other students as well. Specifically, the strategy allowed a continued focus on increasing the number of minority scientists, including admitting both students who are ethnic minorities and admitting non-URM students with an interest in supporting this mission.

The academic criteria necessary for acceptance into the Meyerhoff Scholars Program have been increasing steadily over the years. The first entering cohort had mean SAT-Verbal scores of 587, mean SAT-Math scores of 611, a mean combined SAT of 1198 (recentered SAT scores, cf. Dorans, 2002), and a high school GPA of 3.60. The most recent 2005 entering cohort of Meyerhoffs had mean SAT-Verbal scores of 644, mean SAT-Math scores of 664, a mean combined SAT of 1308, and a mean high school GPA of 4.04. Prospective Meyerhoff students have cumulative high school averages in science and math well above a B, and many have completed a year or more of calculus in high school. Preference is given to those who have taken advanced placement courses in math and science, have research experience, and provide strong references from science or math instructors. Additional admissions factors considered include a commitment to stay in the sciences, a genuine interest in becoming a researcher, an openness to taking academic advice, a willingness to participate in study groups and to do community service, and a strong interest in the advancement of underrepresented minorities in STEM fields.

In 1996, the Meyerhoff Scholars Program was recognized nationally with the Presidential Award for Excellence in Science, Math and Engineering Mentoring. Previous research established the effectiveness of the program in enhancing the entrance of African American students into STEM Ph.D. programs and examined some of the key processes that lead to these positive outcomes (BEST, 2004; Gordon & Bridglass, 2004; Maton, Hrabowski & Schmitt, 2000; Maton & Hrabowski, 2004).

The program incorporates 15 different components, briefly described below (cf. Maton & Hrabowski, 2004; for a more detailed description, see Gordon & Bridglass, 2004).

*Financial Aid.* The Meyerhoff Program provides students with a comprehensive financial package including, in many cases, tuition, books, and room and board. This support is contingent upon maintaining a B average in a STEM major.

*Recruitment.* The top 100-150 applicants and their families attend one of the two recruitment weekends on the campus.

*Summer Bridge Program.* Meyerhoff students attend a mandatory pre-freshman Summer Bridge Program, and take courses in math, science, and Africana studies (i.e., Introduction to the Black Experience). They also participate in STEM related co-curricular activities, and attend social and cultural events. With the advent of students of different ethnicities, a community-building course was added as well (i.e., Gerstung team building).

*Study Groups.* Group study is strongly and consistently encouraged by the program staff, as study groups are viewed as an important aspect of success in STEM majors.

*Program Values.* Program values include support for academic achievement, seeking help from a variety of sources, peer supportiveness, high academic goals (with emphasis on Ph.D. attainment and research careers), and giving back to the community.

*Program Community.* The Meyerhoff program provides a family-like social and academic support system for students. Students live in the same residence hall during their first year and are required to live on campus during subsequent years.

*Personal Advising and Counseling.* The program employs full-time advisors who monitor and support students on a regular basis. Staff focus not only on academic planning and performance, but on any personal problems students may have as well.

*Tutoring.* The program staff strongly encourages Meyerhoff students to either tutor others or be tutored to maximize academic achievement (i.e., to get ‘As’ in difficult courses).

*Summer Research Internships.* Each student participates in multiple summer research internships at leading sites around the country, as well as some international locations.

*Research Experience during the Academic Year.* A number of students participate in the MARC U\*STAR program, which requires research involvement in a faculty member’s lab during the student’s junior and senior years.

*Faculty Involvement.* Key STEM department chairs and faculty are involved in the recruitment and selection phases of the program. Many faculty provide research opportunities for students in their labs.

*Administrative Involvement.* The Meyerhoff Program is supported at all levels of the University, including ardent support from the President (the program co-founder).

*Mentors.* Each student is paired with a mentor who is in a science profession.

*Community Service.* All students are encouraged to take part in a community service activity, which often involves volunteer work with at-risk Baltimore youth.

*Family Involvement.* Parents are included in social events and kept advised of their child’s progress.

## Method

### *Research Participants*

*Meyerhoff Sample.* The 692 Meyerhoff students from the third entering class (1991) through the most recent class (2005) comprise the primary Meyerhoff sample in this study. The first two entering classes (1989 and 1990) were not included since they were much smaller in size than those that followed. The primary sample includes 526 African American, 88 European American, and 79 Asian American students (12 entering Latino students were not included in the primary sample due to their limited number). The average entering class size between 1991 and 2005 was 46.9 students, with a range from 34 to 63. The average high school GPA for the primary sample was 3.8, average SAT Verbal 608.1, average SAT Math 661.9, and average SAT combined 1270; 49.1% were male.

The number of Meyerhoff students completing process evaluation surveys over the years differed, depending on the specific survey item (some items were added in later years). For the 1991-1995 entering classes, the number of students completing surveys ranged from 91 (45%) to 156 (77%), depending on the item. For the 1996-2000 entering classes, the number of students completing items ranges from 100 (63%) to 110 (69%) for African Americans, 24 (67%) to 28 (78%) for European Americans, and from 22 (67%) to 24 (73%) for Asian Americans. From 1999 to 2001, a subgroup of 40 African American students took part in process evaluation interviews, and a subgroup of 54 students took part in exit interviews from 2002 to 2005.

*“Declined” Comparison Sample.* The “Declined” sample consists of 246 students who were offered Meyerhoff scholarships between 1991 and 2000, but declined the offer. Almost all of these students attended universities other than UMBC. This sample includes only students who took at least three science, engineering, and/or mathematics courses during their freshman year. The sample does not include entering students after 2000 since the Declined students are

included in analyses of post-college outcomes only (i.e., limited to students who have had, to date, at least five years to graduate college). The Declined sample includes 196 African American, 26 European American, and 24 Asian American students. The Meyerhoff and Declined samples differed significantly on several of the pre-college academic background variables, and gender (see Appendix 6-A).

### *Measures*

*Demographic and Academic Background Variables.* Ethnicity, gender, university entrance date, SAT scores (both math and verbal), and high school GPA were obtained from university application records.

*Graduate Education.* The STEM graduate education outcome variable contained eight post-college categories: 1) entered Ph.D. STEM program; 2) entered M.D./Ph.D. program; 3) entered STEM Masters program; 4) entered medical school; 5) entered other STEM professional school (e.g., dental); 6) no post-college education in STEM (includes students who did not complete college, those who graduated in a non-STEM major, STEM graduates who did not pursue graduate or professional education, and those who attended non-STEM graduate programs); 7) those still enrolled at the undergraduate level in a STEM major; and 8) those whose graduate status is unknown (to date). If a student entered a STEM Masters program upon graduation but later entered a STEM Ph.D. program, the latter (i.e., the higher degree program) was coded. However, if a student entered a STEM Ph.D. program but left the program with a terminal masters, or entered a Ph.D./M.D. program but only completed the M.D. aspect, then the degree actually received was counted. For primary analyses, with a focus on the Meyerhoff program goal of enhancing the number of STEM Ph.D.s, students in the first two categories (entered STEM Ph.D. or M.D./Ph.D.) were compared to those in the other six.

*Process Evaluation Survey Items.* Survey items assessed student perceptions of the value of various aspects of their experience in the program. Nine items that appeared especially relevant in the current context were selected (from the larger set of items) for analysis: 1) summer bridge program; 2) feeling a part of the Meyerhoff community; 3) study groups; 4) Meyerhoff staff advising; 5) summer research experience; 6) financial support; 7) social experiences with peers; 8) academic interactions with peers; and 9) program cultural activities. Over the years, who was surveyed, the wording of the survey items, the wording of the anchors on the 5-point Likert scale used, and how the survey was administered have varied (see Appendix 6-B). Any or all of these factors may affect survey responses, and thus comparisons on item responses over time must be viewed cautiously. Given this fact, only descriptive information (means, standard deviations) is provided related to change over time, with no statistical tests performed. A number of students completed surveys on two or more occasions over the years (about 45% of the 1991-1995 entering classes and 12% of the 1996-2000 entering classes); for these students, responses on the most recent survey was used (the only exception was if the most recent survey was the 1996 survey, which used a very different rating format than the others; see Appendix 6-B).

### *Procedure*

All students completed an informed consent form at the time they applied to the program, or else at the start of the program, along with a form providing permission to obtain college and graduate school transcripts from registrar offices. Information on post-college destination was obtained from multiple sources, including program records (in the case of Meyerhoff students), the students, family members, or through Internet or paid searches. Information was confirmed (or clarified) by phone calls to graduate and professional school registrar offices. Process evaluation surveys and interviews were conducted by graduate research assistants.

### Results

#### *Entering Students: Number and Percentage African American*

From 1991 to 1995, the five years preceding the opening of the program to students of all races, there were a total of 202 entering African American students, an average of 40.4 students per entering class (Table 6-1). During the subsequent five years, 1996-2000, following the opening of the admissions process to students of all races, a total of 158 African American students entered the program, an average entering class of 31.6 students. This represents a 21.8% decline in the number of entering African American students. In terms of change in class composition, the decline from 100% (202/202) to 69.0% (158/229) African American is statistically significant,  $X^2(1) = 75.0, p < .001$ . During the five most recent years, 2001-2005, there were 166 entering African American students, an average of 33.2 per entering class. This represents a 5.1% percent increase in the number of entering African American students from the preceding five years. However, there was a substantially larger increase of 49.2% in other entering students (from 71 to 106) during these years. In terms of change in class composition, the overall result was a decline from 69.0% (158/229) African American in 1996-2000 to 61.0% (166/272) in 2001-2006, a difference that approached but did not achieve statistical significance,  $X^2(1) = 3.6, p < .06$ .

Comparing the five years prior to the opening of admissions to all ten years since admissions have been opened (1996-2005 combined), there was a decline in the average number of entering African American students per year from 40.4 to 32.4, representing a 20% decline. In terms of change in class composition, the decline from 100% (202/202) African American to 64.5% (324/501) was statistically significant,  $X^2(1) = 95.6, p < .001$ .

#### *Entering Students: High School GPA, SAT Scores, and Gender*

The five cohorts of entering African American students prior to the opening of the admissions process, 1991-1995, achieved an average high school GPA of 3.6. The next five entering cohorts of African American students, 1996-2000, achieved a 3.8, and the most recent five cohorts, 2001-2005, a 3.9 (Table 6-2). An analysis of variance comparing the three groups was statistically

Table 6-1: Number and Percent of Entering Students by Year of Entry and Ethnicity

<b>Year of Entry</b>	<b>African American</b>	<b>European American</b>	<b>Asian American</b>	<b>Latino</b>	<b>TOTAL</b>
<b><i>Pre: Cohorts 3-7</i></b>					
1991-1992	34 (100%)	0	0	0	34
1992-1993	44 (100%)	0	0	0	44
1993-1994	38 (100%)	0	0	0	38
1994-1995	39 (100%)	0	0	0	39
1995-1996	47 (100%)	0	0	0	47
SUBTOTAL	202 (100%)	0	0	0	202
MEAN	40.4 (5.1)	0	0	0	40.4 (5.1)
<b><i>Post: Cohorts 8-12</i></b>					
1996-1997	28 (77.8%)	5 (13.9%)	3 (8.3%)	0	36
1997-1998	32 (71.1%)	6 (13.3%)	6 (13.3%)	1 (2.2%)	45
1998-1999	32 (60.4%)	8 (15.1%)	11 (20.8%)	2 (3.8%)	53
1999-2000	29 (58.0%)	14 (28.0%)	6 (12.0%)	1 (2.0%)	50
2000-2001	37 (82.2%)	3 (6.7%)	5 (11.1%)	0	45
SUBTOTAL	158 (69.0%)	36 (15.7%)	31 (13.5%)	4 (1.7%)	229
MEAN	31.6 (3.5)	7.2 (4.2)	6.2 (2.9)	0.8 (0.8)	45.8 (6.5)
<b><i>Post: Cohorts 13-17</i></b>					
2001-2002	36 (64.3%)	7 (12.5%)	12 (21.4%)	1 (1.8%)	56
2002-2003	25 (55.6%)	9 (20.0%)	8 (17.8%)	3 (6.7%)	45
2003-2004	36 (58.1%)	17 (27.4%)	8 (12.9%)	1 (1.6%)	62
2004-2005	41 (65.1%)	8 (12.7%)	12 (19.0%)	2 (3.2%)	63
2005-2006	28 (60.9%)	11 (23.9%)	6 (13.0%)	1 (2.2%)	46
SUBTOTAL	166 (61.0%)	52 (19.1%)	46 (16.9%)	8 (2.9%)	272
MEAN	33.2 (6.5)	10.4 (4.0)	9.2 (2.7)	1.6 (0.9)	54.4 (8.6)
<b><i>Combined Post: Cohorts 8-17</i></b>					
SUBTOTAL	324 (64.5%)	88 (17.6%)	77 (15.4%)	12 (2.4%)	501
MEAN	32.4 (5.0)	8.8 (4.2)	7.7 (3.1)	1.2 (0.9)	50.1 (8.6)

significant,  $F(2, 520) = 28.6, p < .001$ , with post hoc tests indicating that each succeeding cohort achieved a statistically higher GPA than the preceding one.

The 1991-1995 cohorts of entering African American students achieved an average verbal SAT of 626.7, the 1996-2000 cohorts 626.1, and the 2001-2005 cohorts 620.4 (SAT scores reported prior to 1996 have been recentered; cf. Durans, 2002). There was not a significant difference



Table 6-2: High School GPA, SAT Scores, and Gender by Year of Entry and Ethnicity

Year of Entry	African American	European American	Asian American	Total
<b>Pre: Cohorts 3-7</b>				
High School GPA	3.6 (0.3)			3.6 (0.3)
SAT Verbal	626.7 (52.5)			626.7 (52.5)
SAT Math	643.4 (47.4)			643.4 (47.4)
SAT Total	1270.1 (73.6)			1270.1 (73.6)
% Male	51.5%			51.5%
N	202			202
<b>Post: Cohorts 8-12</b>				
High School GPA	3.8 (0.3)	4.0 (0.2)	4.0 (0.3)	3.8 (0.3)
SAT Verbal	626.1 (59.2)	667.8 (71.3)	629.0 (41.4)	633.1 (60.9)
SAT Math	657.3 (39.7)	688.6 (52.6)	686.5 (54.4)	666.3 (46.1)
SAT Total	1283.4 (73.2)	1356.4 (85.6)	1315.2 (75.5)	1299.4 (80.0)
% Male	45.6%	41.7%	38.7%	44.0%
N	158	36	31	225
<b>Post: Cohorts 13-17</b>				
High School GPA	3.9 (0.4)	4.0 (0.4)	4.1 (0.4)	3.9 (0.4)
SAT Verbal	620.4 (62.7)	655.4 (53.1)	625.7 (67.7)	628.2 (63.1)
SAT Math	651.5 (41.6)	706.4 (53.3)	702.0 (48.9)	671.3 (52.0)
SAT Total	1271.9 (82.7)	1361.9 (72.0)	1327.8 (88.2)	1299.5 (89.5)
% Male	47.9%	55.8%	54.3%	50.4%
N	166	52	46	264
<b>Total: Cohorts 3-17</b>				
High School GPA	3.7 (0.4)	4.0 (0.3)	4.1 (0.4)	3.8 (0.4)
SAT Verbal	624.5 (57.8)	660.5 (61.1)	626.9 (58.3)	629.4 (59.4)
SAT Math	650.1 (43.7)	699.1 (53.4)	695.7 (51.4)	661.5 (50.1)
SAT Total	1274.7 (76.5)	1359.6 (77.3)	1322.6 (83.2)	1290.9 (83.0)
% Male	48.5%	50.0%	48.1%	48.6%
N	526	88	77	691

across the three cohorts,  $F(2, 521) = 0.6, ns$ . The 1991-1995 cohorts of entering African American students achieved an average math SAT of 643.4, the 1996-2000 cohorts 657.3, and the 2001-2005 cohorts 651.5. There was a significant difference between cohorts,  $F(2, 521) = 4.7, p < .01$ . Post-hoc comparisons indicated that the 1996-2000 cohort had significantly higher scores than the 1991-1995 cohort, but there was not a significant difference between the 2001-2005 cohort and either of the two earlier cohorts. In terms of combined SAT scores, the 1991-1995 cohorts of entering African American students achieved 1270.1, the 1996-2000 cohorts 1283.4, and the 2001-2005 cohorts 1271.9. There was not a significant difference across the three cohorts,  $F(2, 521) = 1.5, ns$ .

Slightly more than half, 51.5%, of the 1991-1995 entering African American students were male, and somewhat less than half, 45.6% and 47.9%, respectively, of the 1996-2000 and 2001-2005 cohorts were male. Chi-square analyses did not reveal statistically significant differences between the 1991-1995 and 1996-2000 cohorts,  $X^2(1) = 1.2$ , *ns*, the 1996-2000 and 2001-2005 cohorts,  $X^2(1) = 0.1$ , *ns*, or the 1991-1995 and the 1996-2005 cohorts (combined),  $X^2(1) = 1.2$ , *ns*.

In terms of ethnic group differences, analyses of variance for the 1996-2000 entering students revealed statistically significant differences on all academic variables: high school GPA,  $F(2, 221) = 14.2$ ,  $p < .001$ , SAT Verbal,  $F(2, 222) = 7.4$ ,  $p < .001$ , SAT Math,  $F(2, 222) = 11.1$ ,  $p < .001$ , and combined SAT,  $F(2, 222) = 14.5$ ,  $p < .001$ . Post hoc tests indicated that African American Meyerhoff students achieved statistically lower scores than the European American and Asian American students on high school GPA, SAT Math, and combined SAT, and statistically lower scores than European American students but not Asian American students on SAT Verbal. A chi-square analysis did not reveal ethnic group differences in gender,  $X^2(2) = 0.6$ , *ns*.

Similarly, analyses of variance for the 2001-2005 entering students indicated ethnic group differences for all academic variables: high school GPA,  $F(2, 259) = 13.4$ ,  $p < .001$ , SAT Verbal,  $F(2, 259) = 6.4$ ,  $p < .01$ , SAT Math,  $F(2, 259) = 41.5$ ,  $p < .001$ , and combined SAT,  $F(2, 259) = 27.2$ ,  $p < .001$ . Post hoc tests indicated that African American Meyerhoff students achieved statistically lower scores than European American and Asian American students on high school GPA, SAT Math, and combined SAT, and statistically lower scores than European American students but not Asian American students on SAT Verbal. On the combined SAT, Asian American students scored significantly lower than European American students. A chi-square analysis again did not reveal ethnic group differences in gender,  $X^2(2) = 1.4$ , *ns*.

