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Ambivalent Advocates: Why Elite Universities Compromised the Case for Affirmative Action

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AMBIVALENT ADVOCATES: WHY ELITE UNIVERSITIES COMPROMISED THE CASE FOR AFFIRMATIVE ACTION

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ABSTRACT

"The end of affirmative action." The headline is near. When it arrives, scholars will explain that a controversial set of policies could not withstand unfriendly doctrine and less friendly Justices. This story is not wrong. But it is incomplete. Critically, this account masks an underappreciated source of affirmative action's enduring instability: elite universities, affirmative action's formal champions, have always been ambivalent advocates.

Elite universities are uniquely positioned to shape legal and lay opinions about affirmative action. They are formal defendants in affirmative action litigation and objects of public obsession. And yet, schools like Harvard and the University of North Carolina—embroiled in litigation now before the Supreme Court—avoid the facts and theories that would buttress their own race-conscious programs against predictable lines of attack. As a result, affirmative action's formal advocates enable the case *against* affirmative action.

In this Article, I explore the source of this ambivalence. Specifically, I examine how common institutional dynamics

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disincentivize elite universities from marshaling the most compelling case for their own policies, thereby compromising the case for affirmative action in the court of law and the court of public opinion. The consequences transcend legal skirmishes over race-conscious admissions. For decades, affirmative action debates have stood in for more fundamental fights over what, if anything, is necessary to overcome America's legacy of legalized white supremacy. Accordingly, when university defendants understate the case for affirmative action, they do more than compromise their own modest interventions. They also enable a resurgent right-wing campaign to discredit antiracism as the new racism, and antiracists as the new racists.

INTRODUCTION

Harvard University and the University of North Carolina, Chapel Hill ("UNC") belong to an exclusive club. In 2021, both triggered public backlash after denying tenure to a distinguished Black scholar. At Harvard, the university failed to tenure Cornell West, one of America's most influential thought leaders.[1] Harvard ultimately reconsidered, but not before West departed for Union Theological Seminar—a move he attributed, in part, to Harvard's "pattern of denying tenure to scholars of color."[2]

A similar script unfolded at UNC. In May 2021, UNC's Board of Trustees ("Board") voted not to tenure Nikole Hannah-Jones,[3] whose

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[1] For an interview with West: George Yancy, *Cornel West: The Whiteness of Harvard and Wall Street is "Jim Crow, New Style,"* TRUTHOUT (Mar. 5, 2021), https://truthout.org/articles/cornel-west-the-whiteness-of-harvard-and-wall-street-is-jim-crow-new-style/. This followed another high-profile incident where Harvard denied tenure to its only Black Latinx professor. *See* Graciela Mochkofsky, *Why Lorgia García Peña was Denied Tenure at Harvard*, NEW YORKER (July 27, 2021) https://www.newyorker.com/news/annals-of-education/why-lorgia-garcia-pena-was-denied-tenure-at-harvard. In February 2022, the Yale School of Medicine received widespread criticism after denying tenure to a celebrated scholar of racism and inequality. *See* Isaac Yu & Sanchita Kedia, *SOM tenure denial sparks debate on diversity in academia*, Yale Daily News (Feb. 23, 2022), https://yaledailynews.com/blog/2022/02/23/som-tenure-denial-sparks-debate-on-diversity-in-academia/ (noting that the scholar's "body of work has been cited more than 10,000 times").

[2] Meera S. Nair & Andy Z. Wang, *Cornel West to Depart Harvard, Return to Union Theological Seminary*, HARV. CRIMSON (Mar. 9, 2020, 12:28 AM), https://www.thecrimson.com/article/2021/3/9/cornel-west-to-leave-to-union/.

[3] Reporting traced the tenure decision to a powerful donor critical of Hannah-Jones' 1619 Project. *See* Margaret Sullivan, *Why it's so Important that UNC Trustees Give Nikole Hannah-Jones the Tenure She Deserves*, WASH. POST (June 29, 2021), https://www.washingtonpost.com/lifestyle/media/unc-nikole-hannah-jones-tenure/2021/06/28/cb51a03e-d82a-11eb-bb9e-70fda8c37057_story.html. This incident tracks a history, at UNC and beyond, of influential donors intervening in university governance to oppose antiracist efforts—including race-conscious admissions. *See* Petition to Intervene at 6, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516) ("Defendants may face additional pressure from alumni of the University—often key donors and fundraisers—who might oppose race-conscious

distinguished resume includes a MacArthur Genius Fellowship and the heralded 1619 Project.[4] Following public pressure spearheaded by UNC's Black student leaders,[5] the Board reversed course.[6] Hannah-Jones, in a move that paralleled West, took her talents to Howard University—one of the nation's most renowned Historically Black Colleges and Universities. To explain her decision, Hannah-Jones located her experience within UNC's ongoing failure to reckon with its own legacy of white supremacy:

> It is not my job to heal this university, to force the reforms necessary to ensure the Board of Trustees reflects the actual population of the school and the state, or to ensure that the university leadership lives up to the promises it made to reckon with its legacy of racism and injustice.[7]

These episodes are noteworthy in themselves. But they are not

admissions programs or who might seek to maintain preferential admissions for their children—even if to the detriment of African-American and Latino students.").

[4] The Board disregarded Hannah-Jones' colleagues and academic department, all of whom supported her tenure case. *See* Katie Robertson, *Nikole Hannah-Jones Denied Tenure at University of North Carolina*, N.Y. TIMES (June 30, 2021), https://www.nytimes.com/2021/05/19/business/media/nikole-hannah-jones-unc.html.

[5] *See* Annie Ma, *Black Students, Faculty: UNC Needs Self-Examination on Race*, ASSOC'D. PRESS (July 7, 2021), https://apnews.com/article/business-racial-injustice-race-and-ethnicity-education-7fca1c1b2c97788d409a34c63e149afd.

[6] *See* David Kolkenflik, *After Contentious Debate, UNC Grants Tenure to Nikole Hannah-Jones*, NPR (June 30, 2021), https://www.npr.org/2021/06/30/1011880598/after-contentious-debate-unc-grants-tenure-to-nikole-hannah-jones (reporting that the UNC Trustees voted to grant Hannah-Jones tenure "several months after refusing to consider her proposed tenure").

[7] Press Release, Legal Defense Fund, Nikole Hannah-Jones Issues Statement on Decision to Decline Tenure Offer at University of North Carolina-Chapel Hill and to Accept Knight Chair Appointment at Howard University (July 6, 2021) https://www.naacpldf.org/press-release/nikole-hannah-jones-issues-statement-on-decision-to-decline-tenure-offer-at-university-of-north-carolina-chapel-hill-and-to-accept-knight-chair-appointment-at-howard-university/.

what distinguishes Harvard and UNC from other elite schools.[8] Rather, the distinction comes from the context in which these incidents occurred. In the same moment that Harvard and UNC faced scrutiny for mistreating preeminent Black scholars, they also comprised—and remain—the last line of defense between affirmative action[9] and a Supreme Court more hostile to civil rights than any since before *Brown v. Board of Education*.[10] There is little reason to believe the line will

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[8] The episodes track a broader phenomenon of anti-Black bias in higher education. *See* Meera Deo, *Trajectory of a Law Professor*, 20 MICH. J. RACE & L. 441 (2015).

[9] The term "affirmative action" has been used to describe a range of policies and practices that promote access and inclusion within employment, education, and other domains of American society. *Cf.* Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CAL. L. REV. 1063, 1118 (2006) ("[Affirmative action] includes a broad range of policies and practices that are designed to respond to past discrimination, prevent current discrimination, and promote certain societal goals . . . . Affirmative action programs may be facially race- or gender-neutral (for example, broadcasting widely a particular employment opportunity) or race- or gender-contingent (for example, providing some resource to a woman or racial/ethnic minority under circumstances in which that person would not have received the resource but for that person's status as a woman or minority."); David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921 (1996). Within this Article, unless otherwise stated, I employ "affirmative action" interchangeably with the term "race-conscious admissions" as shorthand for policies that permit reviewers to consider an applicant's race during a selection process.

[10] On January 24, 2022, the Supreme Court agreed to hear and consolidated admissions lawsuits at Harvard and UNC. *See* Order Granting Cert, *SFFA v. Harvard*, https://www.supremecourt.gov/orders/courtorders/012422zor_m6io.pdf. The Supreme Court's current rightwing majority has already rolled back civil rights gains in the domains spanning voting, reproductive justice, and racial inclusion. *See* Kermit Roosevelt III, *The Supreme Court has been Engaged in a Rollback of Rights. Abortion Would Just Be the Latest*, TIME (May 16, 2022), https://time.com/6176168/supreme-court-overturned-rights-history/. Both Harvard and UNC prevailed below. *See Students for Fair Admissions, Inc. v. President & Fellow of Harv. Coll.*, 807 F.3d 472 (1st Cir. 2015) (upholding Harvard's race-conscious admissions policy); *Students for Fair Admissions Inc. v. Univ. of N.C.*, 319 F.R.D. 490 (M.D.N.C. 2017) (upholding UNC's race-conscious admissions policy). The Board that denied tenure to Hannah-Jones is a named defendant in the UNC litigation. *See* UNC Defendants' Proposed Findings of Fact and Conclusions of Law at 1, ¶5, Students for Fair Admissions, Inc. v. The Univ. N.C. 319 F.R.D. 490 (M.D.N.C. 2017) (No. 14-cv-00954) (naming as defendant "the University and

hold.[11]

Elite universities have long embodied this duality. They constitute sites of institutionalized racism, on the one hand, and stand as affirmative action's formal champions, on the other. The dynamic is

certain of its employees, the University of North Carolina Board of Governors and its individual members, and the University of North Carolina System and its president.").

[11] *See* Harvard Race Case Punctuates Supreme Court's Turn to Right, Bloomberg News (Jan. 24, 2022), https://news.bloomberglaw.com/us-law-week/harvard-race-case-punctuates-supreme-courts-sharp-turn-to-right ("They really are in this sort of moment where they can do whatever they like," said Melissa Murray, a constitutional law professor at New York University. The decision to hear the admissions case suggests that "they're just checking things off their list and affirmative action will be next."). Stare decisis is the principal that the Supreme Court will adhere to existing precedent absent extraordinary circumstances that counsel otherwise. *See* Stare Decisis, Cornell Law School Legal Information Institute (last visited May 31, 2022), https://www.law.cornell.edu/wex/stare_decisis. The Supreme Court's current rightwing majority has shown little respect for stare decisis—particularly when the relevant precedent advances racial and gender justice. *See* Alison Frankel, *With Supreme Court poised to ditch* Roe*, does precedent matter anymore?*, Reuters (May 3, 2022), https://www.reuters.com/legal/government/with-supreme-court-poised-ditch-roe-does-precedent-matter-anymore-2022-05-03/. It is not difficult to count five Justices ready to conclude that affirmative action violates the Constitution or federal law. Chief Justice Roberts, now the closest to a "swing" Justice, has noted his antipathy for any race-conscious government action. *See* Parents Involved v. Seattle School Dist. No. 1, 551 U.S. 701 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."). At least three other Justices appear ready to prohibit schools from even considering an admissions policy's racial impact. *See* Order in *Coalition for TJ v. Fairfax Cty. School Bd.* (Apr. 25, 2022), https://www.supremecourt.gov/orders/courtorders/042522zr_3fb4.pdf (denying request to vacate stay in case challenging Virginia school board's decision to alter admission criteria in order to promote racial diversity; with Justices Thomas, Alito, and Gorsuch dissenting).

not new.[12] But it remains underappreciated and undertheorized.[13] As a result, standard accounts continue to overlook a source of affirmative action's perpetual precarity: *elite universities*—affirmative action's formal, but ever-ambivalent, advocates.

Two high-profile lawsuits challenging the admissions practices at Harvard and UNC, now consolidated before the Supreme Court, reinforce this dynamic.[14] Even as Harvard and UNC defend their right to consider an applicant's race, they omit critical facts and theories that would fortify the case for their own policies.[15]

But the problem transcends what the universities leave on the table.[16] To begin, Harvard and UNC—consistent with past university defendants—have resisted third-party efforts to develop a more robust

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[12] *See infra* Part II (discussing the University of California's ambivalence toward affirmative action in *Regents of California v. Bakke*, the first race-conscious admissions case to receive substantive Supreme Court review). *See also* Alan Jenkins, *Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies*, 4 MICH. J. RACE & L. 263, 309 (1999) (identifying the facts and theories that affirmative action advocates often leave on the table).

[13] At least two threads of scholarship have engaged this dynamic. One thread has explored how procedural rules privilege the voice of university defendants over third-party stakeholders—even when those stakeholders would better defend affirmative action. *See, e.g.*, Jenkins, *supra* note 12. The other thread has critiqued how university defendants tend to reproduce conservative frames that portray affirmative action as a "racial preference." *See, e.g.*, Luke Charles Harris & Uma Narayan, *Affirmative Action as Equalizing Opportunity: Challenging the Myth of "Preferential Treatment", in* SEEING RACE AGAIN 246-266 (Kimberlé Williams Crenshaw ed., 2019). This Article is the first to integrate these distinct threads within a single piece of scholarship.

[14] *See supra* note 11.

[15] *See* Jonathan Feingold, *Colorblind Capture*¸102 B.U. L. REV. _(forthcoming 2022) (explaining, for example, that Harvard and UNC have failed to foreground the many facially race-neutral dimensions of their respective admissions processes that confer racial advantages on white students—racial advantages that affirmative action is well-suited to mitigate).

[16] Devon W. Carbado, *Footnote 43: Recovering Justice Powell's Anti-Preference Framing of Affirmative Action*, 53 U.C. DAVIS L. REV. 1117, 1149 (2019) (arguing that liberals tend to defend affirmative action "in lukewarm and defensive terms as a 'preference' whose costs are begrudgingly justifiable").

factual record and compelling legal narrative.[17] In other words, affirmative action's formal defenders have actively obstructed the admission of evidence that would benefit affirmative action.

Compounding this dynamic, Harvard and UNC privilege arguments that invite predictable lines of legal and political attack. This includes

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[17] In both cases, student intervenors have tried to develop a factual record that highlights past and present manifestations of racial discrimination attributable to the university and to frame affirmative action as a necessary countermeasure for that conduct. *See, e.g.*, Memorandum of Law in Support of Proposed Defendant-Intervenors' Motion to Intervene at 15, SFFA v. UNC, 319 F.R.D. 490 (M.D.N.C. 2017) (No. 14-cv-954) (seeking "to present evidence showing that UNC-Chapel Hill's current admissions policy is necessary in part because it helps remedy the long history of segregation and discrimination in North Carolina, including within the University itself"); *See also id*. ("This [unfavorable] outcome could result if the Court does not consider or weigh (or cannot consider or weigh because the record is insufficiently developed) the history of discrimination at UNC-Chapel Hill, the inextricable link between that history and UNC's current compelling interest in student body diversity, and the adverse effect that elements of the current admissions process have on the diversity of the student population."). Harvard and UNC both objected to the students' attempt to intervene. *See* Harvard's Response to Motion to Intervene, Students for Fair Admissions, Inc. v. President & Fellow of Harv. Coll. 807 F.3d 472 (1st Cir. 2015); Defendants' Response to Motion to Intervene, Students for Fair Admissions Inc. v. Univ. of N.C. 319 F.R.D. 490 (M.D.N.C. 2017). This resistance to intervention is not new. In 2003, Professor Cheryl Harris commented on similar dynamics in *Grutter* and *Gratz*. *See* Cheryl I. Harris, *What the Supreme Court Did Not Hear in Grutter and Gratz*, 51 DRAKE L. REV. 697, 697 (2003) ("It might seem like after all the briefs, all the arguments, all the ink (I think there were a record number of amicus briefs filed in this case), that it would be difficult to argue, as I am today, that there is something that the Supreme Court didn't hear in Grutter. But perhaps it is an inevitable part of making history that certain stories are left untold."); *see also* Jenkins, supra note 12 at 309 ("[A]n affirmative action defendant cannot advance a vigorous defense of its program on remedial grounds without risking liability to beneficiaries and others under the Constitution [or Title VI] . . . for defendants who are recipients of federal funds."). Beyond litigation, scholarly debates about affirmative action long sidelined the voices, experience, and expertise of scholars of color. *See* Derrick Bell, Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3, 4 (1979) ("The exclusion of minorities from meaningful participation in the *Bakke* litigation and, for that matter, from much of the scholarly debate over the case, was more polite, but no less firm. Minority interests were not represented on either side of the counsel table as the *Bakke* case wound its way through the court. Allen Bakke's counsel opposed the interests of minorities; attorneys for [UC], except perhaps by comparison with Mr. Bakke's position, could hardly claim to speak for minorities.").

treating their own admissions practices as *justifiable* discrimination—that is, "preferential treatment" that benefits Black and brown students over "more qualified" and "deserving" white (and, at times, Asian) applicants.[18] This "affirmative action-as-preference" framing is ubiquitous. But it is not inevitable. To the contrary, Harvard and UNC could defend race-conscious admissions as *necessary anti*-discrimination—that is, a modest prophylactic that mitigates the many racial advantages that standard selection processes confer upon white applicants.[19] Yet rather than defend their own policies on this basis,

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[18] In a companion project, I detail how university defendants reproduce colorblind logics that undermine the case for affirmative action. *See* Feingold, *supra* note 16. This includes the common reflex to frame affirmative action as "preferential treatment" that injects race into an otherwise race-neutral process. *See* Luke Charles Harris & Uma Narayan, *Affirmative Action As Equalizing Opportunity: Challenging the Myth of "Preferential Treatment"*, 16 NAT'L BLACK L.J. 127, 132 (2000) ("[Affirmative action] defenders continue to characterize these policies as 'preferential treatment,' but argue that these preferences are justified, either as forms of 'compensation' or on grounds of 'social utility.'"); Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1220 (2002) ("Yet an increasing source of frustration was the inadequacy of the liberal response that too often accepted the premise that race consciousness amounted to racism and that too often argued for race-conscious remediation as temporary, exceptional, and aberrational within an otherwise neutral legal frame.").