### *Experience in Program*

The 1991-1995 entering African American Meyerhoff students did not achieve a mean score on any of the nine survey items equal to or higher than those of the 1996-2000 entering African American Meyerhoff students (Table 6-3). Averaging across the nine items, the 1991-1995 students had scores 0.4 lower (range 0.2 to 0.7). Although changes in the wording and scaling of items over the years preclude formal statistical testing, the findings suggest that a decline in the value of the program experience did not occur (if anything, it increased).

Of note, both sets of entering students perceived the value of their experiences in the program to be quite positive, with six of the nine items rated 4.0 or higher for the 1991-1995 students, and eight of the nine items for the 1996-2000 students rated 4.0 or higher (the scale range was 1 to 5, with 5 the most positive rating). Financial support was rated most highly by both groups of students (4.4 and 4.7, respectively). Academic interactions with peers (4.2, 4.5), being part of the larger Meyerhoff community (4.1, 4.6), the on-campus, 6-week summer bridge orientation program (4.0, 4.5), social interactions with peers (4.0, 4.4) and summer research opportunities (4.0, 4.2) also received ratings of 4.0 or higher from both sets of students. Study groups also were rated highly by both (3.9, 4.2). The largest discrepancy between groups was for the value

Table 6-3: Program Components by Year of Entry and Ethnicity

Year of Entry	African	European	Asian	TOTAL
<b>Pre: 1991-1995</b>				
Summer Bridge	4.0 (1.1)			4.0 (1.1)
Part of Community	4.1 (1.1)			4.1 (1.1)
Study Groups	3.9 (1.2)			3.9 (1.2)
Staff Advising	3.5 (1.3)			3.5 (1.3)
Summer Research	4.0 (1.5)			4.0 (1.5)
Financial Support	4.4 (1.1)			4.4 (1.1)
Peer Social	4.0 (1.3)			4.0 (1.3)
Peer Academic	4.2 (1.1)			4.2 (1.1)
Program Cultural	3.4 (1.2)			3.4 (1.2)
Mean across items	3.9 (0.7)			3.9 (0.7)
<b>Post: 1996-2000</b>				
Summer Bridge	4.5 (0.8)	4.3 (0.8)	4.6 (0.7)	4.5 (0.8)
Part of Community	4.6 (0.8)	4.1 (1.3)	4.7 (0.6)	4.5 (0.9)
Study Groups	4.2 (1.2)	4.2 (1.2)	4.3 (1.1)	4.2 (1.1)
Staff Advising	4.2 (0.9)	3.8 (1.3)	4.4 (0.8)	4.2 (1.0)
Summer Research	4.2 (1.0)	3.9 (1.1)	4.1 (1.1)	4.1 (1.0)
Financial Support	4.7 (0.7)	4.9 (0.5)	4.7 (0.9)	4.8 (0.7)
Peer Social	4.4 (0.9)	4.4 (0.8)	4.5 (0.7)	4.4 (0.9)
Peer Academic	4.5 (0.7)	4.4 (0.8)	4.4 (0.8)	4.5 (0.7)
Cultural Activities	3.6 (1.1)	3.1 (1.0)	3.5 (0.9)	3.5 (1.0)
Mean Across Items	4.3 (0.5)	4.1 (0.7)	4.4 (0.4)	4.3 (0.5)

of program staff academic advising (3.5, 4.2). Both sets of students viewed program cultural activities as providing moderate value (3.4, 3.6).

Among the 1996-2000 cohorts, an analysis of variance did not reveal a difference in overall perceptions (all items combined) among African American (4.3), European American (4.1), and Asian American (4.4) students,  $F(2, 134) = 2.3, ns$ . In terms of individual items, the three groups did not differ on seven of the nine items. There were significant differences on being part of the Meyerhoff community,  $F(2, 147) = 3.0, p < .05$ , and program staff academic advising,  $F(2, 147) = 3.3, p < .05$ . Post-hoc analyses revealed that European American students had marginally ( $p < .06$ ) lower scores than African American students on the program community item, and significantly lower ( $p < .05$ ) scores than the Asian American students on the academic advising item. The African American and Asian American students reported scores of 4.0 or higher on eight of nine items (only cultural activities was below 4.0), and the European American students reported scores of 4.0 or higher on six of nine items (staff advising, summer research, and cultural activities were each below 4.0).

*Student Perspectives on the Opening of Admissions*

*Interview Findings: 1999-2001.* Semi-structured interviews were conducted with a randomly selected subgroup of 40 African American Meyerhoff students in 1999, 2000, and 2001—three, four, and five years following the entrance of the first integrated class. The interview examined various aspects of the student’s experience in the program. One question asked students to provide their thoughts and feelings about the racial integration of the program, and whether such an integration would allow the program to remain true to the goal of increasing the number of African American Ph.D.s in the sciences. Students expressed positive, negative, and mixed feelings about the change. However, most students expressed a belief that despite this change the program would still be able to meet its overarching goal of increasing the number of African Americans receiving STEM Ph.D.s. Representative responses from students interviewed are provided below.

*Positive.* Positive feelings primarily involved an appreciation for diversity in the program and the positive impact racial diversity would have on minority and non-minority students. Students reported feeling that the racial integration of the program would prepare them for racially integrated environments of graduate school and workplace, reduce biases and racial stereotypes held by both minority and non-minority students about the other, and make the program stronger by enhancing its credibility and legitimacy in the larger campus environment. The first three interview excerpts below are representative of the large number of students who viewed diversity in the program as providing African American students with a necessary “real world” experience—preparing them for the racially integrated environments of graduate school and the workforce.

*“I think that it is a benefit. Only because, the work place and . . . graduate school—it’s not going to be only African American. By making the program more diverse people are surrounded by an atmosphere that’s going to be more similar to the atmosphere we’re going to experience when we actually get into the work force.”* (African American female student, 1998 entering class; interviewed in 1999)

*“I think it’s good that other racial groups have [been] included . . . . When you get out in the real world there are a number of other people that you’ll have to be able to work with, and you can’t be biased or anything.”* (African American female student, 1996 entering class; interviewed in 2000)

*“I think it’s great to have people from different backgrounds interacting while they’re going through the process of becoming scientists, so when they get to become scientists it won’t be hard for them to interact with people who aren’t like them.”* (African American male student, 1997 entering class; interviewed in 2001)

The next three respondents focus on learning from others who come from a different ethnic background, and the reduction of biases.

*“I guess [the integration] can help us networking. Maybe some of the Caucasians in the program will talk to other Caucasians outside of the program which will then introduce*

*them to other Meyerhoffs . . . . It's helped the program become more diverse. It's helped people get a feel for different cultures outside of African American.”* (African American male student, 1997 entering class; interviewed in 1999)

*“I think it is for the better to have the program for all races. For example, one guy...had not experienced intelligent people of color until he came here. So that definitely helps. Having things diverse is better.”* (African American male student, 1998 entering class; interviewed in 1999)

*“I guess it's always good to have different types of people. We can really learn from each other.”* (African American female student, 1998 entering class; interviewed in 2000)

A number of students reported feeling that racial diversity among applicants and students awarded the Meyerhoff scholarship added legitimacy and credibility to the program, in that it would less likely be viewed as an “affirmative action” program for blacks—but instead a program truly based on excellence in scholarship.

*“I think opening the program to everyone made it stronger . . . . It makes the comment that you only got the award because you're black irrelevant now. So now if you get in the program you can say, ‘Well I'm just the best of the best that came to get this.’”* (African American male student, 1997 entering class; interviewed in 2000)

*“From what I've seen . . . it makes us a lot more open and it kind of destroys the biases that are there, especially in dealing with the campus at large. I'm sure people used to look at it and say, “Well, those black people really don't deserve it and why do they have all these privileges.” But now seeing that it's open to everybody and the [way the] races interact with each other, now it's like the only bond isn't race. So everyone's looking at it like, “Wow, there's something really special here.”* (African American male student, 1996 entering class, interviewed in 2001)

*“I think it makes the program better to see that you don't have to be a particular race or ethnic group to actually be successful.”* (African American male student, 1997 entering class; interviewed in 2001)

Several students expressed a positive or accepting viewpoint concerning the legal rationale for the change in program admissions. The first excerpt below reflects a positive view and the second an accepting perspective along with comments on the likely continued achievement of program goals.

*“I think it was a very smart decision to integrate the program before it was forced to integrate.”* (African American male student, 1996 entering class; interviewed in 1999)

*“I don't have any objections to including any other races besides African American. I do like the fact that the program is still focused on particularly African Americans but I understand where they're coming from, as far as on a legal level that they have to*

*include other races. I don't see that as something bad and I definitely don't see that as a detriment to the program at all . . . . I believe the goal [of the program] is still . . . attainable and likely, with the inclusion of other students besides African Americans."* (African American male student, 1996 entering class; interviewed in 2000)

*Negative.* Although a number of students discussed positive aspects of the integration, many others expressed negative feelings about the change in the program's racial demographics. Concerns focused around a fear that the goals of the program would change as a result of the demographic shift, a change in program cohesion as a result of the integration, and feelings of upset that resources initially designed for African Americans were being taken away. The first five responses focus on concerns about changing the program's goal of enhancing the number of African American Ph.D.s.

*"You know it's a shame because whenever black people get anything good someone always starts to take it away. My only worry is that the whole goal was to increase the numbers of blacks with Ph.D.s. By letting other students in that's taking away a spot for another black student who is deserving and otherwise may not have opportunities to get the Ph.D."* (African American female student, 1995 entering class; interviewed in 1999)

*"I don't think the inclusion [of students from different background] has helped, honestly. Just because you're not as focused on your main objective. Because my understanding of it is that they did this, integrated the program not because they thought it would be better for the program or they thought it would be better for the students they were targeting. They did it because it was mainly a political issue."* (African American male student, 1996 entering class; interviewed in 2000)

*"I think it's changed the dynamics of the program. I would say that due to the inclusion of non-minority students the goals of the program need to shift . . . . Because the goal was to get more minority students to get Ph.D.s. As more and more non-minority students are coming in those goals don't seem to be the same among those students."* (African American female student, 1997 entering class; interviewed in 2000)

*"Actually I think it weakened the program . . . . It's basically diluting the program."* (African American female student, 1997 entering class; interviewed in 2000)

*"Whenever Summer Bridge comes in [6-week summer orientation session] there is always more white people . . . . It seems like [the program] is losing its goal as the years progress."* (African American male student, 1998 entering class; interviewed in 2000)

The next three students note a reduction in cohesion within and between cohorts of students. The fourth student expresses concern about a potential loss of an African American core of support.

*"I've heard that the later [integrated] classes weren't as cohesive [and] that white Meyerhoffs stayed with themselves and black Meyerhoffs stayed with themselves. My [all*

*black] class was pretty unique [because] when we got in we all pretty much became friends.” (African American male student, 1995 entering class; interviewed in 2001)*

*“I think diversity in general is good. But in terms of the program and how they’re trying to promote a family atmosphere, it gets kind of hard sometimes . . . . The white people in my class sort of hung out together and with no one else. So [some] of the black students were saying, “You know when we go into a majority white atmosphere we’re the ones that have to reach out and get to know people.” They [see] the responsibility of the white students to reach out and get to know us because we were the majority in our class. So I think a lot of people didn’t get to know each other because of that reason.” (African American female student, 1997 entering class; interviewed in 2001)*

*“I think it put a division between the classes that weren’t, and the classes that were, [integrated].” (African American female student, 1997 entering class; interviewed in 1999)*

*“I see the program as being majority black and becoming increasingly white. And I think the idea of the program is majority black . . . . Being surrounded by blacks that were intellectual, well-rounded, and successful was really instrumental to my success and growth.” (African American male student, 1997 entering class; interviewed in 2001)*

*Mixed Responses: Transition Process and Post-Transition Future.* Some responses concerning the change in program composition could not easily be categorized as positive or negative, but contained elements of each. The three student responses below each refer to initial distress or resistance to the change, but also comment positively on the transition process or the post-transition future.

*“I think [the integration] changed the Meyerhoff program. I still see the focus as the same . . . getting minorities in science. [But] at first I was taken aback . . . . African Americans can never have anything without someone coming in and changing it . . . . For the future I still hope the focus is mainly towards African Americans and most of the classes are still African American students because there’s definitely more of a need.” (African American male student, 1994 entering class; interviewed in 1999)*

*“When [the transition] initially happened I was the last class to have an all African American class and initially we were distraught about the situation. . . . It’s kind of hard to go from one way of life to another. . . . But I think that they made a smooth transition because they made it as painless as possible.” (African American male student, 1995 entering class; interviewed in 1999)*

*“I was the first class that was actually integrated. I know initially there was some resistance to opening up the program to everybody because people thought it defeated the purpose: trying to get more minorities into science and engineering. I think the transition has been smooth.” (African American female student, 1996 entering class; interviewed in 2000)*

*Exit Interview Findings: 2002-2005.* As part of a larger exit interview conducted yearly with graduating seniors from the MARC U\*Star program (primarily Meyerhoff scholars), students are asked whether or not they felt the presence of students from different racial and ethnic backgrounds has affected the program and the students in it. Almost all of the graduating seniors have indicated that the program's diversity did not negatively impact the students or the program but rather was an important, positive factor. Many commented that it allows non-minority students to interact with minority students and experience different cultures, and helps to change perceptions of students who may have never otherwise had an opportunity to interact with minorities. Also, many minority students felt that white students get a chance to see what it is like to not be in the majority group (while in the program). Others felt that the experience encouraged them to explore more about their own culture. Representative student comments, from African American Meyerhoff/MARC scholars, included the following:

*“To see so many students, from all kind of backgrounds . . . to see them all on the same level does a lot for breaking apart any stigma you might have ever had, and that's just great.”*

*“I think it gives you good experience, it gives you good training . . . to have this interaction with people now . . . . I mean you have to learn how to interact with people from different backgrounds, because otherwise you're going to be trying to make it alone in this world and you really can't.”*

*“I think it's really important that the program doesn't just focus on African Americans because people of other races need this too, they need to see that there are people that don't live like them that can succeed in this field as well.”*

*“I think, it's more realistic of what everyday is like . . . what being in the workforce is going to be like.”*

### *Post-College Outcomes*

The post-college outcomes for the 1991-1995 and 1996-2000 Meyerhoff cohorts, for students of different ethnicities, and those for Meyerhoff cohorts versus Declined comparison students, are presented below. It should be noted that these latter findings are “quasi-experimental” in nature (i.e., they are not the result of random assignment of students to conditions).

#### Meyerhoff Cohorts: 1991-1995 vs. 1996-2000

African American Meyerhoff students in the 1996-2000 cohorts achieved more positive post-college Ph.D. outcomes than those in the 1991-1995 cohorts, without controlling for differing academic background characteristics (Table 6-4). Specifically, 35.4% of the 1996-2000 students entered either a STEM Ph.D. (27.8%) or M.D./Ph.D. (7.6%) program, compared to 20.3% of the 1991-1995 students (14.3%, STEM Ph.D., and 6.0%, M.D./Ph.D.). Fewer of the 1996-2000 students entered STEM masters programs (13.3% versus 23.8%), medical school (10.1% versus 17.8%), or had no STEM post-college (17.1% versus 33.2%). Conversely, more of the 1996-2000 students were still undergraduates (12.7% vs. 0.0%) or had an unknown graduate status to



date (10.8% versus 4.0%). The chi-square analysis comparing the 1996-2000 and 1991-1995 groups on STEM Ph.D. (includes M.D./Ph.D.) versus all other categories (combined) was statistically significant,  $X^2(1) = 9.5, p < .01$ . However, when SAT Math, SAT Verbal, high school GPA, gender, and college major were statistically controlled in a logistic regression analysis, there was no longer a statistical difference between the groups,  $Wald(1) = 2.4, ns$ .

### Ethnicity Differences

Among the 1996-2000 entering cohorts, 35.4% of the African American students, 41.7% of the European American students, and 22.6% of the Asian American students to date have entered a STEM Ph.D. or M.D./Ph.D. program. The three groups entered STEM master's programs at comparable rates (13.3%, 16.7%, and 16.2%, respectively). Fewer African American (10.1%) and European American (2.8%) than Asian American (22.6%) students entered medical school, more European American (27.8%) than African American (17.1%) and Asian American (6.5%) students had not pursued graduate school after completing their undergraduate degree, and fewer European American (2.8%) than African American (12.7%) or Asian American (9.7%) students were still undergraduates. The graduate status of a substantial number of African American (10.8%), European American (8.3%) and Asian American (22.6%) students were unknown (many of these are recent graduates whose post-college information is currently being sought or confirmed). The chi-square analysis comparing the three ethnic groups on STEM Ph.D. (includes M.D./Ph.D.) versus all other categories (combined) was not significant,  $X^2(1) = 3.0, ns$ . Similarly, the logistic regression analysis with covariates controlled was not significant,  $Wald(1) = 0.0, ns$ .

### Meyerhoff vs. Declined Students

The 1991-1995 African American Meyerhoff, 1996-2000 African American Meyerhoff, and 1996-2000 European American Meyerhoff students each achieved greater post-college STEM Ph.D. outcomes than their respective Declined comparison samples. Specifically, 20.3% of the 1991-1995 African American Meyerhoff students entered either a STEM Ph.D. or M.D./Ph.D. program, compared to 4.7% of the 1991-1995 African American Declined students,  $X^2(2) = 11.2, p < .001$ . With covariates controlled, the difference remained significant,  $Wald(1) = 7.4, p < .01$ . In turn, 35.4% of the 1996-2000 African American students entered either a STEM Ph.D. or M.D./Ph.D. program, compared to 5.5% of the 1996-2000 African American Declined students,  $X^2(2) = 32.4, p < .001$ . With covariates controlled, the difference remained significant,  $Wald(1) = 16.0, p < .001$ . Among 1996-2000 Meyerhoff European American students, 41.7% entered either a STEM Ph.D. or M.D./Ph.D. program, compared to 3.8% of the 1996-2000 European American Declined students,  $X^2(2) = 9.0, p < .01$ . With covariates controlled, the difference remained significant,  $Wald(1) = 8.0, p < .01$ . Among the 1996-2000 Asian American Meyerhoff students, 22.6% entered a STEM Ph.D. or M.D./Ph.D. program, compared to 16.7% of the

Table 6-4: Post-College Outcome by Year of Entry and Ethnicity for Meyerhoff and Comparison Students

	<b>African American</b>		<b>European American</b>		<b>Asian American</b>	
	<b><u>Meyerhoff</u></b>	<b><u>Declined</u></b>	<b><u>Meyerhoff</u></b>	<b><u>Declined</u></b>	<b><u>Meyerhoff</u></b>	<b><u>Declined</u></b>
<b><i>Pre: Cohorts 3-7</i></b>						
STEM Ph.D.	29 (14.3%)	4 (4.7%)				
M.D./Ph.D.	12 (6.0%)	0 (0.0%)				
STEM M.S.	48 (23.8%)	15 (17.5%)				
M.D.	36 (17.8%)	36 (41.9%)				
Other Profess.	2 (1.0%)	5 (5.8%)				
No STEM Grad	67 (33.2%)	19 (22.1%)				
Still Undergr.	0 (0.0%)	0 (0.0%)				
Unknown	8 (4.0%)	7 (8.1%)				
TOTAL	202	86				
<b><i>Post: Cohorts 8-12</i></b>						
STEM Ph.D.	44 (27.8%)	6 (5.5%)	14 (38.9%)	1 (3.8%)	6 (19.4%)	1 (4.2%)
M.D./Ph.D.	12 (7.6%)	0 (0.0%)	1 (2.8%)	0 (0.0%)	1 (3.2%)	3 (12.5%)
STEM M.S.	21(13.3%)	12 (11.0%)	6 (16.7%)	2 (7.6%)	5 (16.2%)	1 (4.2%)
M.D.	16 (10.1%)	20 (18.2%)	1 (2.8%)	2 (7.6%)	7 (22.6%)	5 (20.8%)
Other Profess.	1 (0.6)	3 (2.7%)	0 (0.0%)	1 (3.8%)	0 (0.0%)	0 (0.0%)
No STEM Grad	27 (17.1%)	47 (42.7%)	10 (27.8%)	10 (38.5%)	2 (6.5%)	9 (37.5%)
Still Undergr.	20 (12.7%)	8 (7.3%)	1 (2.8%)	1 (3.8%)	3 (9.7%)	0 (0.0%)
Unknown	17 (10.8%)	14 (12.7%)	3 (8.3 %)	9 (34.6%)	7 (22.6%)	5 (20.8%)
TOTAL	158	110	36	26	31	24

1996-2000 Asian American Declined students, a difference that was not statistically significant  $X^2(2) = 0.3, ns$ . With covariates controlled, there also was not a significant difference,  $Wald(1) = 0.1, ns$ .

## Discussion

The Meyerhoff Scholars Program changed in fall 1996 from a program that had exclusively served African American students to one that also admitted, in smaller numbers, students of other races who had an interest in the advancement of minorities in STEM fields. In the ten years since, there has been a 20% decline in the average number of entering African American students (40.4 to 32.4), with slightly more than one-third (35.5%) of the admissions slots going to other students (mostly European American and Asian American students). Over the 10-year period, if the rate of 40.4 per year had been maintained and the program maintained as race-exclusive, there would have been an additional 80 African American students (8 per year). Assuming this number of qualified African American students were in the application pool and would have matriculated, the opening of admissions has led to lowered achievement of the initial program goal of enhancing the number of African American students entering STEM Ph.D. programs. However, this assumption may be questionable, since the smaller number of African Americans, according to program staff, was largely the result of reduced external scholarship funding availability in many of the years. That is, the size of each cohort was determined primarily by the level of funding attracted from federal agencies, foundations and private individuals; when funding declined, the number of African American students admitted declined accordingly. (Of note, some of the decline was later offset by incorporating additional African American students (3-5 per year) from the existing student body as additional funding became available—these students are considered Meyerhoff “affiliates”).

Importantly, the opening of admissions has not resulted in a decline in the quality of entering students, their experience in the program, or their outcomes. Indeed, analyses indicated that the 324 African American students entering the program since the opening of admissions had higher high school GPA scores than those who preceded them, and were more likely to enter STEM Ph.D. programs. These trends may be due to various factors—for example, in part it may be due to a growing public recognition over the years, in Maryland and nationwide, of the quality of the program and its success in producing large numbers of students who enter graduate and professional schools. As a result, it may have attracted applications from students with stronger high school records than in the program’s earlier years, and those with greater interest in and commitment to matriculation in STEM graduate programs. In addition, the University and the program have continued to strengthen academic support initiatives (e.g., increased funding for tutoring and advising), and the peer support culture may be even stronger than in the early years.

African American students appear to have an experience in the program that is comparable (or perhaps better) to those in the program when only African Americans were participants, based on survey item responses. Their experience in the program is comparable to the European American and Asian American Meyerhoff scholars. Furthermore, although a number of African American students had very negative responses in the years following the change in admissions, a number of others did not, including those who were aware it would add credibility and legitimacy to the program in the primarily white campus environment. More recently, students

have only had the experience of the program as integrated, and they consistently voice positive views about the racial diversity within the program. Most important, the 1996-2000 African American students have been entering STEM Ph.D. programs at a much greater rate than those who preceded them (when differing background characteristics and major are not taken into account), at a rate comparable to those of their European American and Asian American peers in the program, and at a rate greater than comparison sample students.

Changing from a race-exclusive to an integrated program (with the majority African American), then, appears to have been on the whole a viable strategic response to an anti-affirmative action political climate. Admissions have been opened to students of all races, but the defined mission of the program helps to ensure an African American majority. Over the years, an increasing number of applications from European American and Asian American students has been received, but program staff report informally that it has been a challenge to find among these students those who meet the entire set of factors considered for admissions, including openness to taking advice, willingness to work with others in study groups and to take part in community service, and, directly related to the program mission, a strong interest in the advancement of underrepresented minorities in STEM fields. In fact, according to program staff, some of the European American students consider the staff's approach too strong-handed or "dictatorial," for example requiring students to attend regular program meetings.

It is possible that several additional factors have contributed to the maintenance of an African American majority in the program. These include the high number of high-achieving African American students in Maryland who apply, and the relatively lower numbers of comparable Latino/a students in the state, the unwavering commitment of University administration and faculty to the program mission, the location in the Washington/Baltimore metropolitan area, the science and engineering strengths of the University, the University's racially and ethnically diverse student body, and the commitment of the University administration and faculty to the program mission.

This study has a number of limitations. Possible self-selection differences between Meyerhoff and comparison students limit conclusions that can be drawn about these findings. That is, students who opt to attend the program may be more committed initially to obtaining a Ph.D. than the comparison sample of students who declined the admissions offer and attended other universities instead. Only random assignment designs would allow overcoming this design weakness. Also, the generalizability of findings may be limited. The Meyerhoff Program is relatively unique in its focus, its comprehensiveness, its high level of resources (e.g., a budget of several million dollars annually) and the high levels of commitment of the University administration (beginning with the University president, the program's co-founder) to its success. Also, the nature and quality of the program likely has changed over the years as faculty and staff have revised program strategies and components based on their experience with students.

The changes in the content and scaling of survey items over time greatly limit conclusions that can be drawn about change, or lack of change, in student experience over time. The interview findings are limited to small samples of students and do not reflect the perspectives of European American and Asian American students. The increasing quality of the high school records of

Meyerhoff students over the years limit the meaningfulness of direct comparisons on STEM outcomes. The attitudes and perceptions of faculty and Meyerhoff staff regarding the opening of the program to students of other races were not assessed and should be in future studies.

An additional limitation of the study was the absence of detailed information about the nature and quality of student relationships in the program. Anecdotal evidence indicates that, at least at times, the distinctive mission of the program combined with the mix of students has generated honest discussions about challenging issues such as the attitudes of faculty to different types of students, stereotypes students have about each other, reasons for the underrepresentativeness of minority groups in science, and what it means to be smart and black in America. In our experience, such discussions tend not to happen often in public settings in higher education, or even in private among students from different races. Changes over time in the nature and impact of such interactions, and more generally about the nature and quality of student relationships with those different than themselves in both academic and social contexts were not systematically examined and should be a focus of future research.

The limitations notwithstanding, the current study remains one of the few systematic, empirical evaluations of the impact of changes in admissions policies in the anti-affirmative action context. Consistent with methods used in the current research, future studies of similar programs in this area will benefit from examining changes over time on multiple outcome measures, including the following: the number and percentage of entering minority students; academic preparation; program and university-level academic and social experience, including the nature and quality of cross-racial interactions and relationships; student attitudes, including interest in and commitment to the success of minority students and professionals; and post-college student outcomes, including pursuit of graduate degrees and, over the longer-term, career pathways (e.g., academic; industrial research; policy work) and community involvement. The inclusion of comparison samples for outcome analysis, the assessment of student experience both prior to and in the years following the change, and the inclusion of both minority and non-minority student samples, represent additional important features to be considered in future research in this area. In addition, the use of both quantitative and qualitative data—mixed methods designs—allows the strengths of each to be drawn upon and the limitations of each to be offset. Whenever possible, both process and outcome evaluation data should be gathered and analyzed in order to strengthen program effectiveness.

Ideally, evaluations will be conducted by social scientists who have expertise in evaluation research and who are knowledgeable about theory and practice related to minority student access, retention, and achievement in higher education. To allow state-of-the-art evaluations, sufficient funding must be allocated. Furthermore, the evaluation research team ideally should be brought into the program planning process early on, prior to program implementation, to ensure that baseline information and appropriate comparison samples are included in the evaluation effort.

The future of access to higher education in this anti-affirmative action era represents one of the pressing issues of our times. Many approaches are being taken by universities and programs to address the issue. It is hoped that researchers will become involved increasingly in evaluating the outcomes, and the associated processes of these varied efforts, to ensure that decisions are

made on the basis of solid data and not anecdotes. As noted in the recent report from the National Academies, “Rising Above the Gathering Storm,” because of the increasing globalization of the world economy and of competitiveness in science and technology, “for the first time in generations, the nation’s children could face poorer prospects than their parents and grandparents did” (National Academies, 2005, p. 10). It is imperative that we find ways to reduce both the broad academic achievement gap among the races and the disparities in science and engineering performance education, for only in tapping fully the talents of all our citizens can we as a nation remain competitive and meet successfully the challenges ahead.

## Appendix 6A

### Meyerhoff vs. Declined Sample Differences on High School GPA, SAT scores, and Gender

The 1991-1995 Meyerhoff students had a lower high school GPA (3.6) than Declined students (3.7),  $F(1) = 7.8, p < .01$  and lower SAT Verbal (626.7 vs. 642.7),  $F(1) = 5.0, p < .05$ , and a greater percentage of males (51.5% vs. 25.6%),  $\chi^2(1) = 16.5, p < .001$  (see Table 6A). The 1996-2000 African American Meyerhoff students did not differ on any of the academic characteristics, or gender, from the 1996-2000 African American Declined students, nor did the 1996-2000 European American Meyerhoff and Declined students differ on any of the academic characteristics, or gender. The 1996-2000 Asian American Meyerhoffs had lower SAT Verbal (628.7 vs. 666.5),  $F(1) = 5.6, p < .05$ , and lower combined SAT scores (1315.2 vs. 1378.9),  $F(1) = 7.2, p < .01$ , than the 1996-2000 Asian American Declined students.

Table 6A-1: Meyerhoff and Declined Comparison Sample: High School GPA, SAT Scores, and Gender by Year of Entry and Ethnicity

	<b>Pre Cohorts: 1991-1995</b>		<b>Post Cohorts: 1996-2000</b>	
	<b><u>Meyerhoff</u></b>	<b><u>Declined</u></b>	<b><u>Meyerhoff</u></b>	<b><u>Declined</u></b>
<b><i>African American</i></b>				
High School GPA	3.6 (0.3)	3.7 (0.3)	3.8 (0.3)	3.8 (0.3)
SAT Verbal	626.7 (52.5)	642.7 (61.4)	626.1 (59.2)	638.9 (64.5)
SAT Math	643.4 (47.4)	635.7 (46.8)	657.3 (39.7)	657.9 (48.3)
SAT Total	1270.1 (73.6)	1278.4 (82.5)	1283.4 (73.2)	1296.8 (90.2)
% Male	51.5%	25.6%	45.6%	44.9%
N	202	86	158	109
<b><i>European American</i></b>				
High School GPA			4.0 (0.2)	3.9 (0.3)
SAT Verbal			667.8 (71.3)	639.2 (58.1)
SAT Math			688.6 (52.6)	689.2 (44.4)
SAT Total			1356.4 (85.6)	1328.5 (82.5)
% Male			41.7%	46.2%
N			36	26
<b><i>Asian American</i></b>				
High School GPA			4.0 (0.3)	4.0 (0.3)
SAT Verbal			628.7 (41.4)	666.5 (76.6)
SAT Math			686.5 (54.4)	712.3 (49.1)
SAT Total			1315.2 (75.5)	1378.9 (103.4)
% Male			38.7%	41.7%
N			31	24



Appendix 6B

Table 6B-1: Number of Students Completing Process Evaluation Item\* by Survey and Entering Class

Survey	1991	1992	1993	1994	1995	Total 1991-1995	1996	1997	1998	1999	2000	Total 1996-2000
1992/ Freshmen	4	0	0	0	0	4						
1993/ Program Sample	5	5	0	0	0	10						
1994/ All	14	16	22	0	0	52						
1996/ Graduating Seniors	4	5	0	0	0	9						
1999-2001/ Undergraduate Sample	0	0	0	0	0	3	12	16	48	45	0	121
1999-2001/ Graduate Sample	11	8	15	14	20	78	12	10	0	0	0	22
2005/ Graduating Seniors							0	0	0	0	6	6
TOTAL	38	44	37	14	23	156	24	26	48	45	6	149

\* The numbers are for the summer bridge process evaluation item. For students who completed a survey on two or more occasions, the most recent survey was used (except in the case of the 1996 survey, due to the different response format).

Table 6B-2: Process Evaluation Surveys: Item Wording and Rating Scale Over Time (summer bridge as sample item)

Sample Survey Item	Rating Scale				
<b>1992 and 1993 Surveys</b>					
Rate the extent to which each item listed below is a source of academic or emotional support for you: 16. Summer Bridge Program.	Not at all supportive			Moderately supportive	Extremely Supportive
	1	2	3	4	5
<b>1994 Survey</b>					
20. To what extent did your experience during the <u>summer bridge program</u> positively impact on your academic success	Not at All		Moderate Extent		Large Extent
	1	2	3	4	5
<b>1996 Survey**</b>					
Please indicate the type of impact the following aspects of the Meyerhoff program had on your experience as a Meyerhoff student. c. Summer bridge program	Great Negative Impact	Some Negative Impact	No Impact	Some Positive impact	Great Positive impact
	1	2	3	4	5
<b>1999, 2000, 2001, and 2005 Undergraduate Surveys</b>					
Please indicate the degree to which the following aspects of the Meyerhoff Program were helpful in your experience as a student. 11. Summer bridge program	Not at all helpful	A little helpful	Somewhat helpful	Helpful	Very helpful
	1	2	3	4	5
<b>1999, 2000, and 2001 Graduate Student Surveys</b>					
Please indicate the degree to which the following aspects of the Meyerhoff Program were helpful in preparing you for your current experiences in graduate school: 11. Summer Bridge Program	Not at all helpful	A little helpful	Somewhat helpful	Helpful	Very helpful
	1	2	3	4	5

\*\* To increase consistency with other survey scales, responses were recoded: 1, 2 or 3 as a 1, and 4 as a 3 (5 was retained as a 5).

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## CHAPTER 7

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### IS ANYTHING RACE NEUTRAL? COMPARING “RACE-NEUTRAL” ADMISSIONS POLICIES AT THE UNIVERSITY OF TEXAS AND THE UNIVERSITY OF CALIFORNIA



Jorge Chapa

Catherine L. Horn



“*To oppose racism one must notice race.*” Omi & Winant (1994, p. 158)

The 1990s brought to an end race-conscious affirmative action in higher education admissions in both California (as a result of SP-1 and Proposition 209) and Texas (because of the Fifth Circuit’s decision in *Hopwood v. Texas*). However, the “race-neutral” policies, practices, and results of those adopted by these states have been mixed. The number of African American and Latino students at the University of California (UC) dropped precipitously and now, a decade later, is still below 1995 levels. Texas adopted the Top Ten Percent Plan (TTPP), and the University of Texas at Austin (UT) now has more minority students than ever. In addition to increasing the number of Black and Latino students, TTPP has increased the geographic diversity of UT undergraduates (Montejano, 2003).

The goal of this chapter is to examine the prospects for increasing African American and Latino representation in higher education in the time following the U.S. Supreme Court’s decision in *Grutter v. Bollinger*. It first explores what lessons can be learned from Texas’ experience with the TTPP, in particular at UT. UT’s changes to their undergraduate admission process post-*Grutter* are further considered in the context of growth and demographic shifts in the last decade. Texas in general and UT in particular have an opportunity to capitalize on an increasingly racially diverse traditional college-age student population. The chapter then reassesses how UC determines eligibility and how its current practice minimizes minority eligibility. It examines UC’s percent plan, Eligibility in the Local Context (ELC), which admits the top four percent of California’s high school graduates to UC. We will argue that while ELC is not a diversity enhancing program, it does offer a useful lesson. We also briefly review *Castaneda v. Regents of the University of California*, a suit filed in 1999 in federal court on behalf of African American, Latino, and Pilipino American applicants to UC Berkeley. The chapter concludes with a discussion of the policy implications of such efforts and needed research moving forward.

### Texas’ Top Ten Percent Plan

While many policies with peripheral bearing on Texas college student access and success have been implemented and will be discussed later in the chapter, House Bill 588 – The Top Ten Percent Plan (TTPP) – most directly influences institution-level admission decision making.<sup>1</sup> With its passage in 1997, the TTPP guaranteed automatic admission for every student in the top 10 percent of his/her graduating classes to any general academic teaching institution of choice.<sup>2</sup> The policy was put in place as a reaction to the Federal Fifth Circuit Court of Appeals *Hopwood*

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<sup>1</sup> See Horn and Flores (2003) for a full description of the program.