[19] *See* Harris, *supra* note 17 ("The mainstream press has thus framed affirmative action as a hot issue about race in which opinion is polarized over whether racial preferences are fair or not. . . . It assumes the position or conclusion regarding the very thing that is under debate: Is a particular policy reverse discrimination or a racial preference, or is it a justifiable measure to eliminate the effects of past and current discrimination."). Reframing affirmative action as "necessary anti-discrimination" repositions race-conscious admissions as a modest attempt to mitigate racial advantages that white students enjoy and racial disadvantages that students of color confront during and after the admissions process. *See, e.g.*, Brief of Experimental Psychologists et al. as Amici Curiae Supporting Respondents, Fisher v. University of Texas (Aug. 13, 2012) (No. 01-1015) ([S]tandardized test scores and high school GPAs systematically underestimate the true talents of many members of minority groups stigmatized as intellectually inferior. . . . A[race-conscious] admissions policy that takes proper account of stereotype threat is not a departure from merit-based admissions, but is rather an effort to achieve more accurate merit-based admissions."); Defendant-Intervenors' Response to Plaintiff's Proposed Findings of Fact and Conclusions of Law, SFFA v. UNC 14-CV-954 ("Student-Intervenors testified that UNC's race-conscious policy helps to counteract the lingering effects

Harvard and UNC actively resist third-party attempts to do so.[20]

This tendency to treat affirmative action as a departure from racial neutrality tracks decades of ambivalent advocacy.[21] Critically, the consequences transcend the legal fate of race-conscious admissions.[22] As much as any legal dispute, affirmative action litigation implicates broader societal debates about the relevance of race and racism in America—and what, if anything, is needed to remedy a legacy of racialized subordination. As a result, when elite universities understate the case for affirmative action, they do more than compromise their own policies. They also normalize a regressive narrative that delegitimizes antiracism itself.[23] This dynamic has always been problematic.[24] But in a moment marked by unrelenting backlash—including a targeted disinformation campaign against antiracist reform—the enduring ambivalence of elite universities requires

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of UNC's legacy of exclusion by impacting their perception of UNC as welcoming to underrepresented minority students.").

[20] *See infra* Part I.2(1) (outlining Harvard and UNC's opposition to interveners).

[21] *See* Carbado, *supra* note 17 at 1131 ("At bottom, I am urging liberal members of the Court to do what, for the past forty years, they have not done — force conservative justices to affirmatively defend, rather than merely take for granted, their claim that affirmative action is a racial preference."

[22] Others have noted how the stories we tell about affirmative action can be as important as the policies themselves. *See* Khiara M. Bridges, *Class-Based Affirmative Action, or the Lies That We Tell About the Insignificance of Race*, 96 B.U. L. REV. 55, 57–58 (2016) ("[P]ursuant to our thick understanding of racial justice, it is not enough that racial minorities merely are present at schools from which they have been excluded. Equally if not more important are the stories that we tell about *why* they are there."); Barbara J. Flagg, *Diversity Discourses*, 78 TUL. L. REV. 827, 851 (2004) ("[M]y own assessment is that the discursive damage done by *Grutter* is at least equal in significance to its concrete benefits.").

[23] *See* Feingold, *supra* <*Colorblind Country*> (explaining that when elite universities locate racial discrimination in an ignoble past, they mute calls for race-conscious remedies in the present).

[24] *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

scholarly attention.[25]

Accordingly, this Article asks why affirmative action's formal defenders bolster the case *against*, not *for*, affirmative action. More concretely, I explore how institutional dynamics common to elite universities disincentivize more zealous advocacy for their own race-conscious policies.[26] These dynamics interact with procedural rules that privilege university defendants above other affirmative action advocates.[27] In short, reinforcing institutional dynamics and litigation structure produces an adversarial context that pits uncompromising affirmative action opponents against ambivalent affirmative action advocates.

Surfacing this story serves two purposes. First, it broadens and sharpens common accounts of affirmative action's legal and political instability.[28] Second, it reminds us that racial retrenchment has always

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[25] Others have detailed how moments of racial progress (e.g., the Civil War Amendments) have been followed by prolonged periods of racial backlash and retrenchment (e.g., Jim Crow). *See id*. at 1364 ("Without such an analysis of racism's role in maintaining hegemony, [Alan Freeman's] explanation simply does not convincingly capture the political realities of racism and the inevitability of white backlash against any serious attempts to dismantle the machinery of white supremacy."). We are in the midst of a similar dynamic, in which 2020's global uprising for racial justice has triggered a nationwide assault on antiracist efforts and basic civil rights stretching from public education to voting. *See* Amy Gardner, Kate Rabinowitz & Harry Stevens, *How GOP-Backed Voting Measures Could Create Hurdles for Tens of Thousands of Voters,* WASH. POST (Mar. 11, 2021); Olivia B. Waxman, *'Critical Race Theory is Simply the Latest Bogeyman.' Inside the Fight Over What Kids Learn About America's History,* TIME (July 16, 2021).

[26] *See infra* Part II.

[27] *See infra* Part I.2.

[28] The standard story foregrounds unfriendly doctrine, hostile Justices, and a skeptical public. *See* Angela Onwuachi-Willig et al., *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After* Fisher v. University of Texas, Austin, 62 UCLA L. REV. 272, 278-84 (2015) (providing a "brief history" of affirmative action). This story is not wrong. But it is incomplete and, potentially, misleading. To begin, the Supreme Court has exhibited hostility toward antiracist projects since the post-Civil War era. *See* C.R. Cases, 109 U.S. 3, 23 (1883) ("When a man has emerged from slavery ... there must be some stage in progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special

been a bipartisan project—one that cannot succeed without concessions from liberal elites.[29]

This Article proceeds as follows. Part I outlines how legal doctrine and cultural norms position elite universities to shape our national affirmative action debates. Part II then explores why elite universities often resist facts and theories that would buffer their own race-conscious policies against legal scrutiny and political attacks. Specifically, I surface three dynamics that render elite institutions ambivalent affirmative action advocates: (a) commitment gaps,[30] (b) perceived conflicts of interest,[31] and (c) risk aversion.[32]

I. A PRIVILEGED VOICE ON AFFIRMATIVE ACTION

Elite universities are uniquely positioned to shape how we think about, talk about, and feel about affirmative action. This privileged posture derives from two sources: (1) the public's preoccupation with elite schools and (2) a litigation structure that centers the voices and perspectives of university defendants. Put differently, relative to other affirmative action advocates, elite universities enjoy outsized influence in the court of law and the court of public opinion.

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favorite of the laws."). But campaigns to discredit antiracism have always benefitted from the failure of mainstream liberals to defend such policies as necessary antidiscrimination. *See* Jonathan Feingold, *Reclaiming CRT: How Regressive Laws Can Advance Regressive Ends*, 74 S.C. L. REV. 1 (2022); Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009) (explaining why affirmative action, albeit controversial, constitutes a modest policy intervention).

[29] *Cf.* Devon Carbado & Jonathan Feingold, *Rewriting* Whren v. United States, 68 UCLA L. Rev. 1678, 1686 (2022) ("In the present context, the greater good is the so-called "war on drugs"—a now decades-long and bipartisan campaign ostensibly intended to combat illegal drug use in America.").

[30] *See infra* Part II.A (discussing how "integrationist" institutions have never valued racial inclusion as much as "segregationist" institutions valued racial exclusion).

[31] *See infra* Part II.B (discussing how elite universities often perceive a conflict between arguments that would strengthen the case for affirmative action and other institutional interests in brand and budget).

[32] *See infra* Part II.C (discussing how aversion to legal exposure incentivizes elite university administrators and their attorneys to avoid behavior before and during litigation that, if undertaken, would strengthen compromises the case for race-conscious admissions).

This privileged perch matters. As noted above, affirmative action disputes often serve as proxies for broader fights over the contemporary relevance of race and racism in America. Accordingly, when a university defendant understates the case for affirmative action, it does more than compromise the legal viability of a specific practice or policy. It also normalizes, in public discourse, regressive talking points designed to that erode any legal or moral distinction between legalized racial subordination (e.g., Jim Crow) and race-conscious efforts to remedy that history (e.g., affirmative action).[33]

Translated to the present, litigation at Harvard and UNC is about more than race-conscious university admissions. These lawsuits also function as public referenda on the meaning of racism itself—and, by extension, whether antiracism is a moral and just project. In other words, these lawsuits comprise fronts in a broader campaign of racial retrenchment and backlash.[34] Harvard and UNC, given their privileged posture, are uniquely suited to contest the regressive rhetoric underlying this campaign by championing race-conscious admissions as a modest but critical form of antidiscrimination that counters the vestiges of Jim Crow that continue to shape our world. Thus far, they have failed to do so.

A. The Source of Privilege

1. Public Preoccupation

In many respects, elite universities and their students are unrepresentative of the average American university and college student.[35] For this reason alone, many have criticized the attention these institutions garner.[36] That said, elite universities—and Ivy League schools in particular—remain objects of public obsession.[37] Two recent examples are illustrative.

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[33] *See* Flagg, *supra* note <*Diversity Discourses*>.

[34] *See* Jonathan Feingold, *CRT Upside Down*, 73 S.C. L. Rev. __ (forthcoming 2022) (outlining multiple fronts in ongoing political, discursive, and judicial campaign of racial retrenchment).

[35] *See* Ben Casselman, *Shut Up About Harvard*, FIVETHIRTYEIGHT (Mar. 30, 2016), https://fivethirtyeight.com/features/shut-up-about-harvard/ (arguing that a "focus on elite schools ignores the issues most college students face").

[36] *See, e.g., id.*

[37] *See* Jeffrey Selingo, *Our Dangerous Obsession with Harvard, Stanford and other Elite Universities*, WASH. POST (Apr. 5, 2016),

First, in March 2019, the Department of Justice disclosed "Operation Varsity Blues," a federal investigation into a college bribery scheme that implicated "high-profile actresses, lawyers, CEOs, vintners, a fashion designer and more."[38] Among other unlawful conduct, the scandal involved "bribing coaches and university administrators and arranging for falsified test scores on students' entrance exams."[39] More broadly, the scandal illuminated the myriad ways that parents often leverage their personal wealth, networks, and influence to secure their children's admission at elite schools.[40] In this respect, the "Varsity Blues" scandal provoked outrage because of the naked corruption wealthy parents exerted over a process that already favors students (like their children) who come from wealth and privilege.[41]

But the episode also reflected a broader obsession with prestigious universities—an obsession that transcends the nation's wealthiest families.[42]

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https://www.washingtonpost.com/news/grade-point/wp/2016/04/05/our-dangerous-obsession-with-harvard-stanford-and-other-elite-universities/ ("It's also the time when seemingly everyone involved in the college search process — from the media to school counselors — are obsessed with the admissions decisions Harvard and dozens of other selective colleges and universities have made.").

[38] Feroze Dhanoa, *"Operation Varsity Blues": College Cheating Scheme Names Dozens*, PATCH.COM, (Mar. 12, 2019), https://patch.com/massachusetts/boston/college-admissions-cheating-scheme-feds-announce-charges; *See also 8 Outrageous Details From the U.S. College Scam Court Documents*, CBC NEWS (Mar. 14, 2019), https://www.cbc.ca/news/world/us-college-scam-court-cheating-1.5055097.

[39] 8 Outrageous Details, *supra* note 37.

[40] *See Matt Kwong, What Bribery in U.S. College Admissions Says About the 'Myth' of Meritocracy*, CBC NEWS (Mar. 14, 2019), https://www.cbc.ca/news/world/us-college-scam-court-cheating-myth-meritocracy-1.5055854 ("The scandal, in other words, is not just the crimes, said Jeet Heer, an associate editor with The New Republic who comments frequently on U.S. culture and politics. 'The scandal is what is legal.'").

[41] *See* Jonathan Feingold, All (Poor) Lives Matter": How Class-Not-Race Logic Reinscribes Race and Class Privilege, U. Chi. L. Rev. Online 47, 56-57 (2020) (outlining how standard measures of merit—e.g., standardized tests—benefit class-privileged white applicants with "an uneven playing field that rewards inherited race and class privilege"); Complaint for Declaratory and Injunctive Relief, Smith v. Regents of the Univ. of Cal., No. RG19046222 (Cal. Super. Ct. Dec. 10, 2019) (arguing that the SAT and ACT are neither race- nor class-neutral because they function on "prox[ies] for students' wealth and accumulated advantage").

[42] *See* Abby Mims, *I Helped Get Rich Kids into Elite Colleges. Obsessed Parents Drove Me Away*, WASH. POST (Mar. 13, 2019).

For many Americans, elite universities confer symbolic and material benefits. To begin, many "Americans' identities are often intertwined with their post-secondary brands."[43] In other words, for many, an individual's sense of self is inseparable from the university that person attends. The more prestigious or highly regarded the institution, the better it reflects on the students there enrolled.

As for material benefits, access to elite schools is often viewed as a prerequisite to a life of comfort and privilege in the United States.[44] This perception extends beyond universities to secondary, primary, and even early childhood education.[45] This obsession with prestige shows no signs of waning.[46] Nor is it void of merit.[47] For decades, America has seen rising wealth gaps alongside the ever-increasing scarcity of employment opportunities for individuals without a college degree.[48] One can understand

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[43] Kwong, *supra* note 43.

[44] *See* Danielle Douglas-Gabriel & Susan Svrluga, *Former students sue Georgetown, Columbia and other elite universities over financial aid practices*, WASH. POST (Jan. 10, 2022), https://www.washingtonpost.com/education/2022/01/10/university-financial-aid-lawsuit/ ("These elite universities are gatekeepers to the American Dream, and they are closing the gate more than they should.").

[45] *See* Osamudia James, *Risky Education*, 89 Geo. WASH. L. REV. 667, 718 (2021) ("Like selective school enrollment in New York, parents perceive access to elite higher education as essential to ensuring student success.").

[46] *See* Melissa Korn, *Ivy League Colleges Report Dramatic Growth in Early-Admission Applicant Pools*, WALL ST. J. (Dec. 18, 2020) ("Early-admission applications to Ivy League colleges skyrocketed this year, as anxious high-school seniors tried to boost their chances of getting into some of the most selective schools in the country.").

[47] *See* Grutter v. Bollinger, 539 U.S. 306, 332 (2003) ("[U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. . . . The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges.").

[48] *See* Heather Long, *Many left behind in this recovery have something in common: No college degree*, WASH. POST (Apr. 22, 2021), https://www.washingtonpost.com/business/2021/04/22/jobs-no-college-degree/; *see also* John A. Powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. U. L. REV. 785, 806 (2009) ("At a time of perceived scarcity and contracting government budgets, targeted policies may be viewed as favoring some constituent group rather

how the resulting economic anxieties translate to competition over limited spots in institutions associated with wealth and privilege. At the same time, this obsession overlooks (and can obscure) that prestigious universities—unlike their less-prestigious counterparts—are far better at reproducing privilege than catalyzing social mobility.[49] In other words, the universities that provide the most economic mobility to students from low-income backgrounds are not Ivy League staples like Harvard or elite public schools like UNC. Rather, the schools that "create a consistent path to the middle class" tend to be state schools that "enroll mostly low- and moderate-income students."[50]

A 2021 incident at Yale Law School ("YLS") further reflects our public fascination with elite institutions. In the spring of 2021, a minor personnel involving a controversial YLS professor matter ballooned into a public spectacle. In brief, the underlying "drama" arose out of a meeting with the professor and two students at the professor's residence.[51] As Elizabeth Bruenig reported, at least three major and highly regarded publications "gave the mysterious affair a lengthy report."[52] To be clear, the underlying incident

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than the public good. If the target group is historically disfavored or considered 'undeserving,' targeted policies risk being labeled 'preferences' for 'special interests.'). Elite universities are responsible, in part, for perceived and actual scarcity. *See* Sam Haselby, *The Ivy League vs Democracy* (Apr. 25, 2021), https://mattstoller.substack.com/p/break-up-the-ivy-league-cartel ("In 1940, the acceptance rate at Harvard was eighty-five percent. In 1970, it was twenty percent. This year, for the class of 2025, it was 3.4 percent.").

[49] *See* Adam Howard & Ruben Gaztambide-Fernandez, EDUCATING ELITES: CLASS PRIVILEGE AND EDUCATIONAL ADVANTAGE (2010).

[50] Michael Itzkowitz, *Out With the Old, In With the New: Rating Higher Ed by Economic Mobility*, THIRD WAY, https://www.thirdway.org/report/out-with-the-old-in-with-the-new-rating-higher-ed-by-economic-mobility (Jan. 27, 2022) (noting that the "schools shown to provide the most economic mobility are all Hispanic-serving Institutions . . . located in California, Texas, and New York").

[51] Elizabeth Bruenig, *The New Moral Code of America's Elite*, THE ATL. (July 28, 2021), https://www.theatlantic.com/ideas/archive/2021/07/amy-chua-yale-law-school-real-story-dinner-party/619558/. It was understood among students that, due to past incidents, YLS had prohibited this professor from hosting students for private engagements at her residence. *See id*.

[52] *See id*.

arguably called for some level of institutional inquiry.[53] That said, it is hard to imagine public interest in the controversy had it occurred somewhere other than Yale (or a comparably elite institution). More concretely, had the incident occurred at the University of New Haven (just across town from Yale), there is no chance it would have garnered such acute interest by *The New York Times*, *The New Yorker*, and *New York Magazine* and their readership.

Although comprising two data points, the foregoing examples reflect the acute and special attention elite universities command from the media and much of the American public.[54] This dynamic affords elite schools a unique ability to shape national conversations—including longstanding debates about affirmative action. By extension, elite schools enjoy a privileged posture to shape resurgent debates over racism's enduring relevance in America.[55]

Below, I turn to another source of this privileged posture: litigation structure. As I explain, procedural rules and doctrinal norms privilege the voice of university defendants over other affirmative action advocates. As a result, universities like Harvard and UNC can mold the legal and institutional narratives that accompany affirmative action litigation. In effect, basic litigation structure magnifies the ability of elite universities to shape how we

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[53] Among other considerations, power dynamics between professors and students impose a heightened ethical—if not legal—responsibility on institutions to ensure professors do not abuse that power (whether or not such abuse is intentional). *See* C. John Cicero, *The Classroom As Shop Floor: Images of Work and the Study of Labor Law*, 20 VT. L. REV. 117, 142 (1995) ("To me, this is evidence of a dynamic at work where the authority of the professor, like that of a boss, carries with it the power to coerce (even at a school like CUNY which has endeavored to introduce alternatives to the hierarchical professor/student relationship)."). Moreover, that baseline dynamic is even more pronounced when, as here, the professor at issue is recognized as a "gatekeeper" to more prestigious professional opportunities such as Supreme Court clerkships.