<sup>2</sup> As defined by Section 61.003 of the Texas Education Code, “general academic teaching institution” includes the following schools: The University of Texas at Austin; The University of Texas at El Paso; The University of Texas of the Permian Basin; The University of Texas at Dallas; The University of Texas at San Antonio; Texas A&M University, Main University; The University of Texas at Arlington; Tarleton State University; Prairie View A&M University; Texas Maritime Academy; Texas Tech University; University of North Texas; Lamar University; Lamar State College - Orange; Lamar State College - Port Arthur; Texas A&M University - Kingsville; Texas A&M University - Corpus Christi; Texas Women’s University; Texas Southern University; Midwestern State University; University of Houston; University of Texas - Pan American; The University of Texas at Brownsville; Texas A&M University - Commerce; Sam Houston State University; Southwest Texas State University; West Texas A&M University; Stephen F. Austin State University; Sul Ross State University; Angelo State University; The University of Texas at Tyler; and any other college, university, or institution so classified by law.



ruling, which restricted universities in that jurisdiction from considering race in admissions decisions (Horn & Flores, 2003). The Texas 10 percent plan was highlighted in a 2003 Office of Civil Rights Document as one of several “innovative ‘race-neutral’ programs being implemented across the country” (United States Department of Education, 2003, p. iv). It was not intended, however, to act as a direct and effective substitute for race-conscious policies. As the creators of the plan note, “We do not believe that the Ten Percent Plan will reverse the losses that the elimination of affirmative action occasioned or become the alternative that the President and others believe it has become” (Brief of the Authors of the Texas Ten Percent Plan, 2003, p. 3).

### Automatic Admission Policies and Segregated High Schools

School segregation has been, and continues to be, a major obstacle in the attainment of equal educational opportunity for a substantial proportion of African American and Latino students. Many authors have traced the roots and contemporary conditions of segregation faced by African American and Latino students and have underscored the tight connections between racial/ethnic isolation and limited educational opportunities. For example, Linda Darling-Hammond (1998) notes that:

[E]ducational experiences for minority students have continued to be substantially separate and unequal. Two-thirds of minority students still attend schools that are predominantly minority, most of them located in central cities and funded well below those in neighboring suburban districts. Recent analysis of data prepared for school finance cases in Alabama, New Jersey, New York, Louisiana, and Texas have found that on every tangible measure – from qualified teachers to curriculum offerings – schools serving greater numbers of students of color had significantly fewer resources than schools serving mostly white students. (p. 29)

The linkages between school segregation and adverse learning and achievement outcomes are easy to find. Observed correlations between segregation and educational outcomes are negative and robust (Orfield & Yun, 1999). As the minority student body increases in size and concentration, several schooling problems likewise increase. Achievement scores on standardized tests at all grade levels decline. At the secondary level, when segregation increases, the dropout rate rises, the number of college preparatory courses offered decreases, the percentage of students taking college entrance examinations decreases, and the average college admissions test scores decline. Segregation of school-age African American and Latinos is highly related to their low participation in higher education (Orfield & Lee, 2005; Orfield & Yun, 1999). Jeannie Oakes of UCLA found that “African American and Latino students were much less likely than White or Asian students with the same test scores to be placed in accelerated courses” (Oakes quoted in Gordon, Piana, & Keleher, 2000). This variability in educational opportunities available in public schools offers a strong argument for the determination of eligibility for admissions in the context of resources available to students in their high schools. The initiation of automatic admission policies attentive to those high school factors may be a small step in this direction.

While a handful of states in the country implement policies similarly named, wide variations exist as to the actual guarantees provided students (see Horn & Flores, 2003, for full discussion).

At present, Texas' plan affords the most generous provisions for post-secondary entry and has been in place for the longest period of time. Further, as will be discussed in detail later in the chapter, it is now being implemented in the context of the reversal of *Hopwood* and in conjunction with the reinstatement of affirmative action policies at some universities in the state. Having been held out nationally as implementing an effective state-level "race-neutral" admission policy as well as because of its current qualities that forecast the demographic direction of the country, then, Texas represents a key state in which to explore admission decision making and the goal of racial/ethnic diversity on college campuses. Within this state, one institution – the University of Texas at Austin – has particular relevance to this discussion and is now where the chapter turns.

### Pre-Gratz and Grutter UT Admissions Policies

Current admissions practices at UT Austin are best understood in the context of the university's policies prior to the Supreme Court's 2003 decisions in *Grutter v. Bollinger* and *Gratz v. Bollinger*.<sup>3</sup> Since the 1970s, UT had considered race as a factor in its admissions decisions at both the undergraduate and graduate and professional school levels (*Hopwood*). In the 1980s and early 1990s, for example, the Law School placed prospective students in a presumptive admit, discretionary, or presumptive denial category based on a Texas Index score<sup>4</sup> but set different cut off scores for Mexican American and Black applicants to be presumptively admitted (*Hopwood*).<sup>5</sup>

In a challenge to race-conscious policies, Cheryl Hopwood and three other White students filed suit against the University of Texas law school in 1992, arguing that their Fourteenth Amendment right to equal protection had been violated (*Hopwood*). A 1996 Fifth Circuit Court of Appeals decision ruled in favor of the plaintiffs, arguing,

within the general principles of the Fourteenth Amendment, the use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of equal protection.... It treats minorities as a group, rather than as individuals.... The use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants. (*Hopwood*)

The decision revoked UT's ability to consider race in its admissions decision making and also left the state struggling with how to pursue an interest in student-body diversity within the new legal guidelines. In response, UT Austin moved to holistic review of freshman applications,

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<sup>3</sup> See Horn and Flores (2003) for a discussion of Texas public universities' historical struggles with racial segregation and broader context in which race-conscious admissions policies were applied.

<sup>4</sup> Specifically, the Texas Index was weighted 60 percent LSAT score, 40 percent undergraduate GPA. The formula was  $LSAT + (10)(GPA) = TI$  (*Hopwood v. Texas*).

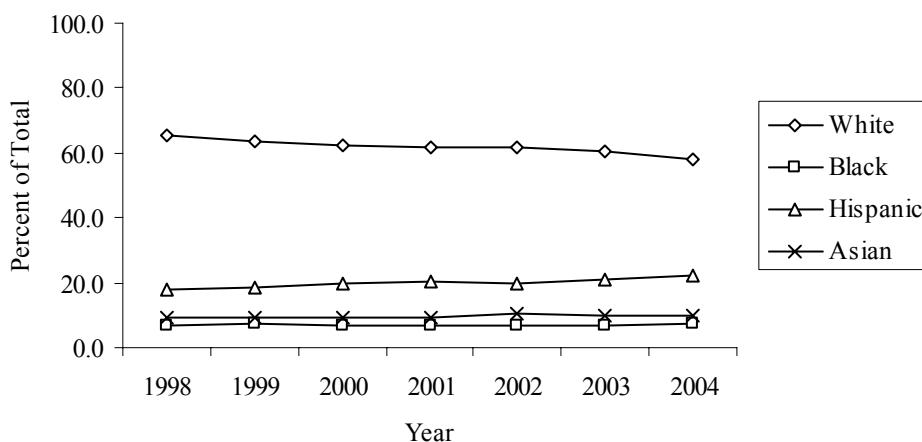
<sup>5</sup> Even with such efforts, Blacks and Hispanics continued to be underrepresented relative to their representation in the state's traditional college-age population (Chapa, 2002). Moreover, substantial proportions of admitted students, specifically undergraduates, originated from a relatively small number of Texas high schools. Montejano (2003), for example, found that 64 Texas high schools accounted for half of the Fall 1996 entering class at UT Austin.

“broadening the factors used to make admission decisions to include subjective criteria (e.g., essays, awards and honors, service, work experience) and special circumstances that put an applicant’s achievements into context” (University of Texas at Austin, 2005, p. 30). At the state level, a group of advocates and legislators proposed the 10 percent plan by which all students at the top of their graduating high school classes would have automatic admission to the public university of their choice (Horn & Flores, 2003). House Bill 588 became law in 1997; UT admitted its freshman class under the new state guidelines in the Fall of 1998.<sup>6</sup>

### Percent Plan Admissions

Looking specifically at the 10 percent plan, Figures 7-1 and 7-2 show freshman, by race/ethnicity, admitted under this policy. Across the system, Whites constituted a decreasing share of the 10 percent plan admissions from 1998 to 2004, moving from 66 to 58 percent of the total. Black representation remained constant at 7 percent, and Asian proportions rose one percentage point over the six-year period (to 10 percent by 2004). The net proportional gains largely were achieved by Hispanics, who rose from 18 to 22 percent of the system-wide 10 percent plan admissions. At UT, 10 percent plan White, Black, and Latino student admissions constituted a slightly lower proportion of the total relative to the state as a whole (Figure 7-2). Asians, however, comprised a much greater share of the total 10 percent plan admissions at UT (roughly 20 percent in 2004) compared to the state.

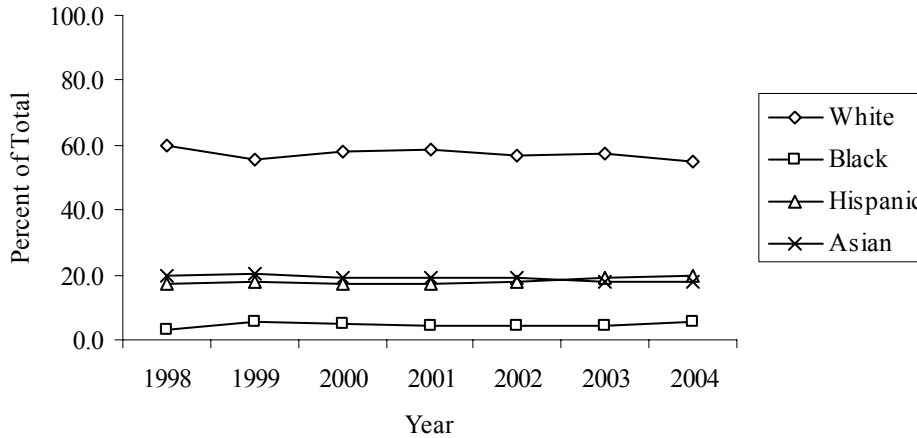
Figure 7-1: Texas System-Wide 10 Percent Plan Summer/Fall Freshman Admissions, by Race/Ethnicity, 1998-2004



Note: Percentages do not sum to 100 due to rounding error and the exclusion of American Indian, International, and “unknown” students. Source: Texas Higher Education Coordinating Board. First-Time Undergraduate Application, Acceptance, and Enrollment Information, Summer/Fall 1998-2004 (<http://www.txhighereddata.org/Interactive/AppAccEnr.cfm>).

<sup>6</sup> The 10 percent plan was not a large change from what UT Austin already had in place, however; between 1989 and 1994, all students graduating in the top 10 percent of their classes were already being automatically admitted (United States Department of Education, 2003). What did change substantially, however, was the outreach and support built around the 10 percent plan (see Horn & Flores, 2003), which has to be strongly considered in understanding the relative effectiveness of the 10 percent plan.

Figure 7-2: UT Austin 10 Percent Plan Summer/Fall Freshman Admissions, by Race/Ethnicity, 1998-2004



Note: Percentages do not sum to 100 due to rounding error and the exclusion of American Indian, International, and “unknown” students. Source: Texas Higher Education Coordinating Board. First-Time Undergraduate Application, Acceptance, and Enrollment Information, Summer/Fall 1998-2004 (<http://www.txhighereddata.org/Interactive/AppAccEnr.cfm>).

### The 10 Percent Plan Post-Grutter

In implementing this newly revised process after the *Grutter* decision, UT officers face the unique situation of putting into practice race-conscious admissions concurrent with the automatic admission policy. UT administrators have publicly voiced frustration about the restrictions the 10 percent plan has unintentionally placed on that process, although their argument has been to amend rather than end the practice altogether (Grissom, 2005a). As the Texas state legislature debated the issue in the Spring 2005, President Faulkner suggested that law be modified to cap the number of students admitted under it, suggesting that only half of the freshman class be comprised of 10 percent plan qualifiers (Grissom, 2005b). Additionally, further revisions were suggested by various senators. For example, Senator Royce West of Dallas sponsored legislation to limit the automatic admissions guarantee only to students who have completed the state’s recommended or advanced high school programs (Grissom, 2005b). In contrast, some critics simply wanted the plan rescinded altogether (Fischer, 2005). The 2007 Texas Legislative session brought further strong debate. Advocates from districts with large minority populations and from rural areas joined together, keeping the TTPP in place as originally written (Jaschik, 2007).

### TTPP Student Performance

The latest data show that TTPP students have better grades across the board and within every band of SAT scores. TTPP students also have greater retention and graduation rates than non-TTPP students (UT Austin, 2005). Additional research has compared TTPP students to similarly credentialed non-TTPP students and concluded that TTPP students were outperforming other students (Walker, 2000; Gary Hansen, personal communication). The campus has also benefited. Bruce Walker notes, “Because the Ten Percenters were better prepared, the Austin campus has

been able to scale back remedial courses and increase honors sections” (Interview with Bruce Walker, Vice Provost and Director of Admissions, reported in U.S. Department of Education, 2003).

It is important to note that the increase in minority students is not an automatic consequence of the enactment of HB 588. An important part of the success of the TTPP was vigorous recruitment and targeted need-based scholarships. In fact, research has shown that knowledge about TTPP has “significantly influenced college intentions and the likelihood of actual enrollment in a four-year institution” (Tienda, Cortes, & Niu, 2003). The law seemed to have a particularly marked “contagion” effect on raising the higher educational aspirations of minorities and helping them focus on meeting the requirements for college. Students who knew a lot about TTPP were more than five times as likely to enroll in a four-year institution as the comparable student who did not know about the law (Tienda, Cortes, & Niu, 2003).

#### California’s Top 12.5% and Top 4% (Eligibility in Local Context (ELC))

California’s Master Plan for higher education dictates that the University of California (UC) system educate the top 12.5% of the state’s high school graduates (different from the TTPP, which applies to the graduating class of each high school). California State Senator Teresa Hughes proposed a State Constitutional Amendment that would admit the top 12.5% of each high school to UC, but it failed. However, UC did adopt a top 4% plan, known as Eligibility in Local Context (ELC). The plan was primarily a way to increase the size of the applicant pool to the mandated 12.5% level without “lowering standards.” The statewide pool is determined on the basis of standardized test scores, grade-point average, and curriculum. Because of declining test scores, by 1998 the standards that previously had been met by the top 12.5% of all California high school graduates were now only met by 11.1%. In order to meet its mandate, UC had to increase the size of the pool. Including the top 4% of the graduates of each high school would make it possible to bring the size of the pool back up to 12.5%. In terms of diversity, however, African Americans would comprise only 2% of the UC eligible pool whether it was identified using the 4% plan or the 12.5% statewide pool. In simulations, Latino eligibility increases by one percentage point (author calculations of data presented in Geiser, 1998).

ELC does create a very important opportunity for students who do not score well on standardized tests. First of all, it does make the competition for eligibility more fair, because students are compared to other students in the same high school with the same access to resources rather than comparing students from high-performing, well-funded high schools to those from under-funded, low performing schools. The ELC admissions process requires and encourages applicants to complete the full battery of courses required by UC (UCOP, 2003a). Students from high schools that rarely, if ever, send students to UC now have an opportunity to be admitted. If the students with low test scores can succeed at UC, then it provides an effective argument for increasing the percentage of students admitted on the basis of their class rank rather than their test scores.

Since it focuses on the top 4% of graduates, many of whom would also be in the statewide top 12.5% pool, ELC will admit relatively few new students. It has added about 3,600 students to the eligibility pool (U.S. Department of Education, 2003), but it has also encouraged many other

potentially eligible students to complete the required coursework and to apply to UC. The manner in which ELC was implemented is very instructive.

ELC has evolved quickly into a successful and popular program in large part because it functions to motivate students to achieve and apply and because it provides the University and its individual campuses with a way to contact these students early in their senior year and stay connected with them throughout the application process. Presumably some proportion of the students identified as ELC would not have finished the eligibility requirements or would not have applied to UC. The ELC identification process alerts these students that eligibility is within reach and provides a clear and inviting path to UC enrollment. As a result, virtually all of the ELC students attain full statewide eligibility. The positive message the ELC program sends is amplified by individual campuses, several of which aggressively recruit ELC students during their senior year and all of which include in their admission policies additional consideration for ELC applicants. (University of California Office of the President [UCOP], 2003a, pp. 10-11)

The biggest impact of ELC lies in its capacity to function as an effective means of recruiting applicants. Many observers have made the same point about Texas' TTPP. (See, for example, Chapa, 2002; Tienda, Leicht, Sullivan, Maltese, & Lloyd, 2003; Walker, 2000.) ELC has increased applications from high schools that previously had a small number of applicants to UC, including rural and urban rather than suburban high schools. And finally, the proportion of African Americans and Latinos participating in the program is increasing (UCOP, 2003a).

#### *Castaneda v. Regents of the University of California and Comprehensive Review*

The same strong association of racial and ethnic segregation with limited educational opportunities discussed earlier was the basis of a lawsuit filed in 1999 by the NAACP Legal Defense and Educational Fund, Asian Pacific American Legal Center of Southern California, Mexican American Legal Defense and Educational Fund, Lawyers' Committee for Civil Rights of the San Francisco Bay Area, and the American Civil Liberties Union of Northern California in federal court on behalf of African American, Latino, and Pilipino American applicants to UC Berkeley. *Castaneda v. Regents of the University of California* alleged that the university's admission procedures unfairly disadvantaged applicants of color in violation of their federal civil rights by not taking into account the full range of indicators of "merit." The plaintiffs demonstrated that high schools serving African American and Latino students offered fewer AP courses than schools serving Anglos (Klugman, 2005).

In the Fall of 1998, the University implemented a new admissions policy that plaintiffs claimed discriminated against and unfairly diminished the admission chances of qualified students of color by relying heavily on standardized tests such as the SAT....

In 1998 over 750 African American, Latino and Pilipino American applicants with grade point averages of 4.0 or better were denied admission. While white students with 4.0

GPA or better had a 48.2 percent chance of admission, Latino students had only a 39.7 percent chance, African American students a 38.5 percent chance and Pilipino students a 31.6 percent chance. (NAACP Legal Defense and Education Fund, 2003)

The case was settled because of UC's decision to use "comprehensive review" for every applicant. Faculty committees on each UC campus have developed criteria and procedures to be used in the review of all aspects of every application (UCOP, 2003b). Comprehensive Review assesses the applicant across a variety of broadly categorized academic and supplemental characteristics (e.g., in their specific context of their high school circumstances) (Horn & Marin, 2006). For example, at UC Berkeley, an applicant without AP credit from a high school in which most college-bound students take several AP courses would have his/her application downgraded in comparison to an applicant from a high school that did not offer AP courses (U.S. Department of Education, 2003).

Initially, the review process was quite controversial. In the Fall of 2002, the Chair of the UC Board of Regents, John Moores, released a report that was highly critical of the first freshman class admitted under Comprehensive Review. Many of the criticisms, however, could be quite reasonably explained. For example, half of the admitted applicants with SATs below 1,000 were in the top 4% of their high school class. Similarly, almost all of the rejected Berkeley applicants with high SAT scores either had "withdrawn their applications, applied to extremely competitive engineering programs, or faced stiffer competition because they were not California residents" (Equal Justice Society et al., 2003, p. 3).

Like ELC, Comprehensive Review may be a step in the right direction. Both potentially counteract, albeit to a small extent, the unequal access to K-12 educational opportunities faced by African Americans, Latinos, poor people and others. Data available show that these two measures, along with vigorous outreach efforts, have been associated with an increase in the proportion of underrepresented minorities in UC's freshman class since the low point reached in the Fall of 1998 (UCOP, 2003b).

### Race-Conscious Affirmative Action since *Grutter*

While the Supreme Court's decision is replete with caveats and conditions, *Grutter* permits race-conscious affirmative action in college admission. It is now possible to consider initiatives that will make access to higher education more equitable and that will result in a more racially and ethnically diverse student body. However, in order to do so, universities must now make the judgment that student diversity is essential to their educational mission. A racially and ethnically diverse student body promotes learning. Moreover, social justice and equity concerns demand that the racial and ethnic composition of university students look more like the composition of the college age population.

Supporters of affirmative action saw the *Grutter* decision as a victory affirming the right of universities to practice race-conscious affirmative action. However, the victory celebration seems to have been premature. The same individuals and groups that had spearheaded the legal attacks on affirmative action vowed to continue their efforts. For example, the National Association of Scholars has announced its intention to use open-records laws to examine how selective public

colleges are considering race and ethnicity in their admissions practices. The Center for Equal Opportunity and the Center for Individual Rights are also participating in this campaign (Schmidt, 2004). Legal challenges to voluntary desegregation plans provide additional evidence that race-conscious policies continue to be under attack. However, even though the U.S. Supreme Court's recent ruling in *Parents v. Seattle School District* and *Meredith v. Jefferson County* struck down the voluntary school integration plans in Seattle, Washington and Louisville, Kentucky, it upheld the ruling in *Grutter*. Moving forward, a great deal of careful research needs to be done to assess exactly how universities have implemented *Grutter*, what impacts these changes have had, and what can be learned by K-12 and higher education policymakers alike. However, even when affirmative action was practiced vigorously without fear of constant legal attack, minorities were severely underrepresented in colleges and universities. Now, in its more cautious form, we have to expect that affirmative action will have a more limited impact.

### Where Do We Go From Here?

Studying automatic admission policies such as the TTPP and the 4 percent plan is an important component in understanding the complexity of college admissions in a post-*Grutter* setting. Both of these percent plans were combined with vigorous recruitment efforts. Also, both had the advantage of being able to give potentially eligible juniors and seniors the certainty of admission if they met very clear and specific conditions. In Texas, these conditions included graduating in the top ten percent of their class, taking the SAT, and completing an application to UT Austin. In California, ELC students met analogous conditions plus completing the UC prerequisite coursework.

If UC's procedures were changed to replicate the success of the Texas plan, and to admit the top 12.5% of ***each*** high school based on class rank, then the eligibility pool would contain many more African Americans and Latinos. A simulation based not on the class rank of high school graduates, but on the Academic Index scores within each school, indicates that such an admission policy would likely increase African American eligibility to 6.6% and Latino eligibility to 7.2% (Geiser, 1998). There is nothing else being discussed or proposed that has the likely possibility of ***doubling*** the proportion of minorities admitted to a selective university.

California had 376,000 high school graduates in 2004. Of these, 116,000 had finished the A-G courses required by UC which enrolled 28,000 first-time freshmen, or about 25% of the A-G graduates (California Postsecondary Education Commission, 2005). There are many good reasons to think that many more than one quarter of these students could succeed at UC. The question is how to choose them. A random drawing among qualified applicants could itself be race neutral. It is very likely that the discriminatory and biased aspects of our educational system would have diminished the number of African Americans and Latinos among the 116,000 high school graduates who had completed the A-G requirements.<sup>7</sup>

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<sup>7</sup> Graduate and professional schools typically face the same problem of having many more qualified applicants than they can admit. Many of these institutions typically use standardized test scores to choose the "best" among these applicants. This procedure typically minimizes the number of admitted African Americans and Latinos. A random drawing of qualified applicants would be a race-neutral means to increase the representation of these minorities.



California faces the special challenge of Proposition 209. This proposition prevents the University of California from practicing race-conscious affirmative action. (See California Secretary of State's Office, 1996.) If it should ever come about, an initiative to admit the top 12.5% of each California high school to UC in order to increase the number of minorities would likely be the target of legal action. However, the same initiative, if passed with the intent of democratizing access to UC by giving students from all socio-economic backgrounds access to UC, seems much less susceptible to a successful legal action.

Ultimately, the racial impact of various policies depends on the political context in which these policies are chosen and implemented. As debate continues around the parameters of the percent plans, careful consideration is required of how those programs (alone and in conjunction with outreach and retention services) affect racial/ethnic diversity at elite campuses. Additionally, states need to make available and researchers need to carefully monitor the implications of peripheral admissions policies, particularly for students starting at a community college with the intent to transfer. While beyond the scope of this chapter, the racial/ethnic effects on enrollment of broader policy issues such as decentralization of tuition need to be determined. Further, in-state tuition policies for undocumented immigrants in Texas may also result in important enrollment changes that need to be carefully studied. The different "race-neutral" policies at UC and UT produce results with widely disparate racial impacts. These results and a very large related literature suggest that nothing is race neutral.

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## CHAPTER 8

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### **RACE-CONSCIOUS STUDENT FINANCIAL AID: CONSTRUCTING AN AGENDA FOR RESEARCH, LITIGATION, AND POLICY DEVELOPMENT<sup>1</sup>**



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<sup>1</sup> This chapter incorporates research previously conducted with support from two studies: one conducted for the NAACP Legal Defense Fund, the other for plaintiffs in *White v. Engler*. C. G. Chung assisted with analyses for the *White v. Engler* case. This support is gratefully acknowledged. The opinions expressed in the paper are the authors' and do not reflect policies or positions of funding organizations.



The *Gratz* and *Grutter* decisions did not settle issues related to the legality of race-conscious strategies for outreach and student aid (Ancheta, 2006; Banks, 2006; both are chapters in this volume). Programs that are race exclusive may be especially vulnerable, although there still may be a sound basis for defense. Changes in college prices resulting from the decline in federal need-based grant aid (Advisory Committee on Student Financial Assistance, 2002), the rise of state merit programs (Heller & Marin, 2002), and the emergence of targeted, market-oriented grant aid as tools in institutional enrollment management (McPherson & Schapiro, 1997) have increased inequality in the opportunity to enroll in college across racial groups since 1980 (St. John, 2003). This condition has only been partially mitigated by race-conscious aid programs;<sup>2</sup> however, the extent to which the legal challenges to race-conscious aid awards as targeted<sup>3</sup> forms of grant aid, actually dismantle these programs, it will be increasingly important to adapt other forms of aid (including other merit and targeted aid programs) to ensure diversity in enrollment in institutions whose missions align with this goal.

This chapter examines how research can inform advocates of equal educational opportunity about: 1) responses to legal challenges to race-conscious aid; and 2) the redesign of merit and targeted grant programs to improve diversity and equalize opportunity. We examine federal, state, and institutional student aid in relation to the gap in enrollment opportunity and the role of race-conscious student aid. The review of federal student aid provides context for the legal issues facing states and institutions that choose to respond to legal challenges to race-conscious aid programs. The sections on state and institutional aid provide case studies of legal analyses related to financial aid and educational opportunities across race/ethnic groups. The conclusion discusses how research can inform legal and policy agendas for improving diversity in higher education. The policy agenda for advocates of equal opportunity must recognize the complexities of public finance introduced by the new emphasis on privatization<sup>4</sup> of public higher education (Priest & St. John, 2006).

### Federal Student Aid

It is sad as well as ironic that the federal efforts to desegregate colleges, dating back to a series of U.S. Supreme Court decisions in the 1940s and 1950s, started in earnest in 1977 after the *Adams* decisions ordered states to develop plans for desegregation in 19 states with historically black colleges (St. John, 1998; Williams, 1988), but were quickly followed by the Middle Income Students Assistance Act of 1978 (MISAA)—legislation that is symbolic of the shift away from equal opportunity as the goal of federal student financial aid programs. Perhaps the most important indicator, with respect to the goal of ensuring equal educational opportunity in the

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<sup>2</sup> *Race-conscious* grants target underrepresented students of color. *Race-sensitive* grants consider race along with other factors. *Race-exclusive* grants are limited to students of color and may also consider merit, need, or both.

<sup>3</sup> *Targeted* grants are defined as awards that emphasize a group of people, based on their characteristics. This form of aid could be reported as need-based, or non-need based. Since states report on all non-need grants in the same category, targeted race-conscious grants are often categorized with merit grants in analyses of student aid (e.g., Heller & Rasmussen, 2002). Given the importance of understanding the role of student financial aid in ensuring diversity in college enrollment, it is necessary to distinguish targeted grants from purely merit and need-based awards.

<sup>4</sup> *Privatization* is the trend toward reduced government (federal, state and local) financial support of postsecondary education, increasingly shifting the financial burden to individuals to fund their postsecondary educations within public institutions. For related research, see Heller, 2006.

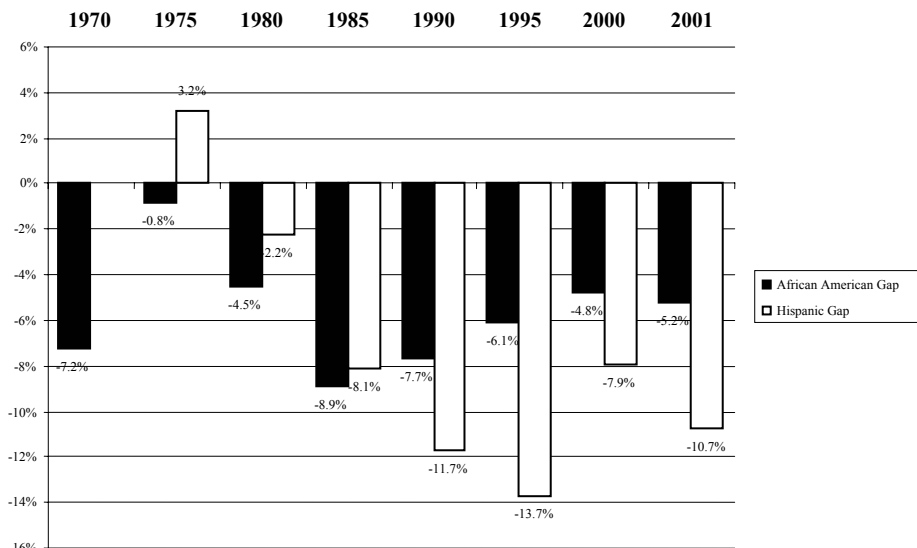


United States, is whether the financial aid strategies used by states and the federal government have improved or accentuated the gap in college enrollment rates across groups. The review of the government role starts with a review of trends in enrollment, then examines changes in federal and state student aid policies.

*The Opportunity Gap*

A substantial enrollment gap opened after the maximum Pell award for individuals failed to keep pace with rising college costs.<sup>5</sup> This gap persisted through the 1980s and 1990s. Compared to whites, the differential was 7.7 percentage points for African Americans and 11.7 for Hispanics in 1990. These differentials had lessened only slightly by 2000 (to 4.8 and 7.9 percentage points, respectively). In short, there has been a slight reduction in the gap since 1985, the period of the most severe inequality, but the equality of the mid-1970s has not been restored.

**Figure 8-1: Differentials in College Enrollment Rates for Hispanic and African American Compared to White 18- to 24-Year-Old High School Graduates**



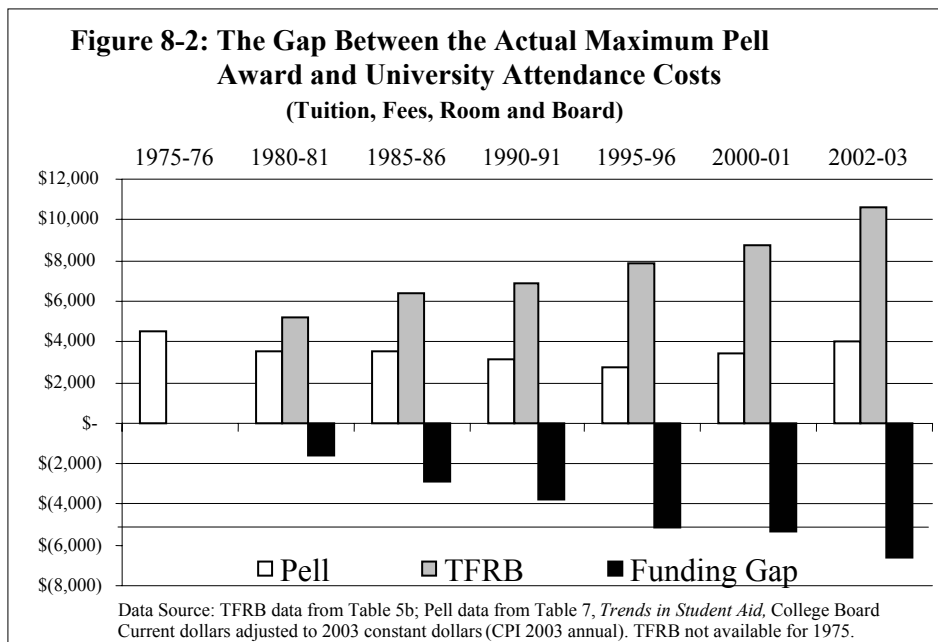
Note: Adapted from St. John, 2003; Data from *Digest of Education Statistics 2002*, p. 10, Table 4

Federal Pell grants played a crucial role in equalizing educational opportunity from 1973 until 1978, when financial aid for middle-income students became a priority. And Pell grants rapidly declined in their purchasing power after they were fully implemented, as is evident in Figure 8-2. In 1975 the maximum Pell award actually exceeded the average tuition in public colleges, but the half-cost provisions limited the maximum award to half of the total cost of attendance, so many public college students did not get these awards. As the purchasing power of Pell decreased, these cost provisions were dropped from the Pell program.

<sup>5</sup> The Pell Grant maximum award actually declined in the late 1980s (as discussed in reference to Figure 2 below).

A comparison of Figures 8-1 and 8-2 illustrates that the rise in the unfunded Pell gap corresponds directly with the growth in inequality of enrollment opportunity. The decline in the purchasing power of Pell grants explains most of the increase in the gap during this period: the reforms in K-12 education and growth of encouragement programs, the policies thought to be linked to access, simply are not viable explanations (St. John, 2003; St. John, 2006). However, as is evident from the review of other policies below, state and institutional financing strategies also contributed modestly to the increased inequality.

The shift in funding students, especially through the development of loan programs that use private capital, continues to be a major stimulus for privatization. To deconstruct the underlying issues in this shift, we examine trends in funds for students through loan programs, funds through federal grants, and the purchasing power of Pell grants (award maximums in relation to costs of attending four-year colleges).



(Figure published previously in St. John, Tuttle, & Musoba, 2006.)

### *Federal Funding of Grant Programs*

Historically, before the Education Amendments of 1972, the federal government used targeted, specially directed grants (Finn, 1978; St. John, 2003) as the primary means of financing students. The GI Bill of Rights and subsequent veteran benefit programs targeted ex-servicemen, and the Social Security Survivor Benefits targeted dependents of deceased working people. Both programs were funded at substantially higher levels than any other federal programs before 1975, when the Basic Educational Opportunity Grants (now the Pell program) was fully implemented. The 1964 War on Poverty legislation funded Work Study programs and college access efforts, and the 1965 Higher Education Act marked the federal government's move into grants for the

poor. The shift away from targeted grants to need-based grants only took hold as the major federal role in student financial aid after 1973, and Pell grants were not fully implemented for another three years.

The Pell Grant program has been the major federal need-based grant program since it was implemented, as Basic Educational Opportunity Grants, in 1973. Pell Grants provide a need-based, voucher-like grant awarded directly to students by the federal government. The college disburses funds, but the amount of funds colleges receive and disburse through Pell is dependent on the number of low-income students who enroll.

Other than Pell, the federal government funds Leveraging Educational Assistance Partnerships (LEAP), Supplemental Educational Opportunity Grants (SEOG), and other grants. SEOG is an artifact of an earlier period when the federal government gave block grants to colleges as a means of funding students. LEAP is funded at one-third by the federal government and two-thirds by states. It is woefully under funded, given its potential for improving unequal opportunity. If LEAP had been appropriately reconstructed, almost two million students could have gone to college in the 1990s (St. John, Chung et al., 2002).

The story of federal funding for Pell (Figure 8-3) is far from compelling. Funding rose slightly during the 1980s, from about \$5 billion in 1980 to nearly \$7 billion in 1990-91, as the Reagan administration retargeted the program on low-income students. One of the ironies of this period was that it was possible to redirect funds from middle-income to low-income students by lowering the maximum award (St. John & Byce, 1982). Reductions in the award maximum did not hurt low-income students who enrolled in four-year colleges in the early 1980s because there was a half-cost provision: it was not possible to secure a grant of more than half the cost of attendance, and during this time public colleges still had low tuition. However, as tuition rose, the half-cost provision was dropped (St. John, 2003).