[54] Elite universities remain a common target of ridicule from entities, individuals, and interests across the political spectrum. The Right, for example, often invokes elite universities as a potent political foil—an alleged bastion of leftwing indoctrination that threatens conservative American values. *See, e.g.*, Anemona Hartocollis & Shawn Hubler, *Donald Trump vs. the Ivy League: An Election-Year Battle*, N.Y. TIMES (Sept. 21, 2020), https://www.nytimes.com/2020/09/21/us/trump-ivy-league-election.html.

[55] The Supreme Court's upcoming review of race-conscious admissions at Harvard and UNC is likely to amplify the attention these two institutions already command from the media and public.

think and talk about affirmative action—in the courtroom and in the public square.

2. Litigation Structures

Multiple aspects of litigation structure elevate the voices and perspectives of elite universities over an array of third parties with a material stake in affirmative action lawsuits.[56] I explore two below: (a) procedural rules that hinder third party intervention and (b) judicial deference to university "expertise."

(1) Procedure Disfavors Intervenors

Features common to civil litigation privilege universities over other affirmative action advocates in two directions. Standard procedural rules (a) center the university defendant's perspective and (b) marginalize, if not exclude, the views, voices, and perspectives of third parties who would tell a more comprehensive and compelling affirmative action story.[57]

As to the former, when an admissions policy is challenged, the university—as the formal defendant—acquires the right to control the defense. This entails the authority to determine which defenses to raise, which theories to invoke, and what evidence to submit.[58] Pursuant to this formal status, the university can craft the underlying legal narrative—that is, the story that explains what affirmative action is, the function it performs, and the backdrop against which it intervenes. The prevailing narrative

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[56] This includes, for example, students of color and civil rights organizations dedicating to desegregating higher education in America. *See* Harris, *supra* note 17 at 702 (noting that in *Grutter* and *Gratz*, the Supreme Court "heard arguments from the plaintiffs, the University, and even the Solicitor General on behalf of the United states . . . everyone except these [underrepresented minority] students" who also possessed "a serious stake in the outcome of the litigation").

[57] *See* Jenkins, supra note 12 (explaining that procedural rules privilege the perspective of university defendants over third-party stakeholders who attempt to highlight how affirmative action is necessary to counter racial (dis)advantages that benefit white applicants); *see also* Carbado, *supra* note 17 (cataloguing "colorblind" criteria common to university admissions processes that confer "racial preferences" to white applicants).

[58] *See* Fed. R. Civ. P. 17 ("An action must be prosecuted in the name of the real party in interest.").

matters, in part, because it shapes how the court and the public will view the underlying dispute.[59]

Moreover, basic litigation structure and related procedural rules privileges the university's voice and perspective over third parties—even when those individuals or entities have a direct stake in the litigation and would marshal a more compelling affirmative action story.[60] Such procedural rules include Federal Rule of Civil Procedure ("FRCP") 24, which prescribes when a non-party may intervene by right or at the court's discretion.[61] To intervene as a matter of right, non-parties must demonstrate, *inter alia*, that the "existing parties [cannot] adequately represent [the non-party's] interest."[62] To warrant permissive intervention, courts consider whether "an applicant's claim or defense and the main action have a question of law or fact in common."[63]

As I detail in Part II, institutional dynamics dis-incentivize universities from marshalling the most compelling case for their own policies.[64] As a result, and as Alan Jenkins observed over two decades ago:

> Without intervention by [affirmative action] beneficiaries, affirmative action cases typically pit unsuccessful White applicants and counsel

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[59] Even if empowered to craft the defense, the university must contend with the facts, theories, and frames that the plaintiff employs.

[60] *See* Harris, *supra* note 19 at 702 (explaining that the *Grutter* student intervenors "had a serious stake in the outcome of the litigation" and that in "*Bakke*, the [students of color] that arguably had the most at stake in the outcome did not have a direct voice in the case when it was hear").

[61] FED. R. CIV. P. 24. A party may intervene by right when "[o]n timely motion," the movant "(1) is given an unconditional right to intervene by federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Id. at 24(a).

[62] *Id*.

[63] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 308 F.R.D. 39, 45 (D. Mass.), *aff'd*, 807 F.3d 472 (1st Cir. 2015) (internal quotation marks and citation omitted). When deciding whether permissive intervention is warranted, courts "can consider almost any factor rationally relevant, and enjoy[] very broad discretion in allowing or denying the motion." *Id.*

[64] *See infra* Part II (explaining that, among other dynamics, universities are reluctant to foreground their own racial discrimination—even if that showing would buttress the case for race-conscious admissions).

> opposed to traditional civil rights enforcement against governments and other institutions with a history of racial bias and strong incentives to avoid confessing civil rights liability.[65]

In the abstract, this dynamic suggests that FRCP 24 creates a viable vehicle for third-party stakeholders—such as students of color or civil rights organizations—to attain formal defendant status. In practice, intervenors in the admissions context have found, at best, mixed success under FRCP 24.[66]

This trend has extended to the Harvard and UNC lawsuits. In the Harvard case, putative student intervenors questioned the university's "ability and willingness" to advance the strongest affirmative action defense.[67] More specifically, the intervenors argued that Harvard, "so as not to offend its alumni, faculty, the academic community, or the public," might "be hesitant to advance relevant arguments advocating affirmative action as a remedial step that would expose its own history of past discrimination or to address ongoing problems with race relations or dissatisfaction with racial diversity on the campus."[68] Building on this point, the students further argued

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[65] Jenkins, *supra* note 13, at 268. *See also id*. ("[E]ach party in a bipolar affirmative action case faces strong disincentives to presenting evidence of recent discrimination by the defendant or questioning the validity of standardized tests and other selection criteria that may discriminatorily exclude certain classes of applicants."). Similar dynamics overshadowed the *Bakke* litigation. *See* Dreyfuss & Lawrence, at 49 (" . . . . *Bakke* was a defensive action, and minorities found themselves on the sidelines, reminded that despite the rhetoric of progress so popular in the 1970s, most American institutions remained solely in the hands of white men who made decisions that would profoundly affect their welfare.").

[66] *See* Jenkins, *supra* note 13, at 266 ("[S]tudents of color and organizations that represent them have sought, and been denied, intervention in suits challenging affirmative action programs at the University of Washington, the University of Texas Law School, and the Boston Latin Academy."). This contrasts with affirmative action litigation outside of the admissions contexts where intervenors have found greater success. *See id.* (identifying multiple affirmative action cases from the 1990's where district courts granted intervention). At the same time, the Supreme Court has relaxed standing requirements for parties challenging affirmative action. *See id* at 264.

[67] Memorandum in Support of Proposed Defendant-Intervenors' Motion to Intervene at 14, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. 308 F.R.D. 39 (D.Mass.), *aff'd*., 807 F.3d 472 (1st Cir. 2015) (No. 14-cv-14176). This line of reasoning tracks intervention arguments in past affirmative action litigation.

[68] *See id.*

that Harvard would omit theories of ongoing discrimination that would support the constitutional case for affirmative action.[69]

Harvard objected to intervention.[70] Among other arguments, the university refuted the suggestion that it would inadequately defend its own program.[71] The district court sided with Harvard and denied the motion.[72] Even in so doing, the district court recognized that the intervenors would benefit the litigation. Specifically, the district court granted the students "amicus plus" status—thus enabling them to substantively participate above other non-parties.[73] Still, Harvard retained primary authority to frame the case, marshal evidence, and respond to the plaintiffs' arguments.[74] In other words, the students were given a partial but subordinate voice; Harvard remained empowered to shape the prevailing narrative that would inform legal and lay perceptions of the case.

In the UNC litigation, putative intervenors also attacked UNC's ability to adequately defend its own admissions policy. Unlike the Harvard movants, the UNC intervenors sought a limited right to submit evidence on two issues: (1) "the history of segregation and discrimination at UNC-Chapel Hill and in North Carolina" and (2) "the effect of UNC-Chapel Hill's existing, and

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[69] *See id*.

[70] *See* Harvard's Response to Motion to Intervene, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. 308 F.R.D. 39 (D.Mass.), *aff'd*., 807 F.3d 472 (1st Cir. 2015) (No. 14-cv-14176).

[71] *See id*. at 1 ("Harvard is mounting a vigorous defense of those policies and practices, and it looks forward to a successful and expeditious resolution of this case.").

[72] *See* Memorandum and Order on Proposed Defendant-Intervenors' Motion to Intervene, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. 308 F.R.D. 39 (D.Mass.), *aff'd*., 807 F.3d 472 (1st Cir. 2015) (No. 14-cv-14176).

[73] The district court permitted the student intervenors to: 1) ''submit a brief or memorandum of law not to exceed 30 pages, exclusive of exhibits, on any dispositive motion in this case''; 2) ''participate in oral argument on any dispositive motion''; and 3) ''submit personal declarations or affidavits in support of their memorandum of law, which may be accorded evidentiary weight if otherwise proper.'' *Id.* at 23.

[74] *See* New Hampshire Ins. Co. v. Greaves, 110 F.R.D. 549, 552 (D.R.I. 1986) (explaining that absent intervention, the original parties have the right "to control the destiny of their own suits").

[plaintiff's] proposed, admissions processes on the critical mass of diverse students at UNC-Chapel Hill."[75] UNC objected on all fronts.[76]

Unlike the Harvard litigation, the district court granted the students' request to submit evidence on the two aforementioned issues.[77] Given the intervenors' limited status, UNC has retained much of its authority to construct the narrative and factual record that will inform lay and legal perceptions of the case. Even so, the intervenors have already affected the litigation. Through their presence—at trial and within briefing—the intervenors surfaced and highlighted evidence that tethers the ongoing relevance of race at UNC to the university's own history of formal racial exclusion and white supremacy.[78]

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[75] Consolidated Reply in Support of Motion to Intervene at 2, Students for Fair Admissions Inc. v. Univ. of N. Carolina, 319 F.R.D. 490 (M.D.N.C. 2017) (No. 14-cv-954). The district court distinguished the intervenors motion from that in the Harvard litigation. *See* Memorandum Opinion and Order at 12-13, Students for Fair Admissions, Inc. v. Univ. of N. Carolina, 319 F.R.D. 490 (M.D.N.C. 2017) (No. 14-cv-954) ("However, the factual circumstances of the two cases are distinguishable. Unlike in Harvard College, where the proposed intervenors sought to participate as full-fledged parties to the action, Proposed Intervenors here seek only limited participation in this action. Further, UNC-Chapel Hill, as a public institution, subject to state funding and regulations, is distinguishable from Harvard, a private institution. Over 80% of UNC-Chapel Hill's entering freshman class must come from North Carolina, a state which has its own history of discrimination and segregation.").

[76] *See* Defendants' Response to Motion to Intervene, Students for Fair Admissions, Inc. v. Univ. of N. Carolina, 2015 WL 4764171 (M.D.N.C.) (objecting to intervention on the basis that UNC adequately represented the intervenors' interests, intervention would delay the litigation, and that intervenors could meaningfully participate as Amici curiae).

[77] *See* Memorandum Opinion and Order at 12-13, Students for Fair Admissions, Inc. v. Univ. of N. Carolina, 319 F.R.D. 490 (M.D.N.C. 2017) (No. 14-cv-954).

[78] *See, e.g.*, Defendant-Intervenors' Brief in Response to Plaintiff's Motion for Summary Judgment, Students for Fair Admissions, Inc. v. Univ. of N. Carolina, 2019 WL 1339089 (M.D.N.C.) ("North Carolina has a 'sordid,' 'shameful,' and 'disgraceful' history of state sponsored racial discrimination, which includes excluding African-American and other students of color from UNC-Chapel Hill.") (internal citation omitted).

This context would not have entered the case but for the intervenors.[79] To appreciate its impact on the litigation, one need only look to the district court's opinion upholding UNC's admissions policy. Specifically, the court cited "credible evidence that UNC 'has been a strong and active promoter of white supremacy and racist exclusion for most of its history.'"[80] The underlying testimony came not from UNC, but rather from one of the intervenors' experts.[81] The same expert testified, and the district court noted, that UNC's complicity transcends affirmative white supremacist conduct in the past. The court, drawing on the intervenors' expert, further observed that although "faculty, administrators and trustees have made important strides to reform the institution's racial outlook and policies, . . . those efforts have fallen short of repairing a deep-seated legacy of racial hostility and disrespect for people of color."[82]

In essence, the intervenors did what UNC would not. They defended race-conscious admissions as a mechanism to reckon with the enduring relevance of race at UNC and throughout North Carolina—a reality that cannot be understood without linking the present to the past. This story, and the testimony on which it rests, bolsters the legal case for affirmative action. But it does more. By exposing how race still matters, the intervenors counter regressive talking points that deny race's contemporary force and thereby insulate inequality—and the systems that produce it—from critique.

It is here, in this site of contestation, that affirmative action litigation dovetails with broader fights over race and racism in America. This includes the political Right's ongoing effort to weaponize Critical Race Theory ("CRT") for political and economic gain.[83] As journalist Sam Adler-Bell

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[79] Aside from limited gestures, UNC did not center its own legacy of racial exclusion and white supremacy as part of that backdrop of racial discrimination that necessitates race-conscious admissions. As one example, UNC's post-trial brief did not include any of the following words or phrases to describe its past or present conduct vis-à-vis students of color: "discrimination," "segregation," or "white supremacy." *See* UNC Defendants' Proposed Findings of Fact and Conclusions of Law, Students for Fair Admissions, Inc. v. Univ. of N. Carolina (M.D.N.C. 2021).

[80] *See* Trial Findings of Fact and Conclusions of Law at 9 n.5, Students for Fair Admissions, Inc. v. Univ. of N. Carolina (M.D.N.C. 2021) (No. 14-cv-954) (describing the expert testimony as an "important contribution to the Court's understanding of the context of this case").

[81] *See id*.

[82] *Id*.

[83] *See* David Theo Goldberg, *The War on Critical Race Theory*, BOSTON REVIEW (May 7, 2021), https://bostonreview.net/articles/the-war-on-critical-race-theory/.

observed, "[a]n unstated goal of demonizing CRT, then, is to eliminate this insight [of structural racism] from the policy discussion: to shift the blame for persistent inequalities away from the government and back to individuals and families."[84] In other words, by stigmatizing concepts such as "systemic racism," "affirmative action," or "antiracism," regressive projects seek to explain material inequality as the legitimate consequence of individual or cultural deficiencies.[85]

This link between affirmative action litigation and broader cultural conflicts is one reason why court decisions upholding race-conscious admissions are not enough to counter regressive theories of inequality. The explicit rationale guiding and defending those decisions always matters. When affirmative action advocates—whether it be universities, courts, or others—characterize such policies as "justifiable discrimination" or necessary "racial preferences,"[86] they normalize conservative narratives that place racism in an ignoble past and legitimize the status quo. When this occurs, affirmative action advocates—even when they prevail—erode their own structuralist accounts of racism and invite false equivalencies between affirmative action and the legacy it is meant to overcome.

(2) Courts Defer to University Expertise

In addition to the features of litigation outlined above, courts often defer to university defendants on academic matters that benefit from institutional expertise. This extends to university admissions policies.[87] This deference, which traces to Justice Powell's opinion in *Regents v. Bakke* in 1978,[88] is

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[84] Sam Adler-Bell, Behind the Critical Race Theory Crackdown, THE FORUM (Jan. 13, 2022), https://www.aapf.org/theforum-critical-race-theory-crackdown.

[85] *Id*.

[86] *Cf.* Andy Portinga, *Racial Diversity As A Compelling Governmental Interest*, 75 U. DET. MERCY L. REV. 73, 75–76 (1997) ("The most common argument in favor of affirmative action is that *racial preferences* are *necessary* to remedy the effects of past discrimination.") (emphasis added).

[87] *See* Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198 (2016).

[88] 438 U.S. 265, 312 (1978) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.").

well-established within the Supreme Court's race-conscious admissions jurisprudence.[89]

In *Grutter v. Bollinger*, where a 5-4 majority upheld the University of Michigan Law School's race-conscious admissions policy, Justice O'Connor invoked this principle. Specifically, she declared that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer."[90] Justice O'Connor further located the Court's holding in "our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."[91]

In 2016, Justice Kennedy reaffirmed this juridical posture in a decision affirming the University of Texas's race-conscious admissions policy. Specifically, in *Fisher v. Texas*, Justice Kennedy explained that "[o]nce . . . a university gives a reasoned, principled explanation for its decision, deference must be given to the University's conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals."[92]

Kennedy clarified that deference is not boundless. To begin, "judicial deference is proper" vis-à-vis a university's interest in student body diversity.[93] But "no deference is owed when determining whether the use of race is narrowly tailored to achieve the university's permissible goals."[94] In other words, deference extends to the compelling interest prong of the Court's strict scrutiny analysis, but not to narrow tailoring.[95] Moreover, even within the compelling interest prong, deference has been limited to the diversity rationale.[96] The Supreme Court has not, for example, deferred to

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[89] *See* Fisher, 136 S. Ct. at 2198.

[90] Grutter v. Bollinger, 539 U.S. 306, 328 (2003) ("Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.").

[91] *Id*.

[92] Fisher, 136 S. Ct. at 2208.

[93] *Id*.

[94] *Id*.

[95] Under prevailing equal protection doctrine, a defendant that employs a "racial classification" must establish that the use of race (a) promotes a *compelling interest*, and (b) is *narrowly tailored* to that end. *See Grutter*, 539 U.S. at 2338.

[96] Scholars have raised multiple concerns about institutional deference in the admissions context. *See, e.g.* Charles Lawrence III, *Each Other's Harvest:*

institutional judgments concerning other compelling interests—e.g., remedying past discrimination.[97]

At a minimum, the above reveals that deference is far from boundless. And given the Supreme Court's current composition, there is reason to question whether universities will continue to receive the deference they enjoyed in prior admissions litigation.[98] In other words, judicial deference comes with limits and the Court's center has swung right. Even so, relative to other affirmative action advocates, university defendants continue to possess a privileged position to frame public (as well as judicial) perceptions about, and attitudes toward, affirmative action. In the next Part, I explain how universities have failed to leverage this opportunity.

Diversity's Deeper Meaning, 31 U.S.F. L. REV. 757, 771 (1997) (observing that Justice Powell's logic "could as easily justify an all white school as one that is racially diverse."); Goodwin Liu, Remarks at the American Constitution Society Conference, Session E: Segregation, Integration and Affirmative Action After Bollinger 33-34 (Aug. 2, 2003) (noting that the "academic freedom argument ... would seem to swing both ways" and could support arguments for segregated universities if they could be justified on educational grounds); Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461, 590 (2005); John Payton, *Remarks at the American Constitution Society Conference*, Session E: Segregation, Integration and Affirmative Action After Bollinger 34 (Aug. 2, 2003), (available at http://www.acslaw.org/pdf/Affirmative%20Action.pdf) ("acknowledg[ing] the tension [in the academic freedom argument]" and suggesting that the Law School "tried not to make too much of the academic freedom point" in its brief to the Supreme Court).

[97] *Compare* Grutter, 539 U.S. at 329 ("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 a university is "presumed" absent "a showing to the contrary."), *with* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 230 (1995) (refusing to grant deference to Congress in the context of interpreting the Equal Protection Clause and related federal antidiscrimination measures).

[98] *Compare* Grutter, 539 U.S. at 329 ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."), with Fisher v. Univ. of Texas at Austin, 579 U.S. 365, 390 (2016) (Alito, J., dissenting) ("[The University's] primary argument is that merely invoking 'the educational benefits of diversity' is sufficient and that it need not identify any metric that would allow a court to determine whether its plan is needed to serve, or is actually serving, those interests. This is nothing less than the plea for deference that we emphatically rejected in our prior decision. Today, however, the Court inexplicably grants that request.").

B. Opportunity Lost

Above, I outlined why elite universities enjoy a privileged position to shape our national affirmative action debates. I also identified that affirmative action fights often function as a proxy for broader contestation over the enduring relevance of race and racism in America. By connecting these points, one sees that Harvard and UNC have a unique opportunity to enter and shape a growing and, at times, vitriolic, national dialogue over fundamental questions about who we are as a society—and what, if anything, is necessary to overcome a legacy of legalized racial subordination. More than any other affirmative action advocate, these university defendants have an opportunity to counter a calculated campaign to discredit antiracism as the new racism, and antiracists as the new racists.[99] So far, they have failed to do so.[100]

This failure is not surprising. For decades, privileged voices on the Left, including elite universities, have defended race-conscious admissions as acceptable "racial preferences"—that is, justifiable discrimination that harms otherwise deserving whites.[101] This framing, which suggests affirmative action corrupts a race neutral baseline, is neither inevitable nor strategic.[102] To begin, it discounts the myriad racial advantages and disadvantages embedded within standard admissions regimes *before* affirmative action arrives.[103] This constellation of racial (dis)advantages range from inherited

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[99] *See* Benjamin Wallace-Well, *How a Conservative Activist Invented the Conflict Over Critical Race Theory*, THE NEW YORKER (June 18, 2021) (quoting rightwing activist Cristopher Rufo as explaining that "'Critical race theory' is the perfect villain" to counter the growing appeal of progressive politics and antiracism following 2020's summer of protests for racial justice).

[100] In a companion piece, I offer a more comprehensive account of this failure. *See* Feingold, *supra* note 16. The summary herein is accordingly concise.

[101] *See id.*

[102] *See id.*

[103] *See* Devon W. Carbado et al., *Privileged or Mismatched: The Lose-Lose Position of African Americans in the Affirmative Action Debate*, 64 UCLA L. REV. DISCOURSE 174, 199-226 (2016) ("providing] empirical evidence to support [the] claim that black students across class, and not just class-disadvantaged black students, experience multiple disadvantages that likely affect their academic performance and the overall competitiveness of their admissions files").

race-class privilege and fraught measures of academic "merit,"[104] to disparate treatment and pernicious yet dominant narratives that presume minority student deficiencies.[105] The upshot is simple: most universities employ facially "colorblind" criteria that extend unearned race-class preferences to wealthy white applicants.[106]

Accordingly, one might expect university defendants to defend their own policies as modest correctives that reduce racial (dis)advantages embedded throughout the admissions process. Thus, rather than acquiesce to the common but misleading "preference" framing, advocates could instead defend affirmative action as a modest "counter-preference"—that is, antidiscrimination—that, on net, renders the process more objective, neutral, and fair.[107] Or put differently, advocates might stress that accounting for applicant race occurs against the backdrop of a process that remains defined

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[104] *See* Kristen Holmquist et. al., *Measuring Merit: The Shultz-Zedeck Research on Law School Admissions*, 63 J. LEGAL EDUC. 565, 566 (2014) ("The research confirmed that selection based on this more complete model of lawyering [than the LSAT alone] greatly reduces racial disparities and captures a more fundamental meaning of merit which should drive admission decisions."); Jonathan Feingold, *Racing Towards Color-Blindness: Stereotype Threat and the Myth of Meritocracy*, 3 GEO. J.L. & MOD. CRITICAL RACE PERSP. 231, 233 (2011) ("In the presence of stereotype threat, the LSAT is a defective tool that prevents otherwise qualified Black and Latino/a students from displaying their true talent. Understood in this way, reliance on the LSAT contravenes fair measures and deprives Black and Latino/a applicants of the individualized review our Constitution demands.").

[105] *See* Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1109 (2009) ("Generally, there are two major categories of opposing theories explaining the racial gap in SAT scores: 'minority-deficiency' theories and 'test-deficiency' theories.")

[106] *See* Jonathan P. Feingold, *"All (Poor) Lives Matter": How Class-Not-Race Logic Reinscribes Race and Class Privilege*, 2020 U. CHI. L. REV. ONLINE 47 (2020) (identifying how standard admissions policies tend to benefit class-privileged white applicants).

[107] Advocates could borrow from Professors Jerry Kang and Mazharin Banaji, who defended affirmative action as a "fair measure" of applicant talent and potential. *See* Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CAL. L. REV. 1063, 1067–68 (2006) ("'Fair' connotes the moral intuition that being fair involves an absence of unwarranted discrimination, by which we mean unjustified social category-contingent behavior. The term also connotes accuracy in assessment. 'Measure' has the double meaning as well: measurement and an intervention intentionally taken to solve a problem.").

by race—even when it is facially race-neutral. And affirmative action, by reducing the relevance of race, is no preference at all.

Harvard and UNC have failed to make this basic turn. Instead, they continue to justify their own policies as racial preferences (or "tips") necessary to ensure student body diversity. This framing undercuts the strongest case for affirmative action—that is, as necessary anti-discrimination that counters existing racial preferences for white applicants). It also contradicts Harvard and UNC's public statements recognizing that structural forms of racism continue to pervade American society and their own campuses.[108] Among other consequences, it feeds the narrative that racial disparities *pre*-affirmative action reflect actual differences in academic talent and potential—not, for example, a range of social (dis)advantages tied to a students' race and class. In effect, Harvard and UNC defend their own policies on colorblind terms that mask the many ways race operates within standard, facially race-neutral facets of their own admissions regimes. This, in turn, undermines the universities' ability to defend race-conscious admissions as modest attempts to mitigate unearned race-class advantages that benefit wealthy white students over more talented and deserving students from marginalized racial groups.

II. EXPLAINING AMBIVALENCE

Harvard and UNC, like other elite universities, remain ambivalent affirmative action advocates. In this Part, I unpack three sources of this ambivalence: (a) commitment gaps, (b) perceived conflicts of interest, and (c) risk aversion. In total, these elements coalesce to disincentivize elite institutions from zealously defending their own policies.

This overview identifies key forces that inform institutional decisionmaking. I am not, however, making a causal claim regarding a specific university's affirmative action defense. Rather, my goal is to surface features common to elite universities that help to explain why formal

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[108] *See, e.g.*, Message from Harvard President Lawrence S. Bacow, Harvard & The Legacy of Slavery (Apr. 26, 2022), https://legacyofslavery.harvard.edu/about/aboutmessage-from-president ("But our recent progress must not obscure the reality of our past—or the continuing effects of the past on the present. The legacy of slavery, including the persistence of both overt and subtle discrimination against people of color, continues to influence the world in the form of disparities in education, health, wealth, income, social mobility, and almost any other metric we might use to measure equality.").

advocates continue to avoid—if not resist—facts and theories that would anchor a more compelling case for affirmative action.

A. Commitment Gaps

> *...The overt racists are united, coordinated & relentless in their efforts to completely undo the Civil Rights Movement and doom us to another 100 years at least of brutal racial oppression. White liberals aren't nearly as committed to stopping them...*[109]

Bree Newsome, whose Tweet appears above, gained national attention after she scaled South Carolina's state house and removed a Confederate flag.[110] Her Tweet gestured to a then-nascent campaign of backlash that followed the nation's turn toward antiracism after the global uprising for racial justice in 2020.[111] In her Tweet, Newsome juxtaposed the regressive forces behind that campaign (and their unqualified commitments to roll back civil rights) with white liberals (and their often fickle commitment to civil rights). This contrast—uncompromised segregationists on the one hand;

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[109] Bree Newsome (@BreeNewsome), TWITTER (June 1, 2021, 8:53AM), https://twitter.com/BreeNewsome/status/1399891938640343040?s=20.

[110] Newsome's Tweet tracks a longstanding critique of white liberals—particularly political leaders—as more invested in white reconciliation than with protecting the right of racial minorities. Martin Luther King, Jr. offered similar sentiment in his 1963 Letter from Birmingham Jail, http://okra.stanford.edu/transcription/document_images/undecided/630416-019.pdf:

> First, I must confess that over the past few years I have been gravely disappointed with the white moderate. I have almost reached the regrettable conclusion that the Negro's great stumbling block in his stride toward freedom is not the White Citizen's Council-er or the Ku Klux Klanner, but the white moderate, who is more devoted to "order" than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says: "I agree with you in the goal you seek, but I cannot agree with your methods of direct action"; who paternalistically believes he can set the timetable for another man's freedom; who lives by a mythical concept of time and who constantly advises the Negro to wait for a "more convenient season." Shallow understanding from people of good will is more frustrating than absolute misunderstanding from people of ill will. Lukewarm acceptance is much more bewildering than outright rejection.

[111] *See* Hakeem Jefferson & Victor Ray, *White Backlash Is a Type of Racial Reckoning, Too*, FiveThirtyEight (Jan. 6, 2022), https://fivethirtyeight.com/features/white-backlash-is-a-type-of-racial-reckoning-too/ ("And the racial reckoning of this moment — one characterized by white backlash to a perceived loss of power and status — seems poised to be much more consequential.").

compromising integrationists on the other—neatly captures the first source of affirmative action ambivalence: commitment gaps.

Taking elite universities as the baseline, one can measure commitment gaps against at least two discrete comparators. To one side, elite schools have never valued racially inclusive campuses (or affirmative action, as a means to that end) as much as third parties stakeholders have valued racial inclusion (or the tools to effectuate it).[112] These stakeholders include, as an example, the students and civil rights groups that routinely seek intervention in affirmative action litigation.[113] To the other side, elite schools have never valued preserving affirmative action as much as regressive activists have valued eliminating affirmative action.[114] To concretize this latter gap, it is helpful to juxtapose "segregationist" universities' commitment to segregation with "integrationist" universities' commitment to integration. I turn here now.

1. Uncompromising Segregationists

Here, I employ the term "segregationist" to refer to universities that engaged in de jure racial segregation before *Brown* and resisted integration post-*Brown*. Desegregation resistance was swift and enduring.[115] The Southern Manifesto, which 101 of 128 Southern Congressman signed in the

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[112] *See* Memorandum of Law in Support of Motion to Intervene at 12, Gratz v. Bollinger, 183 F.R.D. 209 (E.D. Mich. 1998), *rev'd sub nom* Grutter v. Bollinger, 188 F.3d 394 (6th Cir. 1999*)* (No. CV-75231-DT) ("While the University's continued existence or prosperity would not be jeopardized by a ruling for Plaintiffs in this case, Applicants face a serious risk of being excluded from educational opportunity at the University.").

[113] *See id.* ("Applicants' interest, by contrast, is not in defending any particular admissions program implemented by the University, but rather in preserving access for African-American and Latino students and in maintaining a racially and ethnically diverse student body.").

[114] The special interests funding anti-affirmative action litigation have also underwritten a range of political and legal efforts to roll back basic civil rights gains across sectors of American life. *See* Anemona Hartocollis, *He Took on the Voting Rights Act and Won. Now He's Taking on Harvard.*, N.Y. TIMES (Nov. 19, 2017), https://www.nytimes.com/2017/11/19/us/affirmative-action-lawsuits.html.

[115] Derrick A. Bell, Jr., *Waiting on the Promise of Brown*, 39 L. & CONTEMP. PROBS. 346 (1975). To a meaningful degree, this resistance never ended. *See* Latoya Baldwin Clark, *Education as Property*, 105 VA. L. REV. 397 (2019).

wake of *Brown*, embodies this commitment.[116] In this statement, the southern lawmakers decried the Supreme Court's ruling in *Brown* "a clear judicial abuse of power" and encouraged states to resist its mandate.[117] Although subject to varying interpretations, the Manifesto represented a unified front against *Brown*'s promise and potential.[118] As Justin Driver describes, "drafters of the Manifesto aimed to preserve the prevailing racial order, which at bottom was animated by an ideology that the Supreme Court has accurately labeled 'White Supremacy,' the bedrock belief that whites are better than blacks."[119]

The Manifesto's spirit of defiance foreshadowed decades of desegregation defiance that spanned the country. This anti-integration campaign took on the moniker of "Massive Resistance"—a term Virginia Senator Harry Byrd employed to capture the segregationist resolve following *Brown*.[120] North Carolina's efforts to evade meaningful integration is instructive. In form and rhetoric, North Carolina engaged in a strategy of calculated "moderation."[121] Unlike other Southern states—that openly defied

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[116] For a detailed review of the Southern Manifesto, see Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1071 (2014) ("The true meaning of the Manifesto was to make defiance of the Supreme Court and the Constitution socially acceptable in the South—to give resistance to the law the approval of the Southern Establishment.").

[117] *Southern Manifesto on Integration* (March 12, 1956), https://www.thirteen.org/wnet/supremecourt/rights/sources_document2.html.

[118] *See* Driver, *supra* note 122, at 1079 ("In the end, the bid for regional unity proved remarkably successful, as the overwhelming majority of the South's congressional delegation signed the Manifesto.").

[119] *Id.*

[120] *See Massive Resistance*, ENCYCLOPEDIA VIRGINIA, https://encyclopediavirginia.org/entries/massive-resistance/ (last visited Jan. 24, 2022); *Byrd Calls for 'Massive' Resistance to Integration*, NEWPORT NEWS DAILY PRESS (Feb. 26, 1956) (quoting Harry Byrd) ("If we can organize the Southern States for massive resistance to this order, I think that in time the rest of the country will realize that racial integration is not going to happen in the South.").

[121] See Davison M. Douglas, *The Rhetoric of Moderation: Desegregating the South During the Decade After Brown*, 89 NW. U. L. REV. 92, 98 (1994) ("[T]he concept of 'moderation' in the post-Brown South, particularly in North Carolina, was a malleable concept, skillfully used to deflect widespread pupil integration. Resistance to Brown was far more spectacular in the defiant southern states such as Virginia and Louisiana, but equally effective in states such as North Carolina that understood the value of tokenism and appeals to moderation.").

federal desegregation orders—North Carolina's white elite adopted privileged token representation and moderated its rhetoric.[122] Even pre-*Brown*, the legislature had opened an all-Black law school so that it could, consistent with evolving legal decisions, exclude Black students from its flagship schools.[123]

Post-*Brown*, moderation proved an effective strategy.[124] As late as 1969, fifteen years after *Brown* and five years after Congress passed the Civil Rights Act of 1964,[125] UNC remained—in substance if not form—an all-white institution.[126] In fact, through the entire 1970s, UNC was embroiled in federal litigation for failing to remedy its history of segregation.[127] That

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[122] *See* Braxton Craven, *Legal and Moral Aspects of the Lunch Counter Protests*, CHAPEL HILL WKLY., Apr. 28, 1960 at 1B ("The choice is not between segregation and integration; it is between some integration and total integration. . . . [If we resist all integration], it is a foregone conclusion that the winner will be total integration, or that the schools will be closed. . . . Token integration . . . will save the state and save the schools. . . . This is moderation.").

[123] Donna L. Nixon, *The Integration of UNC-Chapel Hill – Law School First*, 97 N.C. L. REV. 1741, 1756–57 (2019) ("The unaccredited North Carolina College School of Law was the only institution open to African Americans for enrollment. It was specifically created by the state in 1939 to avoid integrating Carolina Law, the state's flagship university, and the only public law school at the time. The North Carolina legislature acted swiftly to establish the North Carolina College School of Law, situated approximately eleven miles from UNC-Chapel Hill, after the United States Supreme Court decided Missouri ex rel. Gaines v. Canada, a 1938 case against the University of Missouri School of Law."); Irving Joyner, *Pimping Brown v. Board of Education: The Destruction of African-American Schools and the Mis-Education of African-American Students*, 35 N.C. CENT. L. REV. 160, 169 (2013) ("Legislators established the law school to protect the University of North Carolina Law School from a *Missouri ex rel. Gaines* inspired lawsuit by the NAACP on the grounds that the state did not have a law school African-Americans could attend.").

[124] *See* Douglas, *supra* note 127, at 155.

[125] Title VI of the Civil Rights Act of 1964 made it unlawful for entities receiving federal funding to engage in racial discriminate. 42 U.S.C. § 2000d (2012) ("No 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.")