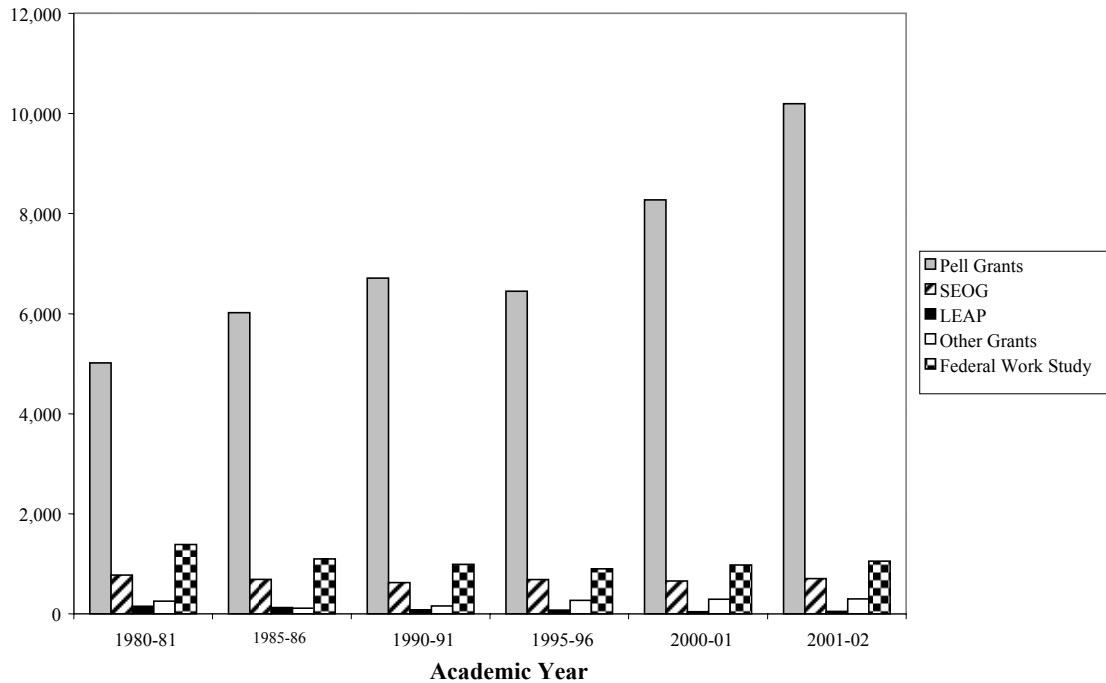
Funding for Pell actually dropped during the early Clinton years as the federal government, sadly, allowed inequalities in enrollment opportunities to grow (Ellwood & Kane, 2000; St. John, 2003). There has been some increase in funding for Pell in recent years, growing to more than \$10 billion in 2001-02, indicating that the G. W. Bush administration has been more responsive to the equity issue than the Clinton administration was. However, the increase in funding for Pell does not mean that low-income students have been better able to pay the costs of attending, as was noted in the discussion of the purchasing power of Pell above.

### *Federal Privatization and Unequal Opportunity*

Privatization of public higher education may have been stimulated by federal policy, including the extensive use of private capital for college students who borrow to pay the higher costs of attending college (St. John & Wooden, 2006). The growth in federal loans, coupled with the decline in the purchasing power of Pell grants, has been a major catalyst for the growth in educational inequality since 1980. However, states are more directly responsible because they did not adapt to these new conditions in ways that maintain or improve equity in opportunity to enroll in higher education. Quite the opposite: state financing strategies have worsened the inequalities in opportunity since 1980, rather than reconstructing their financing policies in ways

**Figure 8-3: Federal Grant Aid for Postsecondary Education**

Millions of constant dollars (2002 base year)



Source: *Trends in Student Aid 2002*, Table 2, p. 7, Appendix B, p. 19. The College Board, 2002.

Note: Dollar amounts for 2001-02 are estimates. Figure from St. John & Wooden (2006).

that enhance equity. Race-conscious aid in states and institutions is appropriately viewed in this changing context of state finance, as well as of being an artifact of changes in federal policy.

### State Financing and Equal Opportunity

State financial strategies play an important role in equalizing access to higher education for diverse groups, especially for low-income students and people of color. In addition, the structural capacity of state systems (i.e., the number of seats available at public four-year, public two-year and private colleges as a percentage of the population) also influences access to postsecondary education, along with college enrollment levels, rates and persistence. That is, students cannot earn a postsecondary degree if sufficient openings do not exist at postsecondary institutions regardless of financial aid levels.

It is important to consider the role of state capacity in relation to state finance strategies when considering financial inequality in access. After reviewing changes in the state role, a case of the Michigan Merit Program is reviewed, to illustrate how research might inform litigation and policy development.

### *Understanding the Challenge in States*

A recent study of financial access examined the statistical associations between state finance strategies and college enrollment rates in the 1990s (St. John, Chung, et al., 2004). The study found the percentages of students enrolled in 1) private colleges and 2) public two-year colleges were positively associated with overall college enrollment rates, indicating that the capacity of the state system as a whole was crucial to expanding access to higher education. Enrolling in private colleges had a particularly strong association. It also found that funding for need-based and non-need grants were positively associated with enrollment rates, but need-based grants had a more substantial effect (the standardized coefficient was twice the size). Controlling for demographic variables, state tax rates, and student financial aid, tuition was not significantly associated with enrollment rates.

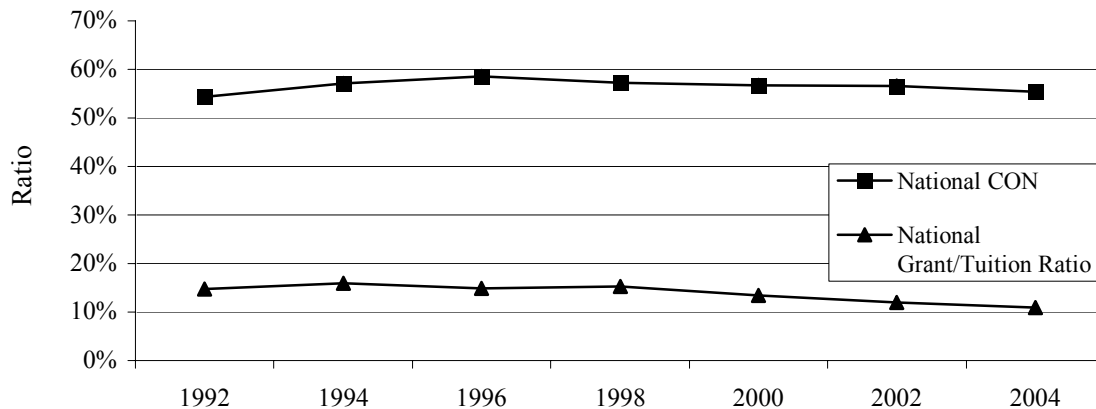
Historically, states developed publicly funded colleges as a means of expanding opportunity to higher education and, with awareness of this aim, most states maintained low tuition. In constant dollars, tuition was relative stable throughout the 1970s. But tuition began to soar in the 1980s due to cuts in federal need-based grants and in state funding for institution. In a tax cutting era, triggered by the 1978 passage of Proposition 13 in California and the Reagan tax cuts, costs were shifted to students, sometimes rapidly during recessions when state revenue declined. While state officials in higher education agencies used to argue that funding colleges was necessary to ensure that residents had access to higher education, they now rationalize tuition increases (Mumper, 2001). With the advent of state need-based grant aid in the early 1970s, a more diverse pattern of public financing emerged. High tuition coupled with large grants was often considered more economical, and some states followed this strategy for expanding access. Minnesota has provided an excellent model for coordinating state subsidies to colleges, tuition, and student aid (Hearn & Anderson, 1989, 1995), but few states achieved this level of coordination. In spite of the great diversity in the financial strategies used by states, it is possible to consider a standard for state financing that promotes equal opportunity for high- and low-income students who are similarly qualified.

*Coordination of Need-Based Grants with Other Finance Policies:* Given the role of tuition and grants in determining financial access to postsecondary education for low-income students, it is important to ask: What standard of equity should be maintained in states? It has been proposed that setting funding for state need-based grants at a level equivalent to about one-quarter of revenue from public college tuition charges would significantly address the needs of low-income and lower-middle-income students (St. John, 2006; St. John, Chung, et al., 2004). This equity standard would apply to the state investment in need-based grants on top of Pell Grants, funded at current levels and adjusted for inflation. In addition, it would refer to the overall funding level for need-based grants and not the average award for a student. That is, states would fund need-based grants at a level of at least one-quarter of the average public college tuition charges, but any given student might receive need-based grants of more than that, depending on his or her financial need. The average award would equal about half the average tuition charge. The total grants—Pell, state, and institutional grants—plus loans at the legal limit for the neediest students should equal total cost of attendance. The equity standard provides a basis for defining the state share of grants, given rising tuition charges in public colleges.

When the equity standard is met, states can fund grants equaling need for low- and lower-middle-income students. Since states essentially save a dollar of general funds for each tuition dollar charged at public colleges, it is more economical for states to invest one quarter of the “tax savings” from privatization into need-based aid rather than simply lowering tuition for all, as a means of ensuring equalized opportunity. This standard appears reasonable and logical, given the foundation provided by Pell Grants.

Nationally there has been a slight decline in state funding for need-based grants in relation to tuition charges since 2000, along with a slight decline in college continuation rates (Figure 8-4). During the same period there was a corresponding decline in the continuation rate (the ratio of high school graduates in the spring to college freshmen in the next fall). Underrepresented students of color are more seriously affected by this pattern because a larger percentage of these student groups are from families with low incomes.

Figure 8-4: National Trends in Continuation Rate and Grant/Tuition Ratio



Source: Calculated from NASSGAP reports and IPEDS data by authors.

*Merit Grants:* If states provided sufficient need-based grants to meet financial need and equalize opportunity for college enrollment and persistence for equally prepared students, then there would not be a need to adjust state grant programs to remove prejudice in awards and to reduce gaps in opportunity. However, these inequalities are increased when total government grants (state and federal need-based grants) fall short of a reasonable equity standard in states.

The recent expansion of merit grants in states has been associated with increased inequality (Heller & Marin, 2004). Inequality in K-12 schools also adds to the inequality that underlies merit aid programs. One approach to adapting merit grant programs is to index merit measures by the high school (Goggin, 1999; St. John, Simmons, & Musoba, 2002). Indexing SAT scores for the high school (i.e., using the positive or negative differential between the individual and the school average in lieu of the SAT) predicts college success as well as the actual SAT, indicating that competition with peers is a good indicator of future success (St. John, Hu, et al., 2001). The case study below considers how new conceptions of merit might inform the reconstruction of state grant programs to ensure more equity in education opportunity.

The literature on merit grants has often included non-need grants in the same category as need-based aid. Some studies refer to the category as merit-based (e.g., Heller & Rasmussen, 2002), while others used the term non-need (mostly merit) to recognize the complexity of state reporting (e.g., St. John, Chung et al., 2004), but neither approach fully recognized the complexity of targeting grants to attract special groups, including minority and low-income students.

*Targeted State Grants:* Targeted state grant programs have also gained some attention in states in recent years. For example, Indiana's Twenty-first Century Scholars Program (St. John, Musoba, et al., 2002) has received attention from Congress (Advisory Committee on Student Financial Assistance, 2002), becoming the model for revision of the Higher Education Act. This Indiana program provides a small grant supplement to students who would have received aid anyway, increasing the total grant modestly and guaranteeing it will be linked to tuition. Fear of college costs can be minimized for low-income families. The central targeting feature of the Indiana program—guaranteeing aid equaling tuition charges for low-income students who prepare for college—was included in some versions of the HEA and has been implemented in a few other states, like Oklahoma and Texas. A similar program has recently been proposed in Wisconsin. These programs are appropriately treated as need-based grant aid.

Indiana's Twenty-first Century Scholars are reported as need-based in the National Association of State Grant Aid Programs (NASSGAP) surveys and would have been counted as part of the need-based aid in the trend analyses, which is one of the reasons why these programs have not grown as rapidly as non-need (mostly merit) grants. However, revising student aid programs to include this feature can be costly and it requires a long-term financial commitment, obligating states to pay for students years in the future. Other alternatives, such as targeting supplemental aid to minority groups with lower rates of enrollment and persistence, such as the Wisconsin Lawton program, also merit consideration as alternative means of equalizing opportunities.

*Race-Conscious State Programs:* Before leaping to the conclusion that race-conscious student financial aid can solve the problem of the growing gap in inequality, it is important to consider trends in the use of race-based student financial aid. Table 8-1 provides trend information in the number of states that have at least one race-conscious grant or scholarship program, as compiled from the NASSGAP surveys (1984-2003).

The NASSGAP surveys of state grants are important sources of information that have been used in most studies of state grant programs. These reports distinguish two forms of grants: need-based programs that make awards based on financial need, possibly in combination with other factors; and non-need grants, which are awards made on criteria other than financial need. While merit grants, such as Georgia's Hope Scholarships, comprise a substantial portion of the non-need grants, they are not the only form of aid lumped into this category. Race-conscious state grant programs that do not have a financial need component would be reported as non-need grants, even if they did not have any merit criteria. And other targeted programs, such as tuition equalization grants for state residents attending private colleges, would be reported as non-need. In contrast, targeted programs restricted to middle-school students who qualify for the federal lunch program (e.g., Indiana's Twenty-first Century Scholars) are reported as need-based because of the central role of financial need. These distinctions are important precisely because

the dichotomies used in the past to distinguish among state grant programs may not be adequate to the task of building an understanding of targeted grant aid, especially race-conscious grants.

The number of states reporting they have programs that are either race-conscious or race-exclusive have grown steadily. In 1984, 16 states reported at least one program. Most of these states reported specialized programs for both African Americans and Native Americans. The total number of states reporting programs grew to 31 in 1996-2001. In 2003, 30 states reported having these programs even though legal challenges were being raised by this time.

It is also important to note that the number of race-exclusive grant programs also increased substantially during the period (see Table 8-2), as did the total number of programs. Most states with a program had more than one such program. Between 1984 and 2001 the number of race-exclusive programs grew from 22 to 55 and this number only dropped to 53 by 2003. In contrast the number of states that had race-sensitive programs grew from 5 in 1984 to 15 in 2000 and dropped to 12 by 2003.

These trends in the number of state programs that consider race as part of the award criteria reveals that the emphasis on race-conscious programs has increased during the period of privatization. The parallel between the growing inequality since 1980 and the rise in race-conscious grant programs is prima facie evidence that states at least implicitly recognize that the privatization process (i.e., shifting costs of higher education from taxpayers to students) added to the inequalities in educational opportunity. While implementation of these programs alone has not resolved the problems, since inequalities in educational opportunity persist, these programs may mitigate some effects of privatization on the disparity in opportunity.

Research on the effects of race-conscious student grant programs is needed to build an understanding of the role they play in reducing inequalities caused by privatization. Such research can inform the legal and policy agendas of advocates of equal educational opportunity. If these programs eventually do not stand up to the equal rights claims currently being used by those in government and the non-profit sectors who litigate against race-conscious programs, then new policies must be crafted to remedy the inequalities created by the privatization process as implemented by the federal government and states.

### *State Contexts*

A major challenge facing states that do not have adequate need-based grants is how to restructure student financial aid to reduce inequality. The best solution is to raise need-based grants to a level sufficient to at least equalize enrollment opportunity across income groups. Many states have used targeted grants for students of color as a partial remedy, but the future of this strategy is not certain. The alternative of redesigning merit grant programs also deserves consideration, a problem examined below.

### *Case Study 1: Research Informing Redesign of State Aid Programs*

The most perplexing challenge facing states in their efforts to recraft public finance policies and grant programs is to address the competing arguments for raising standards and rewarding merit



on the one hand, with arguments about equal educational opportunity on the other. In her commentary on the U.S. Supreme Court decisions in the Michigan cases, Lani Guinier (2003) argued that in the period ahead there is a need for more experimentation with alternative measures of merit. She argues that new approaches, like the Texas Top Ten Percent Plan, warrant further testing. One of the problems states face in the design of merit programs is that the conventional measures of merit do not fully recognize the unequal opportunities to prepare. Top ten percent programs have worked well in admissions, equalizing enrollment opportunities for prepared minority students (Chapa, 2006). The case study summarized below illustrates the potential of using alternative merit criteria in the redesign of state merit grant award programs.

*The Michigan Merit Program:*<sup>6</sup> The State of Michigan implemented the Michigan Merit Scholarship Program, making awards to students in the First Cohort (students in the high school class of 2000) based on scores on high school tests administered by the Michigan Educational Assessment Program (MEAP). The American Civil Liberties Union (ACLU), the National Association for the Advancement of Colored People (NAACP), and other groups brought suit against the State of Michigan based on the inequity in award distribution. Analyses for the plaintiffs demonstrated that the original method of awarding merit aid results in a distribution of student aid that is inequitable across racial/ethnic groups (Heller, 2001).

The method the State of Michigan used to award the Merit Scholarships appears to restrict opportunity for diverse groups in ways that penalize students for attending poor-quality schools. Indeed, when the fact that many college-qualified, low-income students cannot afford to attend is taken into account, the Michigan Merit Scholarship Program appears to discriminate against low-income students. The merit criteria in use at the time of litigation resulted in over awards to whites compared to their proportion of the population (see Table 8-3).

Therefore, it is desirable to modify the uses of MEAP tests in ways that provide an incentive for schools to make improvements in the academic preparation of students, but that do not discriminate against any particular group of students. Whites received 72% of the awards, but were only 53% of the high school population. In contrast, African Americans received 3% of the awards and were 12% of the population. There were similar disparities for other groups.

An alternative method for awarding merit aid involves creating a merit index that adjusts the award criteria to the quality of the high schools students attend. The idea of the merit index that adjusts standardized tests for high school quality was proposed as a more equitable approach for college admission (Goggin, 1999). The development of a merit index involves adjusting test scores and other merit criteria for the averages for the high schools students attend, then using these rankings in admissions decisions. This approach helps achieve greater racial balance because schools remain segregated in spite of court decisions in desegregation cases (Fossey, 1998, 2003).

Prior empirical tests of this method to date have focused on adjusting standardized test scores to refine admission policies. Initial analyses indicate that a merit index yields a more ethnically diverse population of admitted students than does the strict application of a standardized test,

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<sup>6</sup> This case study substantially revises an early discussion of these analyses by St. John & Chung (2004). This case study includes simulation results not previously published.

such as the SAT (St. John, Simmons, & Musoba, 2002). Further, a merit index that adjusts SAT scores for high school contexts predicts college success about as well as the SAT (St. John, Hu, & Weber, 2001).

While the extant research confirmed that the merit-index approach achieved the goals of rewarding merit in admissions while increasing diversity and equity, the method had not yet been extended to awarding merit aid. Conceptually, it had been previously argued that the same logic applied to merit aid (St. John, Simmons, & Musoba, 2002), but the Michigan case presented special problems relative to the implementation of a merit index. Specifically the legislation creating the program required that an assessment test be used that included consideration of the state tests. There was a range of interests among the plaintiffs that encouraged a broader assessment framework, but ultimately the proposal was constrained by the legislation. A two-stage analysis process is summarized below.

*Stage 1: The alternative method of using a MEAP-Merit Index:* There are a variety of ways to construct a MEAP-Merit Index that would adjust the rankings of students within their schools. Using school-based rankings—for either GPA or a combination of GPA and test scores—provides an adjustment for school context that does not penalize students for attending troubled schools. As a preliminary test of the merit-index approach, our initial paper used data files with the raw test scores and the award information to develop the following preliminary simulation. Table 8-4 presents the simulations of award ratios by group, had the state used a school-based ranking of MEAP scores, making awards to the top 25% of each high school's senior class.

As is evident from this simulation, the awards using these alternative merit criteria would have more closely reflected the race/ethnic composition of the population. For example, 58% of the awards would have gone to whites while 54% of the cohort was white. The percentage of African Americans who were eligible for merit awards would have increased to 11%, a percentage close to their share of the population. The distribution of awards for other groups would also have been similar to their representation in the population.

*Stage 2: Analysis of a GPA-Merit Index:* Based on this initial report, the litigants agreed to collect data from a sample of twenty percent of the state's high schools.<sup>7</sup> A random sample of twenty percent of the high schools was drawn within each type of locale in the state, as a means of ensuring representation of diverse types of schools.<sup>8</sup> For each senior, high schools were asked to provide information on ethnicity, cumulative GPA, and the MEAP scores. This data was adequate to test the alternative of using a GPA-Merit Index. The approach is similar conceptually to the Texas Top Ten Percent Plan.

While the sample mirrored the geographical distribution of high schools across the state, the responding high schools were not evenly distributed. The highest response rates were from high

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<sup>7</sup> Most of the members of the plaintiffs' coalition favored GPA or need over the MEAP test. After conference calls to discuss alternatives, we developed a format for a data collection.

<sup>8</sup> Rural and urban schools had the highest levels of poverty and were the most likely to benefit from award criteria that included appropriate equity consideration. However, the suburban districts had the greatest representation in the program under the original award criteria. It was important that efforts be made to have all types of districts represented in the sample.

schools in cities and small towns, the types of schools that would benefit the most from alternative methods. A total of eight urban high schools were sampled and all responded, while 11 of the 14 high schools in small towns responded. In contrast, lowest response rates were from mid-sized cities (4 of 10 responses); and rural areas inside of large metropolitan areas (13 of 25 responses) were the areas that benefited the most from the original award criteria. A total of 14,356 students were included in the sample. The overall response rate (61.6%) was adequate, but it was necessary to adjust for the inconsistencies in reporting. The ethnic distribution of the sample differed slightly from the population, given these school responses.

The method used to adjust to these uneven response rates across local types was to compare awards using the original criteria for the MEAP<sup>9</sup> to awards using the GPA-Merit Index<sup>10</sup> with the sample population. This provided a means of judging whether the use of the GPA ranking would improve diversity of awards compared to the original award criteria.

When the original award criteria were used on the sample population (Table 8-5), the inequality in the distribution of awards was similar to the actual awards:

- American Indians represented 0.5% of the sample and 0.5% of the population that qualified under the original criteria.
- Asians represented 2.0% of the sample and 1.8% of the scholarship-qualified population.
- Blacks were 17.3% of the sample, but only 6.5% of the scholarship-qualified group.
- Whites were 77.9% of the sample and 89.9% of the scholarship-qualified group.
- Hispanics were 1.7% of the sample and 1.2% of the scholarship-qualified group.<sup>11</sup>

These results echo the findings from earlier analyses (e.g., Heller, 2001), indicating disproportional qualification across groups, especially for African Americans and whites. The simulations with the GPA-Merit Index estimated awards for 20%, 25%, 30%, and 35% of high school classes. These analyses provided a more balanced award distribution. The summary of the analysis of the 25% award level (Table 8-6) follows:

- American Indians and Alaska Natives were 0.5% of the sample and 0.3% of the scholarship-qualified group.
- Asians were 2.0% of the sample and 2.1% of the scholarship-qualified group.
- Blacks were 17.3% of the population and 16.4% of the scholarship-qualified group.
- Whites were 77.9% of the sample and 79.5% of the scholarship-qualified group.
- Hispanics were 1.7% of the sample and 1.4% of the scholarship-qualified group.

### *The Potential for Redesign*

These simulations illustrate that it is possible to redesign the award criteria for merit programs in ways that recognize the differences in educational opportunities available to students.

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<sup>9</sup> The original criteria included some alternative methods of qualification (using a specialized vocational test), but very few students met these criteria. Therefore we did not request information on the alternative test to reduce confusion about the data collection. The MEAP-only analysis is essentially similar to the original award criteria.

<sup>10</sup> The GPA-Merit Index was essentially class rank.

<sup>11</sup> The simulations also considered students of “unknown” ethnic origin and Native Hawaiian or other Pacific Islander. Both of these groups were extremely small.

**Table 8-1: Number of States with at Least One Publicly Funded Financial Aid Program that was Race-, Sex-, or Disability-Conscious, 1984-2003**

<b>Population</b>	<b>84</b>	<b>85</b>	<b>86</b>	<b>87</b>	<b>88</b>	<b>89</b>	<b>90</b>	<b>91</b>	<b>92</b>	<b>93</b>	<b>94</b>	<b>95</b>	<b>96</b>	<b>97</b>	<b>98</b>	<b>99</b>	<b>00</b>	<b>01</b>	<b>02</b>	<b>03</b>
<b>African Americans</b>	7	10	10	10	10	13	16	17	21	22	23	23	23	23	24	24	24	24	24	23
<b>Hispanic</b>	8	11	11	11	11	14	16	17	21	22	23	23	23	23	24	24	24	24	24	23
<b>Women</b>	0	1	1	1	1	1	2	2	2	2	2	2	2	2	2	2	1	1	1	1
<b>Native American</b>	13	15	15	15	15	17	19	20	24	25	26	26	26	26	27	27	27	27	26	25
<b>Minority (multiple categories)</b>	7	9	9	9	9	12	14	15	19	20	21	21	21	21	22	22	22	22	22	21
<b>Minority (any and all race/sex conscious)</b>	13	15	17	17	17	20	22	23	27	27	28	29	29	29	29	29	29	29	29	28
<b>Disabled or dependents</b>	4	4	5	5	5	5	5	5	5	5	5	3	3	3	3	3	3	3	3	3
<b>Number of States</b>	16	18	21	21	21	23	25	26	30	29	24	31	31	31	31	31	31	31	31	30

Source: These tables are based on data present in NASSGAP annual reports and state data (state statutes, financial aid coordinating boards, university system administrators and resources). Some dates are approximated based on available data, particularly if relatively old and terminated financial aid program.

Includes programs targeting either graduates or undergraduates. In some cases programs are counted as a single program even though they are funding both graduates and undergraduates when reporting of funds could not be disaggregated. In the cases where the same program was reported as two separate pools of funding, they are counted as individual programs.

Data for the academic year 1989-1990 were not available and were therefore approximated. The change in figures is due to detailed descriptions of programs available at financial aid coordinating boards that specified several programs were initiated in 1989.

Total is the number of states with at least one program that was race, sex or disability conscious. Since some state programs encompassed more than one underrepresented population, the total is not necessarily the sum of the columns.

**Table 8-2: Number of Publicly Funded Financial Aid Programs that are Race-, Sex-, or Disability-Exclusive or Sensitive, 1984-2003**

	1984		1985		1990		1995		2000		2001		2002		2003	
<b>Population</b>	S	E	S	E	S	E	S	E	S	E	S	E	S	E	S	E
<b>African Americans</b>	3	9	3	14	7	29	8	39	8	40	8	39	9	37	8	37
<b>Hispanic</b>	3	9	3	15	6	31	8	38	8	40	8	39	10	37	8	37
<b>Women</b>	0	0	0	1	1	2	1	1	1	0	1	0	1	0	1	0
<b>Native American</b>	4	19	3	25	6	39	7	47	9	48	9	47	10	45	9	45
<b>Minority (multiple categories)</b>	4	9	3	15	7	29	9	36	8	38	8	37	9	35	8	35
<b>Minority (any and all categories)</b>	4	19	4	25	8	44	11	52	15	53	12	52	13	50	12	50
<b>Disabled or dependents</b>	1	3	1	3	1	5	0	4	0	3	0	3	0	3	0	3
<b>Total Programs</b>	5	22	5	28	9	49	11	56	15	56	12	55	13	53	12	53

E refers to race-exclusive program. S refers to race-sensitive program.

Source: These tables are based on data present in NASSGAP annual reports and state data (state statutes, financial aid coordinating boards, university system administrators and resources). Some dates are approximated based on available data, particularly if relatively old and terminated financial aid program.

**Table 8-3: Actual Composition of Scholarship Qualification by Racial/Ethnic Group**

		<b>Native American</b>	<b>Asian/Pacific Islander</b>	<b>African American</b>	<b>Hispanic</b>	<b>White</b>	<b>Multiracial</b>	<b>Other</b>	<b>Missing</b>	<b>Total</b>
<b>Qualified</b>	N	219	964	1,217	601	30,729	599	745	7,635	42,709
	%	0.5%	2.3%	2.8%	1.4%	71.9%	1.4%	1.7%	17.9%	100.0%
<b>Otherwise</b>	N	751	923	13,833	1,760	35,110	1,286	1,634	26,013	81,310
	%	0.9%	1.1%	17.0%	2.2%	43.2%	1.6%	2.0%	32.0%	100.0%
<b>Total</b>	N	970	1,887	15,050	2,361	65,839	1,885	2,379	33,648	124,019
	%	0.8%	1.5%	12.1%	1.9%	53.1%	1.5%	1.9%	27.1%	100.0%

Source: Data were collected by the State of Michigan in *White v. Enger*. Analyses by the lead author and C. G. Chung.

**Table 8-4: Simulation of Racial/Ethnic Composition of Awardees, with Top 25% within Individual Schools (using at least one MEAP test)**

		<b>Native American</b>	<b>Asian/Pacific Islander</b>	<b>African American</b>	<b>Hispanic</b>	<b>White</b>	<b>Multiracial</b>	<b>Other</b>	<b>Missing</b>	<b>Total</b>
<b>Qualified</b>	N	128	404	2,698	356	13,641	416	419	5,607	23,669
	%	0.5%	1.7%	11.4%	1.5%	57.6%	1.8%	1.8%	23.7%	100.0%
<b>Not Qualified</b>	N	728	1,076	10,276	1,499	36,773	1,128	1,592	16,660	69,732
	%	1.0%	1.5%	14.7%	2.1%	52.7%	1.6%	2.3%	23.9%	100.0%
<b>Total</b>	N	856	1,480	12,974	1,855	50,414	1,544	2,011	22,267	93,401
	%	0.9%	1.6%	13.9%	2.0%	54.0%	1.7%	2.2%	23.8%	100.0%

Source: Data were collected by the State of Michigan in *White v. Enger*. Analysis by the lead author and C. G. Chung.

**Table 8-5: MEAP Qualification by Ethnicity, Using Traditional Award Criteria**

	American Indian or Alaska Native		Asian		Black		Native Hawaiian or Other Pacific Islander		White		Hispanic		Unknown		Total	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
	<b>Qualified *</b>	20	0.5	77	1.8	277	6.5	1	0.0	3,852	89.9	50	1.2	6	0.1	4,283
<b>Otherwise **</b>	58	0.6	206	2.0	2,201	21.9	7	0.1	7,338	72.8	195	1.9	68	0.7	10,073	100.0
<b>Total</b>	78	0.5	283	2.0	2,478	17.3	8	0.1	11,190	77.9	245	1.7	74	0.5	14,356	100.0

\* Qualified if the performances are 1 or 2 in all four 2001 MEAP tests (Math, Science, Reading and Writing).

\*\* "Otherwise" includes those who are not qualified, who do not take all four tests and who are missing in test results.

Source: Data were collected by the State of Michigan in *White v. Enger*. Analysis by the lead author and C. G. Chung.

**Table 8-6: Top 25% of GPA by Ethnicity Using GPA-Merit Index**

	American Indian or Alaska Native		Asian		Black		Native Hawaiian or Other Pacific Islander		White		Hispanic		Unknown		Total	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
	<b>Top 25%</b>	10	0.3	71	2.1	568	16.4	2	0.1	2,750	79.5	50	1.4	6	0.2	3,457
<b>Otherwise *</b>	68	0.6	212	1.9	1,910	17.5	6	0.1	8,440	77.4	195	1.8	68	0.6	10,899	100.0
<b>Total</b>	78	0.5	283	2.0	2,478	17.3	8	0.1	11,190	77.9	245	1.7	74	0.5	14,356	100.0

\* "Otherwise" includes those who are missing in GPA report.

Source: Data were collected by the State of Michigan in *White v. Enger*. Analysis by the lead author and C. G. Chung.

The success of the Texas Top Ten Percent Plan in diversifying campuses without reducing student success, as measured by persistence, illustrates that changing award criteria did not change educational quality or impair academic success. In the Michigan merit case, the plaintiffs eventually lost the case because *intentional* discrimination could not be proven even though inequality in awards was evident. Changing merit grant programs to provide incentives for all students is fairer, relative to the equity standard, than the current system. Clearly the current approach to merit awards in Michigan favors students who attend better quality schools, but it does not necessarily reward students with the highest merit relative to their peers. The reconstruction of state merit grant programs represents an alternative that should be tried out in practice.

### *Reconstructing State Policy*

The research on state grant programs consistently shows a relationship between funding for state grants and opportunity for enrollment for diverse students. Targeted programs like Indiana's Twenty-first Century Scholars Program enable more low-income students to enroll in college, while the reconstruction of merit programs using alternative merit criteria can increase the fairness in the ways these awards are made. These sorts of adjustments are necessary within the current system of public finance to overcome the inequalities that have emerged as a consequence of privatization of higher education.

There are no published evaluation studies of race-conscious state grant programs, although some studies are in development. It is highly likely that such studies will find a positive association between state funding for grants and both enrollment and persistence opportunities for students of color. Such findings are likely because they would be consistent with a large body of research (Heller, 1997; St. John, 2003). Questions remain about whether race-conscious aid could stand up to legal challenges, especially if research demonstrates that these grant programs improve diversity.

## **Changes in Institutional Student Aid**

Given the failure of federal and state financial aid policies to ensure equal education opportunity, it is interesting to note that the gap in opportunity has narrowed slightly since 1995 (refer back to Figure 8-1). While federal and state grants have declined in relation to student tuition, colleges and universities have increased their investments. This section first reconsiders campus-based strategies for awarding student financial aid, then presents a case study of strategies for targeting grants to increase diversity in institutions that are also trying to improve selectivity.

### *Trends in Institutional Aid*

Institutional grants and scholarships have the potential of reducing financial inequities. However, most institutional grant aid is awarded on a mixture of merit and need criteria, as institutions use aid to leverage prestige (Hossler, 2004; McPherson & Schapiro, 1997). Aid leveraging involves giving higher awards to students with higher scores as a means of increasing average SAT scores. However, institutional grant aid can reduce or increase financial equality, depending on how it is implemented.



Institutional aid is a vital part of the nation's decentralized student aid system. It has eased the effect of the rise in college costs on regular enrollment. However, college campuses cannot be expected to solve the inequalities created by the decline in the purchasing power of federal and state grants. As the analysis of net price after grants (below) reveals, institutional grant aid has not been sufficient to overcome the inequalities in educational opportunities that are now evident. While institutional aid helps promote enrollment—and played a role in increasing the enrollment rates for high school graduates in the 1990s—it does not equalize opportunity for all academically qualified low-income students because many institutions also consider merit as part of the award process.

*New Targeted (and Hybrid) Strategies:* Targeted grant aid has a long history. Colleges routinely recruit athletes with scholarships, alter admissions and/or reduce tuition for legacy students (children of alumni), and so forth. In the past two decades colleges have targeted aid to middle-income students with relatively high achievement as a means of improving enrollment and prestige (Hossler, 2004, 2006; Martin, 2005).

Targeted grant aid, commonly referred to as leveraging, now predominates institutional aid packaging, especially in private colleges (Martin, 2005; McPherson & Schapiro, 1997). Most campuses cannot afford to provide the additional need-based aid required to enable all admitted students to enroll. Thus, they target aid at students who are likely to enroll with financial support, maximizing the return on institutional investment. Leveraging has been used by institutions to save money compared to need-based aid and yield more students with the desirable characteristics (average test scores, diversity, etc.). The use of this approach is a possible explanation for the narrowing of the gap for African Americans in the late 1990s (Figure 8-1). African Americans are more responsive to student aid than are whites (Martin, 2005). In Indiana for example, low-income students who have taken the Twenty-first Century Scholars pledge are more likely to enroll in private colleges than the otherwise average high school student in the state (St. John, Musoba et al., 2002), an artifact of strategic investment by private colleges. The additional support required to attract these students who bring large state and federal grants with them is less costly than the discounting necessary to attract other students.

*Improving Diversity:* It can be extremely difficult for colleges and universities to improve diversity in states that have inadequate need-based grants. While minority students are more responsive to grants, they also have greater unmet financial need than majority students. Only elite institutions—privates like Princeton University and publics like University of North Carolina—have been able to make and maintain the commitment to meet financial need for low-income students. These institutions can afford to make this commitment because of their admission criteria and their ability to attract large numbers of qualified applicants who can afford to pay the full cost of attendance.

Institutions in states with substantial need-based grant programs also have opportunities to attract large numbers of minority and low-income students because the additional costs of aid are modest. However, this situation does not exist in most states, which has made it difficult for many institutions to enable enrollment by relatively large numbers of minority students. In these instances the common use of aid leveraging can undermine opportunity for low-income students

because the total grant amount required to attract minority students is substantially larger than the amounts being offered to middle-income students with some merit indicators.

Targeted aid can be adapted to improve diversity. For example, the Gates Millennium Scholars (GMS) program (St. John, 2004) has proven effective at improving opportunity for high-achieving, low-income students of color. This program sets a GPA threshold (minimum high school grade point average of B+), requires students to be eligible for the federal Pell Grant program, and uses noncognitive criteria to select among eligible applicants. This billion dollar investment by the Bill and Melinda Gates Foundation appears to be expanding the pool of minorities completing college. Recent evidence also suggests that the promise of financial support for graduate education improves the odds that GMS graduates will apply for and enroll in graduate schools (St. John & Hu, 2005).