[126] *See id.*

[127] In 1969, the Nixon administration responded by naming North Carolina among ten states ordered to develop desegregation plans—an affirmative obligation under

litigation continued until 1981, when the university entered into a favorable settlement with a sympathetic Reagan administration.[128] The NAACP Legal Defense Fund, which played a central role in the preceding litigation, challenged the consent decree as deficient to realize meaningful desegregation.[129] David S. Tatel, who led the federal agency that pushed for desegregation during the Carter administration, offered a similar critique: "This settlement doesn't read like a desegregation plan. It reads like a joint U.S.-North Carolina defense of everything the system did."[130]

In certain respects, the most entrenched desegregation resistance occurred beyond the confines of higher education. Similar to recent campaigns targeting antiracism and Critical Race Theory in K-12 settings, much of the most backlash to federal integration mandates occurred in primary and secondary schools. Across the country, from the deep South to the far North, children of color (often Black) integrating white schools often required armed escort to navigate harassment, intimidation, and actual violence.[131] Rarely did such mistreatment cease at the schoolhouse door.[132]

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federal law. *See* History Department of N.C. State Univ., *Fluctuating Commitment*, N.C. STATE UNIV.: THE STATE OF HISTORY, https://soh.omeka.chass.ncsu.edu/exhibits/show/colorline-hew/hewcommitment.

[128] *See* Charles R. Babcock, *U.S. Accepted Desegregation Plan Once Rejected for N.C. Colleges*, WASH. POST (July 11, 1981), https://www.washingtonpost.com/archive/politics/1981/07/11/us-accepted-desegregation-plan-once-rejected-for-nc-colleges/3e4c542b-40b8-405f-8cc9-a46952035b0f/.

[129] *See* David W. Bishop, *The Consent Decree Between the University of North Carolina System and the U.S. Department of Education, 1981-82*, 52 J. NEGRO EDU. 350, 358-60 (1983).

[130] Babcock, *supra* note 134.

[131] In 1967, the US Commission on Civil Rights observed that "violence against Negroes continues to be a deterrent to school desegregation." *Resistance to School Desegregation*, EQUAL JUST. INSTITUTE, (Mar. 1, 2014), https://eji.org/news/history-racial-injustice-resistance-to-school-desegregation/. *See also* Mamie Hassell, *The Clinton 12: The Integration Story of Tennessee's Public School*, Tennessee State Museum (July 28, 2020), https://tnmuseum.org/junior-curators/posts/the-clinton-12-the-integration-story-of-tennessees-public-schools?locale=en_us (describing the "angry mobs and members of the Ku Klux Klan" who protested the integration of Clinton, TN's high school in 1956).

[132] *See* Derrick A. Bell, *Waiting on the Promise of "Brown"*, 39 LAW & CONT. PROBLEMS 341, 372 (1975) ("The violent response of the white Bostonians was indefensible, but predictable, given their conviction that black students will

One example from Mansfield, Texas, a small farming town of 1500 residents, captures this broader phenomenon:

> When the school board of Mansfield, Texas, a farming town of 1500 people, admitted 12 Black students to all-white Mansfield High School, white residents took to the streets in protest. On August 30, 1956, the first day of school, mobs of white pro-segregationists patrolled the streets with guns and other weapons to prevent Black children from registering.
>
> The mob hung an African American effigy at the top of the school's flagpole and set it on fire. Attached to each pant leg was a sign. One read, "This Negro tried to enter a white school. This would be a terrible way to die," and the other read, "Stay away, n*ggers."
>
> A second effigy was hung on the front of the school building. Soon afterward, the Mansfield School Board voted to "exhaust all legal remedies to delay segregation."
>
> In December 1956, the United States Supreme Court ordered the Mansfield school district to integrate immediately, but Mansfield public schools did not officially desegregate until 1965.[133]

The foregoing overview of desegregation resistance has been far from comprehensive.[134] Still, it points to a well-documented legacy of public and private efforts to fight racial integration across the country.[135] I invoke this history, in large part, to juxtapose (a) the often-uncompromising

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deteriorate already inferior schools and their knowledge that the well-to-do suburbs are exempt from the problems they face.").

[133] *See* Equal Justice Institute, *supra* note 137.

[134] For a more comprehensive review of the anti-integration campaign that became known as Massive Resistance, see *Massive Resistance, Segregation in America*, EQUAL JUSTICE INSTITUTE, https://segregationinamerica.eji.org/report/massive-resistance.html.

[135] Desegregation resistance remains a reality across the country. As a contemporary analogue, anti-antiracist backlash appears to have occurred with greatest frequency in school districts experiencing above-average levels of demographic shift. *See* Tyler Kingkade & Nigel Chiwaya, *Schools facing critical race theory battles diversifying rapidly, analysis finds*, NBC News (Sept. 13, 2021), https://www.nbcnews.com/news/us-news/schools-facing-critical-race-theory-battles-are-diversifying-rapidly-analysis-n1278834 ("An NBC News analysis of 33 cities and counties where school districts have faced rancor over equity initiatives this year in at least three recent school board meetings finds that each has become less white over the last 25 years, reflecting a national trend.").

commitments of segregationist universities to racial exclusion against (b) the often-yielding commitments of integrationist universities to racial inclusion. To further concretize this gap, I now turn to the University of California, an integrationist university[136] that has long exhibited ambivalence toward affirmative action and racial inclusion.

2. Compromising Integrationists

In many respects, the University of California ("UC") offers a paradigmatic example of what I term an "integrationist" university. Even recognizing the range of often-competing viewpoints that comprise a complex institution like UC, university leaders have long championed the value of racial diversity and inclusion. [137] And albeit earnest, UC's commitments to racial integration (and race-conscious admissions as a means to that end) have been far from unyielding. To flesh out this story, I highlight two defining moments in UC history: (1) the *Bakke* litigation in the 1970s and (2) the passage of Regents Special Policy 1 ("SP-1") and Proposition 209 in the mid-1990s.

(1) The Bakke Litigation

Regents of California v. Bakke comprised the Supreme Court's first substantive engagement with affirmative action. Although the basic facts are known to most law professors and students, most details are not.

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[136] As noted above, I use the term "integrationist" university to describe institutions that employ race-conscious admissions and express public commitments to racial inclusion on their campus.

[137] UC is a massive institution spanning 9 academic campuses *See The Parts of UC*, UNIV. CAL., https://www.universityofcalifornia.edu/uc-system/parts-of-uc. Treating UC as a single entity inevitably obscures and flattens this complexity, which includes competing viewpoints about any policy or proposal. For this reason, the following analysis lacks nuance that might otherwise be desirable. Where possible, I disentangle distinct institutional interests and actors to tell a more nuanced story. But the inherent diversity of perspectives at a university like this is likely to mute institutional support for a policy as controversial as affirmative action. *See* Memorandum of Law in Support of Motion to Intervene at 10, Gratz v. Bollinger, 183 F.R.D. 209 (E.D. Mich. 1998), *rev'd sub nom* Grutter v. Bollinger, 188 F.3d 394 (6th Cir. 1999) (No. CV-75231-DT) ("[T]he University's vigor in defending its admissions programs might be affected by real differences among faculty, members of the Board of Regents, and other members of the University community regarding the desirability of race-conscious admissions.").

In 1968, UC Davis opened its Medical School ("Davis") and welcomed an entering class of 50 students. That year, Davis—a public medical school—admitted 47 white students and 3 Asian students. It admitted zero Black, Latinx, or American Indian students. By 1971, Davis expanded to 100 students and "devised a special admissions program to increase the representation of 'disadvantaged' students in each" class.[138] That "Task Force" program involved a parallel admissions track for "economically and/or educationally disadvantaged" students.[139] Through this separate track, which was open to any disadvantaged student, Davis admitted 63 students of color between 1971-1974; only 44 students of color gained entry via the standard track during those same years.[140]

Allan Bakke, the plaintiff, applied to Davis in 1973 and 1974. He was rejected on both occasions.[141] After the second rejection, Bakke—who is white—sued Davis.[142] Among other claims, Bakke alleged that Davis, because it employed a distinct admissions process for applicants from disadvantaged backgrounds, violated his rights under the Fourteenth Amendment's Equal Protection Clause.[143] In 1978, the U.S. Supreme Court found for Bakke and struck down Davis's admissions policies.[144]

For purposes of this Article, the Supreme Court's holding is not the relevant part of this story. Rather, UC's posture throughout the litigation—

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[138] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 272 (1978). For a more detailed summary of the special admissions program, including questions that appeared on Davis' application form, see Bakke v. Regents of Univ. of Cal., 18 Cal. 3d 34, 38-41 (1976), aff'd in part, rev'd in part, 438 U.S. 265 (1978)

[139] *See id*. at 275.

[140] *See* Bakke, 438 U.S. at 276-76 ("From the year of the increase in class size—1971—through 1974, the special program resulted in the admission of 21 black students, 30 Mexican-Americans, and 12 Asians, for a total of 63 minority students. Over the same period, the regular admissions program produced 1 black, 6 Mexican-Americans, and 37 Asians, for a total of 44 minority students.").

[141] *See* Joel Dreyfuss & Charles Lawrence III, THE BAKKE CASE: THE POLITICS OF INEQUALITY 16-30 (1979) (outlining Bakke's medical school application history).

[142] *See id*.

[143] *See* Regents of Cal. v. Bakke, 438 U.S. 265, 277-78 (1978) ("[Bakke] alleged that the Medical School's special admissions program operated to exclude him from the school on the basis of his race, in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment, . . . the California Constitution, and . . . Title VI of the Civil Rights Act of 1964.").

[144] *See id.* at 319-20.

particularly during the initial state court proceedings—illustrates the ambivalence this integrationist institution held toward affirmative action.[145]

For much of the litigation, UC showed more interest in obtaining clarity about the constitutional bounds of race-conscious admissions than in preserving its medical school's admissions scheme.[146] On the one hand, the desire for judicial guidance makes sense. In the mid-1970s, a decade after Congress passed the Civil Rights Act, the Supreme Court had yet to opine on the constitutionality of remedial race-conscious admissions practices.[147] But one can both desire legal clarity and exhibit an unwavering commitment to a specific outcome—e.g., racial inclusion. This was, after all, an opportunity for UC to help shape the Supreme Court's antidiscrimination jurisprudence as it applied to race-conscious admissions and racial remedies more broadly.

And yet, UC exhibited no such commitment—particularly during early stages of litigation. As one example, UC introduced no evidence about "past

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[145] It is important to recognize that as early as the 1970s, Davis and the broader UC system took steps to integrate its campuses. Those efforts include the voluntary race-conscious admissions policy that Bakke challenged in *Regents of UC v. Bakke*. Accordingly, I am not arguing that UC broadly, and the Davis Medical School more narrowly, valued racial inclusion. Rather, my argument is that Davis valued racial inclusion less than segregationist institutions valued racial exclusion. As I outline here, that commitment gap creates a structural dynamic that continues to undermine the case for affirmative action in the court of law and the court of public opinion.

[146] *See* Dreyfuss & Lawrence, *supra* note 131 at 92 (quoting Donald Reidhaar, then Chief UC System Legal Counsel, as stating: "It is far more important for the University to obtain the most authoritative decision possible of the legality of its admissions process than to argue over whether Mr. Bakke would or would not have been admitted in the absence of the special admissions program.").

[147] Here, I use "remedial" to broadly capture race-conscious admissions policies designed to increase the representation of students from historically excluded racial groups. Prior to *Bakke*, the Supreme Court had confronted the constitutionality of race-conscious admissions on only one other occasion. *See* DeFunis v. Odegaard, 416 U.S. 312, 319 (1974). That case, however, produced no substantive law because the Supreme Court vacated and remanded on mootness grounds. *See id*. at 319-20 ("Because the petitioner will complete his law school studies at the end of the term for which he has now registered regardless of any decision this Court might reach on the merits of this litigation, we conclude that the Court cannot, consistently with the limitations of Art. III of the Constitution, consider the substantive constitutional issues tendered by the parties.").

and present racial discrimination in the California public school system."[148] Nor did UC marshal facts or theories to advance the proposition that "the Davis medical school itself had discriminated against minority applicants" when it opened in 1968.[149] In fact, UC agreed to forgo a trial altogether—and thereby reduced the record to evidence presented during a single pre-trial hearing.[150] As a result, the record lacked evidence that could have concretized and quantified the claim that Davis needed to consider race (and class) to counter the race (and class) advantages that white applicants enjoyed in the school's standard process.[151] But rather than mount the most compelling case for its own policy, the university appeared to privilege a speedy resolution—

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[148] *See* Bell, *supra* note 20 at 6. *Cf.* Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 955 (2001) ("For example, when *Grutter v. Bollinger* . . . was first filed, many people encouraged the University to admit and carefully document its own historical and contemporary discrimination against African-Americans and other minority students.").

[149] Bell, *supra* note 20 at 6. Bell notes that these are the precise arguments third party stakeholders were prepared to advance were they not sidelined throughout the litigation. *See id*. at 6-7 ("If the case had been remanded for a full trial, impressive evidence would have been introduced indicated that the Medical College Admission Test (MCAT) is not a valid indicator of minority performance in medical school, and that Davis therefore was justified in attempting to compensate for the test's antiminority bias."). Perhaps most striking, UC failed to even provide evidence for the theories it advanced. *See* Regents v. Bakke, 438 U.S. 265, 310 (1978) ("Petitioner identifies, as another purpose of its program, improving the delivery of health-care services to communities currently underserved. It may be assumed that in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification. But there is *virtually no evidence in the record* indicating that petitioner's special admissions program is either needed or geared to promote that goal.") (emphasis added).

[150] *See* Dreyfuss & Lawrence, *supra* note 131 at 59.

[151] *See* Bell, *supra* note 20 at 7 n.9 (citing cases and noting that "[f]ederal and state courts have found racial discrimination in California's public school system"). In other words, Davis could have framed its dual admissions process as necessary anti-discrimination that mitigated past and present race- and class-advantages. Before the trial court, UC characterized its consideration of race as a "preference." *See* Dreyfuss & Lawrence, *supra* note 131 at 51 ("The question is not whether preference should be allowed; they are basic to the admissions process. The question is whether the Constitution is to deny members of minority groups from disadvantaged backgrounds the kind of preference which is routinely granted to a myriad other individuals and groups.").

even if that risked curtailing or eliminating Davis' still-nascent efforts to integrate its campus.[152]

Throughout the trial court proceedings, UC also failed to affirmatively contest Bakke's framing of its admissions system.[153] From his initial complaint, Bakke argued that Davis employed a "quota of 16 percent" and that "under this admission program racial majority and minority applicants went through separate segregated admission procedures with separate standards for admissions."[154] Bakke further alleged that this process "resulted

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[152] *See* Dreyfuss & Lawrence, *supra* note 131 at 32 ("The lack of a trial in *Bakke* remains a major criticism of the handling of the case by attorneys for the [UC]. In addition, a number of important omissions and concessions by attorneys for the University have muddied the defense all the way to the [Supreme Court]. . . . The facts indicate that the university lawyers were hampered not so much by a lack of lawyering skills as by the competing concerns of their client and an ambivalence about issues central to the case."); *id.* at 66 ("It was not difficult to conclude that a group of white male attorneys would see the *Bakke* case as a simple matter of law and an opportunity to settle once and for all a practice that was generating considerable public resistance as the mood of the nation changed . . ."). In other affirmative action litigation, universities have valued efficiency over investing resources and time necessary to mount the most forceful case for affirmative action. *See* Johnson v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234, 1269–70 (11th Cir. 2001) ("Intervenors also contend that additional time should have been afforded so that they could have developed a record supporting a remedial justification for UGA's consideration of race. As Intervenors see it, whether UGA has eliminated the vestiges of past discrimination is still an open question. But none of the parties—or for that matter the federal government—accepts that claim. Moreover, the issue raised by Intervenors would have greatly expanded the scope and burden of the case, and quite probably have necessitated further delays beyond those ostensibly sought by the Intervenors. Especially given the significance of the lawsuit, and critical *importance to UGA and its future freshman applicants of resolving this matter as soon as possible*, the district court had ample grounds for declining to modify or halt proceedings.").

[153] *See* Dreyfuss & Lawrence, *supra* note 131 at 41.

[154] *See id.* at 37-38. In his brief before the California Supreme Court, Bakke characterized Davis's dual admissions program as a "preferential racial quota" that unlawfully discriminated against white applicants. *See* Brief for Respondent, at 27-28, Regents of Univ. of Cal. V. Bakke, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 187993, at *i. ("There are 100 places in the first year class at the Davis Medical School. Under normal circumstances, Allan Bakke would be eligible to compete for all of those places. In this case, however, petitioner has formally adopted a preferential racial quota and has set aside 16 of the places for members of designated racial and ethnic minority groups. In so doing, petitioner has prevented Bakke, solely

in the admission of minority applicants less qualified than plaintiff" and other rejected applicants.[155] This framing, which conjured the image of a rigid and racially exclusionary process, mischaracterized Davis's actual practices.[156]

In a 1978 review of the case, journalist Joel Dreyfuss and professor Charles Lawrence lamented that "[e]arly in the case the university virtually conceded that a quota was in operation."[157] To begin, the university provided inaccurate information about its own program. Specifically, UC submitted evidence indicating that in the two years Bakke applied, Davis had admitted sixteen students through the Task Force program.[158] In fact, admissions records revealed that in 1974, Davis admitted only fifteen students through the Task Force. This discrepancy, albeit minor, contradicted the characterization of a rigid quota and the claim that Davis admitted "unqualified minority applicants."[159]

Exacerbating inaccurate numbers, Davis omitted key facts about its program. This included testimony that the Task Force had considered (but did not admit) white students and had excluded middle-class students of color.[160] Moreover, Davis never disclosed that the dean often intervened on behalf of well-connected, but academically unimpressive, white

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because of his race, from competing for the 16 quota places. Petitioner does not dispute this fact and, under the burden of proof rule announced by the California Supreme Court, concedes that it cannot refute Bakke's claim that he would have been admitted to the medical school had there been no quota.").

[155] *See* Complaint, [FULL CITE]

[156] *See* Dreyfuss & Lawrence, *supra* note 131 at 41-43.

[157] *See id.* at 41.

[158] *See id.*

[159] *See id.*

[160] The controlling criteria was student disadvantage, not student race. *See id*. at 41-42 (citing testimony that "white applicants were interviewed . . . [but] were not admitted because they failed to meet the economic and social qualifications applied to minority applicants or because they indicated no plans to practice in underserved or ghetto areas"). These details arose in the state court proceedings, but the California Supreme Court appeared to discredit those facts. *See* Bakke v. Regents of Univ. of California, 18 Cal. 3d 34, 44 (1976), aff'd in part, rev'd in part, 438 U.S. 265 (1978) ("The trial court found that although the special admission program purports to be open to 'educationally or economically disadvantaged' students, and although in 1973 and 1974 some applications for the program were received from members of the white race, only minority students had been admitted under the program since its inception, and members of the white race were barred from participation.").

applicants.[161] As Dreyfuss and Lawrence explain, this undisclosed behavior reflected an "extremely subjective and arbitrary admissions" processes that benefitted otherwise unqualified white and wealthy applicants. In other words, Davis never introduced evidence that could have undercut Bakke's core framing that a rigid quota unfairly harmed innocent white applicants like himself.[162] Whether or not dispositive, Davis's initial defense compromised its ability to counter predictable lines of attack.[163]

Bakke also argued that he would have been admitted but for the "special admissions" track. After initially contesting this claim, Davis later withdrew any attempt to prove that Bakke would have been rejected even absent its special admissions program.[164] To onlooking stakeholders, this decision reaffirmed that UC was more interested in obtaining legal clarity than defending its right to employ a modest affirmative action policy.[165]

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[161] *See id.* at 42 (referencing reports that the Dean was admitted as many as five such applicants each year).

[162] After the trial court proceedings, UC took a more aggressive stand against Bakke's core framing. But the damage had been done; the narrative of a rigid quota delimited by race dominated judicial and public discourse. *See Bakke*, 438 U.S. at 289 ("[T]he parties fight a sharp preliminary action over the proper characterization of the special admissions program. Petitioner prefers to view it as establishing a 'goal' of minority representation in the Medical School. Respondent, echoing the courts below, labels it a racial quota.").

[163] Justice Powell, drawing on the California Supreme Court, adopted Bakke's characterization of racially segregated admissions tracks. *See* Bakke, 438 U.S. 265, 288 n.26 ("The court below found—and petitioner does not deny—that white applicants could not compete for the 16 places reserved solely for the special admissions program. Both courts below characterized this as a 'quota' system."); *see id.* at 289 ("To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.").

[164] *See id*. (noting that twelve other medical schools had rejected Bakke and that his age was likely a factor). *See also* Bakke v. Regents of Univ. of Cal.553 P.2d 1152, 1172 (Cal. 1976), *aff'd in part, rev'd in part*, 438 U.S. 265 (1978) ("In these circumstances, we would ordinarily remand . . . for the purpose of determining . . . whether Bakke would have been admitted . . . absent the special admission program. However, on appeal the University has conceded that it cannot meet the burden of proving that the special admission program did not result in Bakke's exclusion.").

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Concerns intensified when UC, after losing before California's Supreme court, indicated its desire to appeal to the United States Supreme Court.[166] The NAACP moved for a new trial so that the "real parties in interest" could cure a "wholly adequate and almost non-existent" record.[167] The National Conference of Black Lawyers, for its part, opposed certiorari on the grounds that UC's inadequate representation would deprive the Supreme Court of a "fully developed record in a vigorously litigated case."[168] The Supreme Court took the case and, affirming the stakeholders' concerns, held that Davis had violated Bakke's constitutional rights.[169]

(2) SP-1 & Proposition 209

The next moment brings us to the mid-1990s, when UC Regent Ward Connerly spearheaded the passage of two anti-affirmative action measures in

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[166] *See* Bell, *supra* note 18 at 5 ("[T]he Regents took the *Bakke* case to the Supreme Court over the vehement protests of virtually every minority rights group in the country. Those groups . . . [concluded that] the inadequate record developed by the Regents . . . might prove an invitation to disaster.").

[167] Petition of National Association of the Advancement of Colored People For Leave to File Amicus Curiae on Petition For Rehearing and Brief, Bakke v. Regents of Uni. of Calif., 18 Cal. 3d 34 (1976). *See also* Petition of NAACP for Leave to File as Amicus Curiae on Petition for Rehearing at 6, Bakke v. Regents of the Univ. of Cal. (Bakke I), 553 P.2d 1152 (Cal. 1976) (arguing that remand was necessary so third-party stakeholders could "present evidence on a full range of issues"); *id*. at 7 ("The real parties in interest in the instant case are Blacks, Mexican-Americans, Asians, Native Americans and other minority persons who will as a result of this decision be denied the opportunity to become doctors."). The California Supreme Court denied the motion. UC shares some responsibility here as well. The California Supreme Court initially ordered remand to determine whether Davis would have admitted Bakke but for the special admissions program. *See* Joanne Villanueva, *The Power of Procedure: The Critical Role of Minority Intervention in the Wake of* Ricci v. Destefano, 99 CALIF. L. REV. 1083, 1115 (2011). UC conceded that it could not meet this burden—even though multiple factors (including Bakke's age) suggested that he would have been denied even if Davis only employed the standard process. *See* Dreyfuss & Lawrence, *supra* note 131 at 90-94.

[168] Brief of Amicus Curiae, The National Conference of Black Lawyers, Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733 (1978), at vii-viii, http://blackfreedom.proquest.com/wp-content/uploads/2020/09/bakke9.pdf ("However, we also have an interest in assuring that so profound a pronouncement not be obscured, diluted or tainted by the infirmities of a poorly developed record and a nonadversary case.").

[169] *See* Regents v. Bakke, 438 U.S. 265 (1978).

California: Special Policy 1 (SP-1) and Proposition 209. Among other goals, Connerly and his allies wanted to eliminate a range of race-conscious practices "at many of the UC campuses that had enabled the racial integration of even flagship schools like UC-Berkeley and UCLA."[170] Accordingly, when the above measures passed, UC and its local campuses confronted a critical question: How to respond? There is little reason to doubt UC's general commitment to racial inclusion; at least since the 1960s, UC had adopted a range of affirmative action policies to integrate its campuses.[171] But unlike the segregationists who treated desegregation as an existential threat, UC treated racial inclusion as a genuine, but far from inviolable, institutional priority.

On July 20, 1995, the UC Regents adopted Special Policy 1, a measure designed to eliminate race-based affirmative action across the UC system.[172] Throughout debate, proponents of SP-1 linked the measure to Republican Governor Pete Wilson's anti-affirmative action crusade—an effort designed to boost his electoral prospects.[173] Fueled by SP-1's passage, Connerly

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[170] *See* Harris, *supra* note 21, at 1222.

[171] *See, e.g.*, Jerome Karabel, *The Rise and Fall of Affirmative Action at the University of California*, 25 J. BLACKS IN HIGHER EDU. 109 (1999) (outlining rise and fall of affirmative action programs at UC).

[172] SP-1 banned UC from "us[ing] race, religion, sex, color, ethnicity, or national origin as criteria for admission to the University or to any program of study." *See* The Regents of the University of California, Policy Ensuring Equal Treatment: Admissions (SP-1) (July 20, 1995) (rescinded May 16, 2001). SP-1 applied to UC admissions. The Regents adopted a related measure, SP-2, to eliminate the consideration of race in employment and contracting. *See* The Regents of the University of California, Policy Ensuring Equal Treatment: Employment and Contracting (SP-2) (July 20, 1995) (rescinded May 16, 2001).

[173] *See* The Regents of the University of California, Policy Ensuring Equal Treatment: Admissions (SP-1) (July 20, 1995) (rescinded May 16, 2001) ("Whereas, Governor Pete Wilson, on June 1, 1995, issued Executive Order W-124-95 to 'End Preferential Treatment and to Promote Individual Opportunity Based on Merit.'"); Harris, *supra* note 21, at 1236 ("Former Republican Governor Pete Wilson had been a moderate supporter of affirmative action as mayor of San Diego and during his first term in office as governor. However, his position took a turn as the primaries for the presidential election loomed in sight. He took the lead in the debate over SP-1 and SP-2 and strenuously lobbied regents who were uncertain or opposed to the measure.").

organized a coalition of anti-affirmative action forces behind Prop. 209.[174] This ballot measure included language that prohibited the state from "discriminat[ing] against" or "granting preferential treatment" to anyone on the basis of race, sex, color, ethnicity, or national origin in employment, education, and contracting.[175] Although the words "affirmative action" are absent from Prop. 209's text, Connerly was not shy about the underlying goal: eliminating the formal consideration of race across sectors of public life in California.[176] In 1996, California voters approved Prop. 209[177]; its language is now codified in California's state constitution.[178]

For present purposes, I am most interested in UC's reaction to the passage of SP-1 and Prop. 209. As with UC's ambivalence during the *Bakke* litigation, the university exhibited a far-from-uncompromising commitment to affirmative action.

To begin, internal fights over SP-1 and Prop. 209 revealed competing commitments to racial inclusion among UC's institutional leaders. With respect to SP-1, the Regents clashed with UC's administrative leaders and faculty governing body—both of which endorsed existing race-conscious

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[174] *See California Civil Rights Initiative*, Encyclopedia.com (last visited June 1, 2022), https://www.encyclopedia.com/social-sciences/applied-and-social-sciences-magazines/california-civil-rights-initiative (identifying coalitions that Connerly partnered with during Prop. 209 campaign).

[175] Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities ("Proposition 209") (Nov. 1996).

[176] *See* Marcia Barinaga, *Backlash Strikes at Affirmative Action Programs*, 271 SCIENCE 1908 (1996).

[177] *See* Bill Jones, Statement of the Vote, https://elections.cdn.sos.ca.gov/sov/1996-general/sov-complete.pdf.

[178] *See* CAL. CONST. art. I, § 31.

practices.[179] As for Prop. 209, numerous students, staff, faculty, and alumni were on the frontlines protesting its passage.[180]

In short, UC was not united against affirmative action. Institutional leaders were, and remain, committed to a racially integrated campus. But that is not my claim. I am advancing the more modest point that a commitment gap has long separated earnest integrationists, on the one hand, and segregationists, on the other.[181] And as intervenors often note, the competing commitments within integrationist universities is one reason why elite institutions likes UC are unlikely to mount the most compelling case for their own race-conscious policies. UNC offers a compelling data point. In the

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[179] The UC Regents and their values are not static. The current Regents, in marked contrast to the body that adopted SP-1, support the repeal of Proposition 209. *See* Press Release, UC Office of the President, UC Board of Regents Unanimously Endorses ACA 5, Repeal of Prop. 209 (June 15, 2020), https://www.universityofcalifornia.edu/press-room/uc-board-regents-endorses-aca-5-repeal-prop-209. Moreover, in 2001, the Regents rescinded SP-1 and SP-1. Amy Argonis, *Regents Rescind SP-1, SP-2: Chancellor, Students Applaud Decision*, UCDAVIS (May 25, 2001), https://www.ucdavis.edu/news/regents-rescind-sp-1-sp-2-chancellor-students-applaud-decision.

[180] *See California Students Protest Prop. 209*, The Harvard Crimson (Nov. 13, 1996), https://www.thecrimson.com/article/1996/11/13/california-students-protest-prop-209-pstudents/ (detailing that student protests at several UC campuses resulted in "more than 40 arrests). Prop. 209 opponents continue to fight for race-conscious admissions. *See* Kayleen Carter, *Affirmative Action Ballot Measure Fails, But These Students are Still Fighting to Diversify Their Universities*, CAL MATTERS (Nov. 5, 2020), https://calmatters.org/education/higher-education/college-beat-higher-education/2020/11/affirmative-action-ballot-measure-fails-but-these-students-are-still-fighting-to-diversify-their-universities/; Brandon Yung, *Black Students at UC Berkeley Spearheaded Statewide Initiative to Restore Affirmative Action*, BERKELEYSIDE (July 9, 2020), https://www.berkeleyside.org/2020/07/09/black-students-uc-berkeley-diversity-proposition-209-proposition-16-affirmative-action-california.

[181] Since the mid-20th century, segregationist efforts have evolved; they have not stopped. The endless string of litigation challenging affirmative action and other policies designed to promote gender and racial inclusion comprises one strand of these efforts. *See* Jody Godoy, *Activist behind Harvard race case takes aim at Calif. Board laws*, REUTERS (JULY 13, 2021), HTTPS://WWW.REUTERS.COM/LEGAL/LEGALINDUSTRY/ACTIVIST-BEHIND-HARVARD-RACE-CASE-TAKES-AIM-CALIF-BOARD-LAWS-2021-07-13/. A separate strand is embodied by the resurgent efforts to maintain racially exclusionary K-12 schools. *See* Erika Wilson, *The New White Flight*, 14 DUKE J. CON. L. & PUB. POL. 233 (2019).

same moment that UNC must defend its race-conscious admissions policy before the Supreme Court, North Carolina's Republican-dominated legislature is advancing bills modeled after Prop. 209.[182]

But to illuminate this commitment gap, it is helpful to explore how UC's leadership--which ostensibly supported affirmative action–responded to SP-1 and Prop. 209. In short, UC's pro-affirmative action leadership exhibited none of the defiance that characterized the Massive Resistance movements against integration.

For purposes of this Article, I put to the side whether UC leaders could have—or should have—engaged in civil disobedience or other modes of extra-legal resistance. Rather, I explore less "radical" steps UC could have taken to defend affirmative action and racial integration on its campuses.[183] I do so because UC's failure to undertake modest countereforts better reveals the institution's limited commitment to race-consciousness.

To begin, UC could have legally challenged the force and effect of both measures. SP-1, for example, was vulnerable to attack on procedural grounds. The measure abrogated admissions authority formally vested within UC faculty.[184] Moreover, before adopting SP-1, the Regents employed a procedural process that lacked the level of deliberation common to, and

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[182] Lynn Bonner, *NC Senate Leader wants to ban consideration of race in UNC admissions and government contracting*, THE PULSE (July 14, 2021), https://pulse.ncpolicywatch.org/2021/07/14/nc-senate-leader-wants-to-ban-consideration-of-race-in-unc-admissions-and-government-contracting/#sthash.ZDs0OBlF.dpbs.

[183] Lawrence, *supra* note 154, at 968–69 ("Short of civil disobedience, what course can the University take to live out its moral obligation? I want to suggest that the legal constraints imposed by Proposition 209, the Hopwood decision, and other provisions prohibiting the use of race in university admissions may offer an opportunity to move closer to the radical vision of affirmative action, a vision that adopts the victim perspective and creatively shapes remedies that directly address remaining conditions of inequality.").

[184] *See* Harris, *supra* note 21, at 1236 ("The Regents of the University of California, the governing body for the university system, delegates the power to make admissions decisions to the faculty of each campus department. Standing Orders of the Regents of the University of California, 105.2(a) (2001). Both the SP-1 and Proposition 209 directly undermined this delegation of authority."); JOHN A. DOUGLAS, A BRIEF ON THE EVENTS LEADING TO SP1 (Feb. 28, 1997), https://senate.universityofcalifornia.edu/_files/reports/sp1rev.pdf.

arguably required of, UC's system of shared governance.[185] On either account, UC (or an individual campus) could have taken legal action to challenge SP-1 as procedural defective.

None did.[186] Rather than challenge SP-1, UC campuses jettisoned a range of racially-attentive practices—including many that, on their face, did not even appear to violate the measures' plain language.[187] This occurred, in part, because UC internalized a broad (and contestable) interpretation of Prop. 209 and SP-1 that called into question a range of race-conscious practices disconnected from the actual selection of students. .[188]

Beyond procedural claims, substantive arguments were—and remain—available to UC. To begin, the university could have argued that Prop. 209 and SP-1 did not prohibit all race-conscious practices. At least two distinct theories—neither of which UC marshalled—support this claim. First, UC could have argued that its existing race-conscious practices complied with

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[185] *See* Douglas, *supra* note 207, at 1 ("[T]he process of consultation leading to SP1 violated the historical pattern of shared governance in which the Regents, the faculty through the Academic Senate, the administration, and to a lesser extent, students, share in the responsibility of managing the University of California.").

[186] Following Prop. 209's adoption, several individuals and groups challenged the ballot initiative in federal court. The trial court granted a preliminary injunction that the Ninth Circuit overturned. *See* Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 698 (9th Cir. 1997), *as amended on denial of reh'g and reh'g en banc* (Aug. 21, 1997), *as amended* (Aug. 26, 1997).

[187] For example, UC eliminated race-conscious outreach efforts designed to increase the pool of applicants from historically excluded racial groups. *See* Kate Antonovics & Ben Backes, *Were Minority Students Discouraged from Applying to University of California Campuses after the Affirmative Action Ban*, 8(2) EDUC. FIN. AND POL'Y 208, 213 (2013) ("It is important to recognize that in an effort to minimize the effects of Prop 209 on minority enrollment, UC campuses increased minority outreach efforts. These efforts were widely viewed as ineffective, however, at least initially. Part of the reason for lack of effective programs was that in the immediate aftermath of Prop 209, there were concerns about whether race-specific outreach (as opposed to, for example, targeting low income areas) was permitted after Prop 209.").

[188] *See* Kim Bojórqeuz, *Affirmative Action Failed on California's Ballot—But Colleges Commit to Diversity Goals*, SACRAMENTO BEE, (Nov. 9, 2020, 5:00 A.M.), https://www.sacbee.com/news/politics-government/capitol-alert/article246990537.html (quoting UCLA Law professor Laura Gomez) ("Prop 209 says that we can't use racial preferences in admissions, but it doesn't say that we can't take race into account when it comes to scholarships or recruiting once they've been admitted . . . But the UC legal interpretation has actually not been that broad ... Why can't we push that further?").

Prop. 209. Second, UC could have argued that racial affirmative action was necessary to maintain federal funding. I discuss each rationale below.

Recall that Prop. 209 does not explicitly prohibit affirmative action.[189] Nor does Prop. 209 expressly prohibit universities from considering an applicant's race. The text of Prop. 209 mandates that "state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race."[190] By its own terms, Prop. 209 bans only those race-conscious practices that entail "discriminat[ion]" or "preferential treatment."