### *Case Study 2: Using Targeted Merit Awards to Improve Diversity*

This case involved assessing the impact of financial aid on enrollment of admitted applicants at an eastern university law school, along with simulations of an alternative award approach at the school. The law school, like others in the country, is adjusting to new competitive market conditions. During recent years the law school has raised admissions standards as a means of improving prestige. However, with the rising admissions standards, the institution has sought ways to maintain diversity. Merit aid has become an important instrument for both attracting better qualified students among admitted applicants and for maintaining diverse enrollment. There is substantial literature indicating differences in responsiveness to student financial aid for students of color compared to majority students, a topic covered elsewhere (e.g., Carter, 2006; Hu & St. John, 2001; Martin, 2005; St. John, Paulsen, & Carter, 2005). However research on the influence of merit aid on enrollment by minority graduate students is limited and the topic of price response among admitted law school applicants has seldom been studied for whites and students of color.

As part of the defense in a case, our research team worked with the university to compile a database of applicants and enrollees for three successive cohorts of applicants. Logistic regression analyses were conducted using a proven model (St. John, 1992, 1999) to establish the relationship between amounts of grant awards and enrollment decisions. Analyses were conducted for the combined sample of three student cohorts, as well as for both whites and minority students. The results of the regression analysis are summarized below, before the presentation of the simulations, which are the focus of this case statement.

*Analysis of Enrollment:* The enrollment model for all students predicted 67% of cases correctly and was reasonable according to other model indicators.<sup>12</sup> A summary of findings from the analyses includes the following:

- *Enrollment by Minorities:* In the analyses of enrollment by all admitted students, African Americans and Hispanics were less likely to enroll than were whites. This was consistent with the descriptive data that indicated that admitted Hispanics and

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<sup>12</sup> Interestingly the model for minority students only predicted substantially better than the model for all students. However, since it was appropriate to use the overall model for simulations, we summarize only the general model here.

African Americans were more difficult to attract to the law school than were other race/ethnic groups.

- *Ability Indicators:* LSAT scores were negatively associated with enrollment in the law school by admitted applicants, indicating the school was not attracting its highest achieving applicants into the law school after admission. However, as predicted by the breakdown of enrollment rates, having “A” grades was positively associated with enrollment, compared to having “B” grades, even controlling for the effects of prior graduate enrollment. In addition, students with “C” grades were less likely to enroll than students with “A” grades.
- *Undergraduate College Characteristics:* College selectivity was significant in enrollment decisions for whites but not for minorities. In both the model for whites and for all students, being from a low-selective college was positively associated with enrollment.
- *Differences Across Cohorts:* The cohort year was significant for whites, but not for minorities. In the model for all students, those in both the 2003 cohort and the 2005 cohort were more likely to enroll than were students in the 2004 cohort.
- *Student Financial Aid:* The amount of aid awarded was significant and positively associated with enrollment in the analyses of whites and minorities, but not in the combined model. It appears that differences in aid programs, as well as differences in price response, influenced these findings.

*Simulations:* The simulations used the regression model for the population, considering the otherwise-average<sup>13</sup> students broken down by gender and race (Table 8-7). The aid amounts were varied in the simulations, to demonstrate the impact of aid on enrollment probability for different types of admitted applicants. The other variables in the model were set as the largest or modal group (usually the comparison group coded as zero in the model). The enrollment year was set at 2005 in the simulation. Raising the amount of award improves the enrollment odds for each group. However, it would require a lower award level to raise the odds that otherwise-average white students would enroll. For example, awards of \$10,000 would raise the odds of enrollment to at least 50% for whites, while an award of \$30,000 is required to raise the odds of enrollment to 50% or greater for minority students. There appears to be more competition from other law schools for minorities with high LSAT scores.<sup>14</sup>

The reasons for these differentials in probabilities of enrollment are related to factors outside of the model, as well as factors in the model. As explained under limitations and analyses above, African Americans and Hispanics have higher financial need than whites, on average, meaning it takes more money from external sources to pay for graduate school. Even among enrolled students, a larger percentage of minorities than whites had need-based grants of some type. However, the availability of need-based grants was very limited at the law school, a factor that could contribute to the lower enrollment rate for admitted and qualified minorities compared to admitted and qualified whites.

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<sup>13</sup> All variables set at the mode for the admitted student population, except of the variables included in the simulation (i.e., race, gender, and grant amount). An otherwise-average student is one who has variables other than race and gender set at the mode for the group

<sup>14</sup> External competition is not a variable in the model. However, it is the most reasonable explanation for the variation in the odds of enrollment for minority students with high LSAT scores.

It is evident from these simulations that it costs more to attract high-achieving minority students than similarly qualified whites when merit-based aid is used. Given the high costs of attending law school and the relatively low supply of high-scoring minority applicants, highly targeted programs are the most cost effective means for this law school (and probably for other law schools) to maintain diverse enrollments.

The simulations provided further insight into the consequences of the differentials in student price response. The baseline probability that an admitted minority student would enroll was only 27%. It takes a substantial investment to raise these odds above even 50%, especially for minority students with high scores. To attract students of color with LSAT scores of 160—that is to raise the probability of enrollment to 50%—would require a scholarship of \$40,000 for Hispanics under the market conditions of 2005, and an award of \$50,000 for African Americans. The minority award program in use achieved this objective with a substantially lower award, probably because of the mentoring and other support provided through the program.

**Table 8-7: Simulations of the Effects of Grant Award Amounts on the Probability of Enrollment by Admitted Students by LSAT, Race, and Gender at the Law School**

Award amount	LSAT score	African American		Hispanic		White	
		Female	Male	Female	Male	Female	Male
<b>\$0</b>	155	15.13%	15.34%	23.78%	24.07%	46.40%	46.79%
	160	7.43%	7.54%	12.31%	12.48%	28.03%	28.35%
	165	3.48%	3.54%	5.94%	6.03%	14.91%	15.11%
<b>\$10,000</b>	155	24.03%	24.32%	35.63%	35.99%	<b>60.57%</b>	<b>60.94%</b>
	160	12.46%	12.63%	19.94%	20.19%	40.86%	41.25%
	165	6.02%	6.11%	10.07%	10.22%	23.72%	24.00%
<b>\$20,000</b>	155	35.94%	36.31%	49.26%	<b>49.66%</b>	<b>73.15%</b>	<b>73.46%</b>
	160	20.16%	20.41%	30.40%	30.74%	<b>55.07%</b>	<b>55.46%</b>
	165	10.20%	10.35%	16.43%	16.64%	35.55%	35.91%
<b>\$30,000</b>	155	<b>49.88%</b>	<b>50.28%</b>	<b>63.27%</b>	<b>63.64%</b>	<b>82.86%</b>	<b>83.08%</b>
	160	30.93%	31.27%	43.66%	44.05%	<b>68.50%</b>	<b>68.84%</b>
	165	16.77%	16.99%	25.85%	26.16%	<b>49.45%</b>	<b>49.85%</b>
<b>\$40,000</b>	155	<b>63.84%</b>	<b>64.21%</b>	<b>75.34%</b>	<b>75.64%</b>	<b>89.56%</b>	<b>89.70%</b>
	160	44.27%	44.66%	<b>57.89%</b>	<b>58.28%</b>	<b>79.41%</b>	<b>79.67%</b>
	165	26.33%	26.64%	38.22%	38.59%	<b>63.45%</b>	<b>63.81%</b>
<b>\$50,000</b>	155	<b>75.80%</b>	<b>76.09%</b>	<b>84.43%</b>	<b>84.63%</b>	<b>93.83%</b>	<b>93.92%</b>
	160	<b>58.50%</b>	<b>58.88%</b>	<b>70.92%</b>	<b>71.25%</b>	<b>87.25%</b>	<b>87.43%</b>
	165	38.81%	39.18%	<b>52.32%</b>	<b>52.71%</b>	<b>75.49%</b>	<b>75.78%</b>
<b>\$60,000</b>	155	<b>84.75%</b>	<b>84.95%</b>	<b>90.58%</b>	<b>90.71%</b>	<b>96.43%</b>	<b>96.48%</b>
	160	<b>71.43%</b>	<b>71.75%</b>	<b>81.23%</b>	<b>81.47%</b>	<b>92.39%</b>	<b>92.50%</b>
	165	<b>52.94%</b>	<b>53.33%</b>	<b>66.06%</b>	<b>66.42%</b>	<b>84.53%</b>	<b>84.73%</b>

Source: Analyses of institutional data on admissions and enrollment provided to the authors for this project.

*Implications of the Case:* These simulations illustrate how both measures of merit and race can be used to develop financial aid strategies in campuses that are trying to improve prestige. On the one hand, students with high test scores were less likely to enroll, which is why targeting aid to this group was desirable. In addition, minority students were less likely to enroll controlling for

the effects of student financial aid, which is part of the reason why it would take a more substantial investment to attract high-achieving minority students to enroll. The specific measures of price response to aid offers will vary by campus, but each institution can build its own approach to equalizing enrollment opportunity for equally prepared students, a basic tenet of equity in higher education access.

### *Improving Diversity on Campuses*

With respect to the role of student financial aid in promoting diversity within higher education, we need to consider three types of markets: local markets of colleges that compete for students at a low cost (i.e., community colleges and some low-cost four-year colleges); high-prestige colleges that attract high-achieving students; and colleges seeking to use aid to raise prestige. Strategies for using financial aid to promote diversity will differ in these cases.

At campuses that compete locally for students, the opportunities to use institutional funds for student financial aid are usually limited. Instead colleges are largely dependent on state and federal student financial aid for students with financial need. Controlling educational costs provides a means of constraining tuition increases. In public colleges facing this condition, state support also has a substantial impact on prices and their ability to attract low-income students. Research also indicates that minorities and low-income students enroll in local institutions in high numbers because of financial constraints. So diversity in most of these institutions reflects the local demographic diversity, at least if high schools are equal and there is adequate state and grant aid. Student financial aid has limited utility as an instrument for promoting diversity at most of these campuses.

At the other extreme, the elite colleges have taken steps to make sure that low-income students know the colleges will provide necessary need-based aid. These colleges tend to have the resources to meet financial need, but the numbers of institutions able and willing to use this strategy has declined in recent decades (McPherson & Schapiro, 1997). Elite privates like Princeton and Harvard have a long history of meeting financial need, although some Ivy League institutions, like Cornell (Ehrenberg, 2002), have shifted away from this approach to make more extensive use of targeted merit aid. In recent years a few elite public institutions—including the University of Michigan, the University of North Carolina, and the University of Virginia—have made the pledge to meet financial need for low-income students who gain admission. Taking this step enables these institutions to attract more diverse applicants, both economically and ethnically.

Finally, a growing number of institutions have developed targeted financial aid programs to attract students with desirable characteristics. A number of forces have motivated this shift, including the desire to rise in national rankings. It is possible that if institutions treat race as a sole criteria in the awarding of aid that their aid policies will be challenged by the Office of Civil Rights. As the case study above illustrates, it is possible for colleges and universities facing these conditions to use market analyses as a basis for developing financial aid awards that equalize the odds of enrollment by high-achieving students from different racial/ethnic groups.

The practice of targeting financial aid to yield students with desired characteristics is widespread but not well understood, especially with respect to the role of diversity. At campuses that are trying to simultaneously improve quality and diversity, it may be necessary to tailor targeted aid programs to achieve this goal. The same methods have been used by campuses to attract students in different majors and to attract other high priority groups.

Many researchers have focused on student aid as though there were two types, need-based and merit-based. The newer forms of targeted grant and scholarship aid can be either merit- or need-based and very often consider both criteria in the award process, as the simulations above illustrate. The tendency to use targeted financial aid can undermine diversity, unless race is considered along with other factors in the award process. As was the case in the analysis of merit-based state grants above, this case study of institutional student financial aid illustrates the need to recraft award criteria to ensure equal opportunity for enrollment of equally prepared students. In the case of merit aid (considered in case 1), the need is to create a more just measure of merit. In the case of targeted aid (considered in case 2), the challenge is to package student aid to equalize opportunity to equally able students from diverse backgrounds.

### **Conclusions**

The current period of litigation over race-conscious student aid programs is especially troubling, given the decline in government need-based grants. Efforts to desegregate the nation's system of higher education have been undermined by the privatization of public colleges and the increased emphasis on high tuition and loans. This new system discriminates because minority populations in the United States are more likely to have low incomes, which means minorities face an unequal burden in paying the costs remaining after grants compared to whites.

Targeting grants to enable enrollment by students of color with a documented record of achievement provides a reasonable means for colleges and universities to contend with the discriminatory effects of government aid policies. While the current discrimination in access to four-year colleges may be an unintended consequence of federal and state policies on student grants, there is nonetheless substantial evidence that the reduction of federal grants has been accompanied by growing inequality. Targeting student aid—linking grants to different forms of merit—has become the predominant means of attracting students and may be the only workable alternative to full funding of need-based aid, as means of equalizing enrollment opportunity across racial groups within colleges and universities. As a conclusion, before deriving lessons learned, we briefly consider our findings relative to the issues of justice and fairness that underlie the issues considered.

Evaluation research can be especially helpful in efforts to defend race-conscious programs and in the design of targeted programs that do not explicitly consider race. Workable models for institutional research have a long history (St. John, 1992); and case study 2 above, illustrates how such research can be used. There are also well-tested methods for studying the effects of state grants, including fixed-effect regression studies (e.g., St. John, 2006); studies of state student resources (St. John, 1999; St. John, Hu, & Weber, 2000, 2001); and difference-in-difference

studies (Dynarski, 2002, 2004). State-level studies of race-conscious grant programs should be a high priority for the defense of these programs.<sup>15</sup>

### *Rethinking the Strategies*

Before 1960 higher education was accessible to fewer students and can be thought of as having been more elite. There was also a long history of racial discrimination in educational opportunity. While school desegregation began after *Brown v. Board of Education* in 1954, higher education desegregation did not begin in earnest until after the second *Adams* decision in 1977. By that time, there had already been a long history of federal student financial aid programs: the GI Bill started in 1945; the first generally available need-based grant programs began as a result of the National Defense Education Act; and the Higher Education Act and the Education Amendments of 1972 firmly established need-based student financial aid. In the middle 1970s, it has been argued, there was a system that had relatively equal access for prepared students who applied to college, meeting both the basic and equity standards reasonably well.

However, the system of low tuition and high grants was relatively expensive for taxpayers. In the late 1970s middle-income families advocated for student aid, leading to the Middle Income Students Assistance Act of 1978, which expanded eligibility for Pell to middle-income students. Soon thereafter tax rates emerged as a major issue, rolling back tax rates and public investment in higher education. College enrollment rates expanded as this new movement toward a privatized system that used private loan capital and charged students for a larger share of college costs. The new system was more reasonable for tax payers but the savings in tax dollars were accompanied by increased inequality in enrollment opportunity, a larger disparity in enrollment rates for African Americans and Hispanics compared to whites. Just savings were not realized given the disparity in enrollment rates.

Now the advocates of equal educational opportunity are faced with a challenging question: how can the current system be adapted to improve equity? One option is to argue for increased investment in need-based grants (Heller & Marin, 2004, 2002; McPherson & Schapiro, 1997; St. John, 2003; St. John, Chung et al., 2002). Another option is to take steps to encourage the redesign of the newer aid strategies—merit and targeted aid—to improve equity. What we advocate is a value-centered logic that adapts to the issues being debated: encouraging adaptation to improve equal opportunity, while promoting major system changes that improve justice in that system.

### *Lessons Learned*

1. *State race-conscious aid programs have more than doubled in number over the past two decades as an appropriate response to the inequalities created by privatization.* The number of states with race-specific programs has more than doubled since 1984, the first year for which there is a national record. It is a

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<sup>15</sup> In fact, the legal defense of one state program is now underway and state records are being analyzed, with backing of the NAACP Legal Defense Fund and the state agency. However, it is not possible to report on this effort at the present time.

crucial time to begin the process of evaluating the impact of both race-specific and race-sensitive grant programs, to test whether they meet the intent of reducing inequality. Whether or not such research will serve as a defense for these programs remains uncertain. However, if such research exposes the nature of unequal educational opportunity, along with the efficacy of student financial aid as a remedy, then this research can also be used in litigation. Researchers can support efforts to redesign other need-based, merit, and targeted-aid programs to ensure equal opportunity is not further eroded when and if these programs are lost.

2. *Need-based student financial aid helps equalize opportunities for equally prepared students with unequal financial means, but these programs are woefully inadequate.* Erosion of the purchasing power of the federal Pell Grant program since 1980 has been accompanied by increasing privatization of public colleges symbolized by rising tuition, decline in the purchasing power of state grants, and higher costs after grants for low-income students at public and private four-year colleges. No matter what standard of preparation is used, prepared low-income students have less opportunity to enroll in four-year colleges than high- or middle-income students (Fitzgerald, 2004; Lee, 2004). These conditions add to inequalities in enrollment opportunities for Hispanics and African Americans compared to whites. Not only should increased state and federal spending on need-based aid be advocated for, but better coordination of finance strategies is also needed. States can probably achieve greater equity for the same investment through coordination without impairing institutional quality.
3. *It is possible to redesign state merit grant programs to improve equal opportunity.* While merit grant programs have been widely criticized by advocates of equal opportunity because they have added to inequality, the option of redesigning these programs has not been sufficiently considered. The success of the top ten percent programs indicates that alternative measures of merit that are indexed to students' schools can yield diverse enrollment. Similar methods can be used to redesign state merit programs to reward competition and high quality within schools. This may be a necessary adaptation to merit aid programs given the very substantial inequalities in high schools.
4. *Targeted financial aid programs are now widely used by colleges to attract students with desired characteristics and can be adapted to improve diversity.* While race-exclusive programs, a form of targeted grant aid, may be difficult to maintain in the future, other forms of targeted aid can be adapted to improve equity in enrollment opportunity. A greater emphasis should be placed on adapting targeted aid programs to consider race along with other factors to ensure that equally prepared students from different backgrounds have equal odds of enrolling. Evaluation targeted grants improve opportunity to enroll and persist for students from underrepresented minority groups.
5. *The agenda for advocates of equal educational opportunity should be expanded to include the redesign of merit and targeted aid programs, in addition to the defense of race-conscious aid programs and advocacy for need-based student aid.* Advocates of equal opportunity have been in a defensive position. New



coalitions can and should be built. Part of this effort involves engaging in research that will help illuminate the linkages between current policies and inequalities in opportunities to prepare for and enroll in college. The new agenda should also involve advocacy, including using research that exposes how policy links to inequality as part of the arsenal for reform. Better information may help us to build more workable coalitions.

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