UC could have, in turn, argued that its race-conscious admissions practices complied with Prop. 209 because they constituted neither discrimination nor preferential treatment. What's the basis for this argument?[191] As noted above, race-conscious admissions tend to intervene against a backdrop in which standard selection confer race- and class-based advantages on wealthy white students. Against such a backdrop, race-consciousness promotes Prop. 209's textual commands by mitigating racial (dis)advantages embedded within facially neutral processes. Or put difference, UC could have defended racial affirmative action as necessary *anti*discrimination—not justifiable discrimination.[192]

Scholars have raised this precise point. Professor Kimberly West-Faulcon, for example, has highlighted how indeterminate terms like

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[189] This omission was strategic. Even as California voters adopted Prop. 209, a larger majority exhibited support for "affirmative action." Please consider a citation to support this claim.

[190] Prop. 209's relevant text, now codified as Section 31 to Art. I of the California Constitution includes:

> (a) The state 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. . . .
>
> (e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.

[191] Historically, many affirmative action advocates have equated affirmative action with "preferential treatment." This common framing is pervasive and problematic. Above all, it treats as an "empirical fact" the contestable claim that affirmative action confers racial advantage. Carbado, *supra* note 13 at 1132.

[192] *See* Feingold, *supra* note 16.

"preference" are "open to substantial and varying interpretation." Accordingly:

> [s]tate courts that interpret the antipreference provision of the state's anti-affirmative action laws as an absolute ban on the use of racial classifications, are, in essence, equating the term preference with any race-conscious action. In contrast, a state court may conclude that prohibiting racial preferences "does not ban all government action that is cognizant of race.[193]

Professor Cheryl Harris advanced a similar argument in the specific context of Prop. 209's effect on admissions at UCLA School of Law:

> The fact that Proposition 209 eliminated any official preferences based on race does not mean that racial preferences have been eradicated; they persist in the form of housing segregation, educational inequality, and access to societal resources from health care to employment. Arguably, they also persist in the selection of admissions processes that rely heavily on a gatekeeping tool—the LSAT—that is known to produce a racial preference—primarily for whites.[194]

UC could have advanced a similar rationale to defend its existing admissions practices. To do so, UC did not need to rely on racially progressive legal scholars. Instead, the university could have returned to Justice Powell's *Bakke* opinion. In an often-overlooked footnote, the conservative Justice made the following observation:

> Racial classifications in admissions conceivably could serve a fifth purpose . . . : fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures. To the extent that race and ethnic background were considered only to the

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[193] West-Faulcon, *supra* note 111, at 1152. *Compare* Connerly v. State Pers. Bd., 112 Cal. Rptr. 2d 5 (Ct. App. 2001) (invalidating a state affirmative action statutory scheme applicable to the state lottery and the sale of government bonds based on equal protection concerns), *with* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1, 72 P.3d 151, 164 (Wash. 2003) ("Given th[e] language [of the I-200 voters pamphlet], an average voter would have understood that I-200 does not ban all affirmative action programs, and would only prohibit the type of affirmative action we have described as 'reverse discrimination' or 'stacked deck' programs.").

[194] *See also* Harris, *supra* note 21, at 1229.

> extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no "preference" at all.[195]

In short, Justice Powell made a simple but critical observation. To determine whether affirmative action constitutes a "racial preference," one must know the function affirmative action performs and the baseline against which it intervenes. If UC considered applicant race to *counter* racial advantages that white applicants enjoyed and racial disadvantages applicants of color suffered, the policy would, in Justice Powell's words, confer "no 'preference' at all."[196]

The empirical case for Justice Powell's counter-preference framing is stronger now than in 1996. But even then, robust evidence suggested that standard measures of merit (e.g., standardized tests) systematically under-measured the existing talent and potential of students from negatively stigmatized groups (i.e., Black and Latinx students). To summarize, UC could have argued that race-consciousness was needed to counter standard metrics that, albeit facially neutral, granted a race and wealth advantage to wealthy white applicants over more talented, but less privileged, peers.[197]

Second, UC could have argued that race-conscious admissions were necessary to maintain federal funding. Both Prop 209. and SP-1 contained a "federal funding exception" that exempted "action which must be taken to establish or maintain eligibility for any funding program, where ineligibility

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[195] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265,, 306 n.43 (1978). It is worth noting that this rationale appears in a footnote because UC did not defend Davis's admissions policy on this basis. *See id*.

[196] Here, I am suggesting that UC had a reasonable basis to claim that Prop. 209 permitted the continued consideration of race. A stronger version of the counter-preference argument would be that Prop. 209 requires race-conscious admissions when universities rely on measures of merit that confer race and class preferences on wealthy white students. In other words, because the SAT and ACT are known to reward inherited race and class privilege, Prop. 209's ban on "preferential treatment" could be read to require an affirmative counter-measure.

[197] Lawrence, *supra* note 154, at 943–44 ("The current Berkeley admissions process creates a preference for white folks in two very concrete ways: First, it gives bonus points to high school students who are enrolled in advanced placement courses; and second, it relies in a determinative and exclusionary way on insignificant differences in standardized test scores."). In the face of a global pandemic, litigation targeting its use of the SAT and ACT, and waning public support for standardized tests, UC announced plans to eliminate all use of the SAT and ACT beginning in 2025. *See* Jose Chavez, *UC Agrees to No Longer Consider ACT/SAT Scores in Admissions*, THE GUARDIAN (May 23, 2021).

would result in a loss of federal funds."[198] To maintain its existing practices, UC could have argued that eliminating any consideration of race would have exposed the university to liability under Title VI or its implementing regulations.

A limited number of government entities defended the continued use of certain affirmative action programs on that basis.[199] UC did not. As professor West-Faulcon has described, UC "simply ceased considering race in admissions."[200]

One might presume that UC forewent such an argument because it lacked supporting evidence. Even were that true in 1996, it was not by 1998, the year UC abandoned affirmative action across its system.[201] That year, the percentage of Black and Latinx admits plummeted—particularly at UC Berkeley and UCLA, the UC system's flagship campuses.[202] This decline accompanied a widening admissions gap between white applicants and applicants of color. In response, local stakeholders sued UC for over-relying on the SAT and ACT.[203] The plaintiffs argued that Berkeley's new admissions practices, which no longer considered race, violated Title VI and the equal protection clause.[204]

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[198] CAL. CONST. art. I, § 31.

[199] *See* West-Faulcon, *supra* note 111, at 1092 ("A few government entities, including the City and County of San Francisco, have attempted to employ [the federal funding] exception to defend their continued use of affirmative action policies.").

[200] *Id*. (describing how UC's decision to cease considering race tracked the response of other universities facing laws similar to Prop. 209).

[201] *See id*. at 1094.

[202] *See* Lawrence, *supra* note 154, at 942–43 ("Berkeley is the UC system's most selective school, and of the 25,796 applicants for the 1999 freshman class, 9,858 had GPAs of 4.0. But a white applicant with a straight "A" average has a much better shot at getting into Berkeley than a black, Latino or Filipino applicant with the same grades."); Kidder & Rosner, *supra* note <How the SAT Creates "Built-in Headwinds> (noting that Berkeley "admitted 28.1% of all applicants (8,438/30,038), including 31.2% of Whites (2,778/8,892), 20.6% of Latinos (647/3139), and 19.3% of African Americans (241/1249)").

[203] Compl. for Decl. and Inj. Relief at 4, Rios v. Regents of the Univ. of Cal., (N.D. Cal. Feb. 2, 1999) (No. C.99-0525) [hereinafter Rios Complaint].

[204] *See* American Civil Liberties Union, *Minority Students Sue U.C. Berkeley Over Unfair Admissions Policy*, ACLU (Feb. 2, 1999), https://www.aclu.org/press-

The litigation resurfaced UC's affirmative action ambivalence. To begin, Berkeley could have marshaled the same facts and theories that anchored the Rios complaint to defend its right to maintain race-conscious admission—even under a Prop. 209 and SP-1 regime. And even if UC was determined to avoid race-conscious admissions, Berkeley could have leveraged the evidence of growing inequality to retool its admissions process. Put differently, if racial integration were a paramount institutional priority, Berkeley should not have needed third-party plaintiffs to demand that the university reduce reliance on metrics that predictably advantaged wealthy white students.[205]

Berkeley did neither. The day after the lawsuit commenced, Berkeley Chancellor Robert Berdahl issued the following response: "We have demonstrated for decades a steadfast resolve to admit and educate students of all races and ethnicities . . . Our resolve has not changed. But the laws under which we operate have changed."[206] This statement entailed factual and normative claims. On the facts, Berdahl attributed the shrinking presence of Black, Latinx, and Pilipino students to exogenous forces beyond the university's control. Specifically, he blamed "the laws"—a reference to Prop. 209 and SP-1.[207] In so doing, Berdahl obscured the array of institutional decisions that produced the outcomes he decried. This includes Berkeley's decision to equate academic "merit" with fraught instruments such as the SAT and ACT.[208]

The foregoing empirical claim enabled Berdahl to advance a complementary normative claim. By identifying "bad" laws as the source of inequality, Berdahl situated Berkeley "on the side of good and right" and

releases/minority-students-sue-uc-berkeley-over-unfair-admissions-policy. For a deeper discussion of the Berkeley litigation, see Kidder & Rosner, *supra* note <How the SAT Creates "Built-in Headwinds>, at 187.

[205] UC eliminated legacy preferences after pressure emerged following the passage of Prop. 209. *See* Dreyfuss & Lawrence, *supra* note <THE BAKKE CASE>, at 24.

[206] Lawrence, *supra* note 154, at 948 n.70.

[207] Berkeley is not the only integrationist university that cited "laws" to evade responsibility for re-segregation. *See id*. at 954–55 ("It is this implicit participation in the big lie that allows liberal faculty at Berkeley, UCLA, and Texas to see themselves as fully committed to affirmative action, even as they throw up their hands and say, 'We are helpless' in the face of Proposition 209 and the Fifth Circuit's decision in Hopwood.").

[208] *See* Feingold, *supra* note 110.

defused accusations of institution racism.[209] In other words, Berdahl identified Berkeley on the side of racial integration by denying how institutional choices (e.g., preference for high test scores) facilitated the university's resegregation.[210] I offer this account not to suggest that Berkeley or its leadership valued a re-segregated campus. To the contrary, the evidence suggests that Berdahl—as with UC's general leadership—valued student body diversity. But that supports my underlying claim: many elite universities and their leaders hold earnest commitments to racial inclusion. But those commitments compete with, and are often subordinated beneath, a range of other institutional interests.[211] One can defend how integrationist universities weigh those competing commitments. But that only reinforces the commitment gap that separates compromising integrationists and uncompromising segregationists.

B. (Perceived) Conflicts of Interest

Above, I contrasted integrationist commitments to racial inclusion with segregationist commitments to racial exclusion. We can think of this *inter*-institutional dynamic as structural disadvantage that compromises affirmative action. To deepen that analysis, I now explore *intra*-institutional dynamics also disadvantage affirmative action. Specifically, I unpack how integrationist universities tend to perceive conflicts of interest between racial inclusion and other institutional priorities. As we witnessed above, when universities perceived conflicts arise, affirmative action (and racial inclusion)

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[209] Lawrence, *supra* note 154, at 948.

[210] Moreover, this explanation suggests that Black and Latinx students were underrepresented because they were underqualified, not because Berkeley privileged a measure of merit that rewards inherited race and class advantage. *See* [Rios complaint]. In so doing, Berdahl reinforced the conservative claim that racial affirmative action constitutes a departure from "neutrality" and "meritocracy," as opposed to a modest mechanism to promote both goals. Even today's UC leadership, which supports racial affirmative action, attributed racial disparities to student deficiencies. *See* Press Release, UC Office of the President, UC To Continue to Champion Diverse Student Body Despite Rejection of Proposition 16 (Nov. 4, 2020), https://www.universityofcalifornia.edu/press-room/uc-continue-champion-diverse-student-body-despite-rejection-proposition-16 ("Despite the failure of Proposition 16, the University will continue to look for innovative and creative approaches to further improve the diversity of its student body through outreach to underserved groups, schools and communities; support for college preparation; and efforts to close equity gaps among students attaining a UC education.").

[211] *See infra* Part II.B.

tends to lose out. Below, to explore this dynamic, outline how racial inclusion tends to compete with institutional commitments that fall within three overarching categories: (1) brand goals; (2) budget goals; and (3) risk aversion.

Before proceeding, two notes are warranted. First, the commitments I identify below often interact with, and at times bleed into, one another. I do not mean to suggest otherwise. Still, these categories help to highlight discrete, if interconnected, elements of university governance that can heighten affirmative action ambivalence.

Second, in many cases, these "competing" goals do not actually conflict with affirmative action and racial integration. In other words, universities often perceive conflicts that do not, in fact, exist. As an analytical matter, it is important to distinguish between perception and reality. As a practical matter, the gap between perception and reality matters far less. If a university perceives a conflict, that perception is likely to shape its behavior even if no conflict, in fact, exists.

1. Brand Goals

Elite universities care about their institutional reputation—what I capture here under the rubric of "brand" goals.[212] At least two brand goals can disincentivize a robust affirmative action defense: concerns about (a) perceived commitments to racial justice and (b) academic prestige. For brevity, I refer to above brand goals as "antiracist U" and "status," respectively. In theory, these goals need not compromise zealous affirmative action advocacy. In practice, elite universities often perceive a conflict. When they do, brand concerns prevail.

(1) "Antiracist U"

Most elite universities project a commitment to diversity, social justice, and antidiscrimination.[213] I am not suggesting that such projections

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[212] *See, e.g.*, Frans Van Vught, *Mission Diversity and Reputation in Higher Education*, 21(2) HIGHER EDUC. POL'Y 151 (2008).

[213] *See, e.g.*, *Anti-Racism: Learning, Healing and Taking Action*, HARVARD COLLEGE, https://dso.college.harvard.edu/anti-racism (last visited Jan. 26, 2022); Message from the University Office for Diversity and Inclusion: Anti-Black Violence, UNC Office of the Provost (May 29, 2020), https://diversity.unc.edu/2020/05/message-from-the-university-office-for-diversity-and-inclusion-anti-black-violence/.

misrepresent actual institutional values.[214] That said, commitments to meaningful inclusion and brand are distinct. An "antiracist" brand can serve institutional ends even absent actual antiracist commitments. Moreover, in certain instances, commitments to brand can undermine meaningful projects of racial reform.

Consider, for example, how an "antiracist" brand can insulate universities from legitimate critique. To begin, university leaders can mobilize a successful brand to defuse complaints about institutional racism.[215] We saw this, for example, when then-UC Berkeley Chancellor Berdahl highlighted the university's diversity commitments to defuse claims of institutional racism.[216] Second, an antiracist reputation can legitimize existing distributions of representation, power, and access within a university.[217] As a result, effective communication strategies can preserve the status quo by muting claims of outgroup derogation and ingroup favoritism.[218]

Translated to affirmative action, "antiracist" brand commitments can incentivize schools to deny or downplay contemporary manifestations of

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[214] That said, to promote a veneer of racial diversity, multiple universities were implicated for cropping students of color into official promotional materials. *See* Deena Prichep, *A Campus More Colorful Than Reality: Beware that College Brochure*, NPR (Dec. 29, 2013).

[215] The above referenced episodes involving Cornel West and Nikole Hannah-Jones reflect how incidents of racial discrimination (actual or perceived) can trigger widespread public rebuke and condemnation.

[216] *See* Lawrence, *supra* note 154, at 948 (characterizing Berdhal's response as an attempt to counter claims of racism); *see also* Dennis Kennedy, *Moving Beyond "Performative" Diversity Commitments*, Presidio Graduate School (Dec. 7, 2020) ("Performative DEII is used to convey a commitment to diversity, equity, and inclusion; however, often neglects to assign a policy, action, or person designed to bring about racial equity. Performatives are ritual social practices that are enacted over time to avoid potential litigation or scrutiny from consumers or stakeholders.").

[217] *See* Dian Squire et al., *Institutional Response as Non-Performative: What University Communications (Don't) Say About Movements Toward Justice*, 2019 REV. HIGHER ED. 109, 113 (2019) (explaining that "institutional rhetoric regarding a desire for diversity [can] act[] as a way to (re)instill white institutional presence").

[218] *See id.* at 129 (arguing that "the purpose of higher education is to maintain the nationalistic, neoliberal discourse that aims to reinforce the status quo via the process of minority absorption"); *see also* Sophia Wolmer, *BSU Members Say College's Response to #BlackMindsMatter Protest is 'Reactionary and Performative,'* The Amherst Student (Apr. 21, 2021).

racial harm.[219] If the goal is to project a picture of racial harmony, this response makes sense. But downplaying evidence of racial harm, particularly if institutional messaging contradicts students' lived experience on campus, can undermine the basic goal of an equal learning environment for all students. Moreover, by downplaying evidence of racial discrimination on campus, universities are evading facts that would buttress the case for race-conscious admissions.[220]

To get more concrete, consider how "antiracist" brand goals could shape how Harvard approaches ongoing litigation that implicates its race-conscious admissions practices. From a brand perspective, Harvard can lose in the court of law but prevail in the court of public opinion. As a formal matter, Harvard enters the litigation as affirmative action's formal champion. This posture furthers Harvard's ability to position itself on the side of racial justice. To a significant extent, Harvard can enjoy the accompanying brand benefits even if it defends its own policy on "lukewarm" terms. And here, brand goals could incentivize Harvard to avoid evidence that, for example, (a) wealthy white students continue to enjoy undeserved race-class preferences in Harvard's admissions process and (b) students of color continue to confront racial discrimination on Harvard's campus.[221] Both sets of facts would support Harvard's right to consider applicant race. But both risk Harvard's "antiracist" brand.

The question becomes: What does Harvard value higher, affirmative action or its brand? If Harvard prioritizes race-conscious admissions over brand, we would expect Harvard's legal defense of affirmative action to foreground evidence of racial discrimination (against students of color) within its admissions process and on its campus. Why? Because doing so

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[219] By "racial harm," I mean to include a range of individual and institutional conduct that denies students of color equal university membership. *See* Jonathan Feingold, *Hidden in Plain Sight: A More Compelling Case for Diversity*, 2019 UTAH L. REV. 59 (2019).

[220] *See* Jenkins, supra note 12 (explaining that remedying discrimination attributable to the university remains a viable defense for race-conscious admissions); *see also* Joanne Villanueva, *The Power of Procedure: The Critical Role of Minority Intervention in the Wake of* Ricci v. Destefano, 99 CALIF. L. REV. 1083, 1115 (2011).

[221] For a more detailed analysis concerning the racial (dis)advantages that permeate standard admissions processes, see Carbado et al., *supra* note 109 and Feingold, *supra* note 16.

strengthens the constitutional and normative case for race-conscious admissions.[222]

In fact, the present lawsuit challenging Harvard's admissions system contains these precise allegations.[223] Students for Fair Admissions ("SFFA"), the plaintiff, has alleged that Harvard discriminates against Asian American applicants. As I detail elsewhere, SFFA has leveraged this narrative of Asian victimhood to scapegoat affirmative action as the source of anti-Asian bias—even as SFFA concedes that anti-Asian bias within Harvard's admissions process tends to benefit white applicants.[224] Harvard could counter this narrative and strengthen the case for its existing race-conscious policy. But doing so requires a somewhat counterintuitive response: acknowledge that facially race-neutral portions of Harvard's admissions process confer unearned racial advantages upon white applicants at the expense of similarly situated Asian applicants .[225]

Recognizing this evidence of anti-Asian bias serves at least two purposes. First, by highlighting who benefits from that bias (i.e., white applicants), Harvard is better positioned to counter SFFA's unsupported

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[222] This is a place where the conflict between brand goals and inclusion goals may be more perception than reality. One could argue that acknowledging and reckoning with institutional racism—as opposed to denying and avoiding itexists presence—bolsters the case for affirmative action and promotes an "antiracist" brand. There are emerging examples of universities taking more proactive steps to reckon with institutional histories of racism. One example comes from John Hopkins:

> Launched in fall 2020, the Hard Histories at Hopkins Project examines the role that racism and discrimination have played at Johns Hopkins. Blending research, teaching, public engagement and the creative arts, Hard Histories aims to engage our broadest communities—at Johns Hopkins and in Baltimore—in a frank and informed exploration of how racism has been produced and permitted to persist as part of our structure and our practice. Through the lessons of hard histories we will chart a way forward. Join us.

Hard Histories at Hopkins, JOHNS HOPKINS UNIVERSITY, https://hardhistory.jhu.edu/ (last visited Aug. 21, 2021).

[223] *See* Jonathan Feingold, *SFFA v. Harvard: How Affirmative Action Myths Mask White Bonus*, 107 CALIF. L. REV. 707 (2019) (outlining allegations in Harvard lawsuit).

[224] *See id*. (identifying that SFFA alleges that several dimensions of Harvard's admissions process harms Asian applicants to the benefit of white applicants).

[225] Lawrence, *supra* note 154, at 941 ("[N]either [Bowen or Bok] questions the validity of standard admissions criteria used at these institutions, nor examines the ways that these criteria reinforce the effects of societal segregation and racism.").

claim that affirmative action is the source of anti-Asian bias.[226] Second, Harvard can leverage the evidence to support the case for more affirmative action—that is, specific steps designed to mitigate the racial advantages that white students continue to enjoy vis-à-vis their Asian counterparts. [227]

In short, Harvard could take seriously allegations of anti-Asian bias.[228] Doing so could lead to a more racially inclusive institution and counter SFFA's core narrative that affirmative action harms Asian applicants.[229]

Harvard has not taken this approach. Rather than acknowledge sites of Asian racial disadvantage, the university disputes all claims of racial discrimination.[230] Brand concerns cannot explain, in full, why Harvard has foregone a response that would buttress the case for race-conscious admissions. Still, brand goals help to explain why Harvard continues to deny and downplay allegations of racial harm (against students of color) within its admissions process.[231]

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[226] *See id.*

[227] *See* Feingold, *supra* note 251, at 732 ("Rather than colorblindness, a responsive remedy would necessitate the implementation of a race-conscious policy capable of redressing the specific harm of negative action underlying SFFA's discrimination claim.").

[228] As one example, SFFA identifies a report from Harvard's Office of Institutional Research that suggested Asian applicants might face a race-based penalty in Harvard's admissions process. *See* Plaintiff's Memorandum of Reasons in Support of its Motion for Summary Judgment at 13, SFFA v. Harvard 2015. SFFA further alleged that Harvard prefers white applicants over Asian applicants with similar academic credentials. *See, e.g., id*. at 10 ("An Asian-American male applicant with a 25% chance of admission would see his chance increase to 31.7% if he were white—even including the biased personal rating."). Rather than deny the allegation, Harvard could redouble efforts to mitigate any such racial harm. This could include a more robust affirmative action policy designed to counter anti-Asian bias embedded within facially race-neutral elements of Harvard's admissions process. *See* Feingold, *supra* note 251, at 732.

[229] *See id*. (explaining how Harvard's defense "fuels the [empirically suspect] narrative that race-consciousness discriminates against Asian Americans").

[230] *See* Brief for Defendant-Appellee, *Students for Fair Admission v. Harvard*, 2020 WL 2521577 (C.A. 1)27 ("On the merits, SFFA's claims fail. As the district court correctly found, Harvard does not discriminate against Asian-American applicants.").

[231] *See* Harvard's Response to Motion to Intervene, *Students for Fair Admission v. Harvard*, 2015 WL 3833689 (D.Mass.) (opposing intervention and arguing that

As referenced above, "antiracist" brand goals also help to explain why elite universities fail to foreground evidence that students of color continue to experience racial bias on campus. In the litigation context, this evidence would benefit university defendants because it buttresses an existing rationale for affirmative action: student body diversity.[232] The diversity rationale remains the primary rationale universities invoke to justify race-conscious admissions.[233] Still, university defendants—like Harvard and UNC—tend to marshal thin conceptions of diversity that foreground how student body diversity promotes more robust conversation in the classroom—what we might call diversity's "speech" function.[234]

But a racially diverse student body does more than promote conversation in the classroom. When severely under-represented on campus, students of color tend to face identify-contingent harms that undermine their basic right to an equal learning environment.[235] Racial diversity, in turn, promotes equality by mitigating those harms—and thereby eliminating a racial tax that white students never bear. We might call this diversity's "equality" function.[236] Race-conscious admissions, in turn, emerge as a potent tool that safeguards the personal and present equality interests of actual university students.[237]

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evidence of discrimination against students of color is legally irrelevant to Harvard's defense).

[232] Feingold, *supra* note 246 (outlining how universities could articulate a more capacious conception of diversity that centers the experience of students of color).

[233] *See id*.

[234] *See* Jonathan Feingold, *Diversity Drift*, 9 WAKE FOREST L. REV. ONLINE 14 (2021); Devon W. Carbado, *Intraracial Diversity,* 60 UCLA L. REV. 1130, 1145 (2013) (enumerating diversity benefits embedded in Justice O'Connors *Grutter* opinion).

[235] *See* Feingold, *supra* note 246 (outlining concept of "equal university membership").

[236] *See id*. *See also* Jonathan P. Feingold & Evelyn R. Carter, *Eyes Wide Open: What Social Science Can Tell Us About the Supreme Court's Use of Social Science*, 112 NW. U. L. REV. 1689, 1707-10 (2018) (describing how an "Elite Student Paradigm" centers whiteness and imagines students of color—particularly Black students—as perpetual university outsiders).

[237] *See id*.

When defending affirmative action, university defendants often gesture to diversity's equality benefits.[238] But rarely do universities center diversity's equality function.[239] Neither Harvard nor UNC, for example, have emphasized how racial diversity constitutes a critical ingredient necessary to counter institutional dynamics that tend to subject students of color to a racially hostile learning environment.[240]

It is unclear why university defendants continue to privilege diversity's speech function over its equality function. One explanation is that, by focusing on speech, Harvard and UNC can position themselves as guardians of racial diversity without interrogating how racial power continues to compromise the basic goal of an equal learning environment for all students.[241] In other words, framing diversity in terms of speech (over equality) enables universities to evade criticism that locates racism in the institutional environment itself.[242] Harvard or UNC, in turn, can champion diversity without having to publicly engage equality concerns that undercut an "antiracist" brand.

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[238] *See, e.g.*, Fisher v. Univ. of Texas, 579 U.S. 365, 384 (2016) (noting that the University of Texas argued that "minority students admitted under the [non-affirmative action] *Hopwood* regime experienced feelings of loneliness and isolation").

[239] *See, e.g.*, *id*. at 404 (Alito, J., dissenting) (noting that UT identified four "more specific" diversity goals: "demographic parity, classroom diversity, intraracial diversity, and avoiding racial isolation").

[240] To the extent this diversity framing has entered the litigation, it has come from student intervenors. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 308 F.R.D. 39, 44 (D. Mass.), *aff'd*, 807 F.3d 472 (1st Cir. 2015) (ruling on motion to intervene) ("In addition, the Students claim that they will argue—and that Harvard is unlikely to argue—that achieving a "critical mass" of minority students is necessary to reduce the racial isolation of minority students on campus.").

[241] Charles Lawrence reflected on this dynamic during the *Grutter* and *Gratz* litigation: "It should not surprise use that well-meaning individuals who self-identify as liberal should be attracted to an argument for racial integration that least threatens their own privilege." Lawrence, *supra* note 154, at 941.

[242] *See id.* at 953 ("By looking only forward, it avoids any direct admission or acknowledgement of the institution's past discriminatory practices, even when that discrimination is de jure and of relatively recent vintage. It makes no effort to inquire into the ways that current facially neutral practices may have a foreseeable and unjustifiable discriminatory impact or to account for unconscious bias in their administration.").

To summarize, elite universities often perceive a conflict between maintaining an "antiracist" brand and acknowledging that institutional arrangements often compromise the present and personal equality interests of students of color. This perceived conflict, even if more perceived than real, helps to explain why Harvard and UNC understate racial diversity's equality function—even if doing so constraints their ability to defend race-conscious admissions as necessary antidiscrimination that ensures all students, regardless of race, can enjoy the full benefits of university membership.

(2) "Status"

A second component of brand is institutional status. Elite universities hunt academic prestige.[243] Derek Bok, a former president of Harvard University, described the pervasive pursuit for prestige as follows:

> [Universities'] most comprehensive objective . . . is academic distinction, or prestige—an elusive concept that embraces the quality of the students and the scholarly and scientific reputations of the faculty.[244]

Bok surfaces three important features of prestige: (1) universities want it; (2) the concept is amorphous; and (3) it is broadly understood to capture the quality of an institution's students and faculty.

Why do universities hunt prestige? The simple answer is that prestige yields multiple institutional benefits. To begin, more prestige makes a university more competitive for sought-after students and faculty.[245] Second, in part due to the above, more prestige increases revenues in the form of tuition and donor giving.[246] In many respects, the relationship between prestige and the benefits it yields is circular: "[P]restige is both the cause and

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[243] *See* Roger L. Geiger, *The Competition for High-Ability Students: Universities in a Key Marketplace*, *in* THE FUTURE OF THE CITY OF INTELLECT: THE CHANGING AMERICAN UNIVERSITY 82, 84 (Steven Brint ed., 2002) (citations omitted) ("The behavior of universities is frequently described as competition for prestige to achieve or maintain status.").

[244] DEREK BOK, UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION 159 (2003). *See also* Geiger, *supra* note 278, at 87 (referring to prestige as the "coin of the realm in higher education").

[245] *See* Sung Hui Kim, *The Diversity Double Standard*, 89 N.C. L. REV. 945, 959–60 (2011) ("Whether these student and alumni patrons will pay, and how much, is in large part a function of the university's prestige . . . .").

[246] *See Id*.

the result of getting or having 'good' students, 'good' faculty, and ample financial support."[247]

Given prestige's amorphous quality, this construct—albeit highly valued—can be difficult to assess in a concrete or objective way.[248] Historically, prestige has been derived from a school's reputation in the relevant community. [249] Today, prestige has become largely synonymous with a school's U.S. News & World Report ranking ("Rankings").[250] In 2003, Professor Lani Guinier described the Ranking's "as undoubtedly the most influential voice in judging who 'wins' and 'loses' in the contest for elite status."[251] There is little reason to believe this influence has waned. If anything, the association between Rankings and prestige appears as strong as ever.[252]

Accordingly, a rational university that prioritizes maximizing prestige should prioritize metrics that influence Rankings.[253] In practice, this often translates to over-reliance on standardized test scores (e.g., the SAT and ACT), which have enjoyed an outsized impact on a university's ranking.[254]

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[247] Geiger, *supra* note 278, at 87.

[248] Kim, *supra* note 280, at 959–60.

[249] That community could be a city, region, country, or subset of similar institutions.

[250] *See id*. at 960–61 ("[T]he abstract concept of prestige has been de facto operationalized into the U.S. News rankings.").

[251] Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 144 n.126 (2003).

[252] *See* Kim, *supra* note 280, at 962–63 ("[Q]uantitative analyses of admissions trends at colleges and law schools conclusively demonstrate that rankings influence how many applications a school receives, the academic characteristics of the school's applicant pool, the percentage of applicants who are accepted, and the percentage of accepted students who then matriculate. . . . [T]he higher the institution's U.S. News rank, the more likely it will attract students with higher academic credentials and the more difficult it will be to gain admission.").

[253] The Rankings have been subject to widespread critique. *See* Malcolm Gladwell, *Lord of the Rankings*, REVISIONIST HIST. (July 1, 2021), https://www.pushkin.fm/episode/lord-of-the-rankings/; Bok, *supra* note 279, at 159-60 ("Although the unreliability of [U.S. News'] ratings is notorious, they continue to have an influence, since nothing else has been devised that provides such regular, seemingly exact measures of comparative academic quality.").

[254] The Rankings rely heavily on standardized test scores to compute "the institution's selectivity which is then used to compute its overall rank." Kim, *supra* note 280, at

The relationship between test scores and rank extends to law schools. Between 2003-2006, for example, of the top 50-ranked law schools, no school had a median LSAT score lower than a lower ranked school.[255] In other words, as Professor Alex Johnson observed, "none of these other so-called variables are apparently important enough or weighted heavily enough to cause a school which is superior in all other respects to be ranked higher than a law school with a higher median LSAT."[256]

This reality is not lost on the leaders of American law schools and universities. Privileging higher test scores produces higher Rankings, which yield other institutional benefits. But privileging test scores comes with cost.[257] Standardized tests better measure a student's social capital (including race and class privilege) than academic promise and potential.[258] It should be no surprise, therefore, that such tests continue to produce racial disparities—at least as measured by group mean.[259] Accordingly, when a school privileges standardized test scores in admissions, it will predictably exclude many otherwise talented and qualified students of color—not to mention poor white students.[260] The Rankings, in other words, penalize universities that admit

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963–64. Given the waning reliance on standardized test scores at elite universities (at least in the undergraduate context), it is unclear how rankings will adjust. *See* Vivi Lu, *Harvard College Suspends Standardized Testing Requirements for Next Four Years*, The Crimson (Dec. 17, 2021).

[255] Alex M. Johnson, Jr., *The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings*, 81 IND. L.J. 309, 311 n.114 (2006).

[256] *Id.*

[257] *See Kim*, *supra* note 280, at 969 (nothing that universities are "forced to choose between a higher median LSAT score and a more diverse student body").

[258] *See* Dixon-Ramon et al., *Race, Poverty and SAT Scores: Modeling the Influences of Family Income on Black and White High School Students' SAT Performance*, 115 Teachers College Record 2 (2013).

[259] *See Richard Reeves & Dimitrios Halikias*, *Race Gaps in SAT Scores Highlight Inequality and Hinder Upward Mobility*, THE BROOKINGS INSTITUTE (Feb. 1, 2017), https://www.brookings.edu/research/race-gaps-in-sat-scores-highlight-inequality-and-hinder-upward-mobility/.

[260] *See* Wendy Espeland & Michael Sauder, *Rankings and Diversity*, 18 S. CAL. REV. L. & SOC. JUST. 587, 596 (2009) ("Generally (and it is crucial to emphasize these patterns are measures of central tendency that necessarily obscure variation), men score higher than women, whites and Asian Americans do better than African Americans, Mexican Americans and Puerto Ricans, and people living in the Northeast do better than those from the South. Studies have also found persistent

meaningful numbers of students from groups that under-perform on standardized tests.[261] Or phrased in the alternative, U.S. News rewards universities that admit wealthy (often white students) at the expense of otherwise qualified Black and Latinx students.

These incentives interact with affirmative action in two respects. First, the Rankings pressure universities to emphasize criteria that increase the need for a robust affirmative action program.[262] The increased need arises from (a) the race and wealth advantage embedded in such scores and (b) the foreseeable reduction in student body racial diversity that results.[263] Second, the same prestige goals that drive over-reliance on test scores disincentivize robust race-consciousness. When a university reduces the exclusionary effects of standardized tests scores by becoming more race-conscious, it has the same effects as reducing reliance on SAT: it threatens prestige. Professor Sung Hui Kim has summarized this dynamic:

> Consequently, affirmative action programs that seek to meaningfully expand the numbers of underrepresented minority groups are at cross-purposes with a university's ongoing attempts to increase its prestige standing, driven primarily by standardized test scores, as represented by its U.S. News ranking.[264]

Ultimately, in a contest that pits racial inclusion and affirmative action against prestige, prestige often prevails.[265] The priority status that prestige enjoys helps to explain gaps between institutional rhetoric (e.g., celebrating racial diversity) and institutional (in)action (e.g., reluctance to jettison admissions practices that privilege wealthy white applicants).

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class effects in standardized testing where students from wealthy or middle-class families do better than those from working-class or poor families.").

[261] *See* Gladwell, *supra* note 288.

[262] *See* Kim, *supra* note 280, at 968 ("Sociological interviews of law school administrators, faculty, and staff involved in the admissions process reveal that the rankings have sharpened the emphasis on students' LSAT profiles, which has impeded their efforts to craft a racially (as well as economically) diverse class of students.").

[263] As I outlined above, beyond group-based disparities, standardized tests tend to systematically under-measure the existing talent and potential of students from negatively stereotyped groups. *See* Carbado, *supra* note 17.

[264] Kim, *supra* note 280, at 968.

[265] Leslie Yalof Garfield, *The Inevitable Irrelevance of Affirmative Action Jurisprudence*, 39 J.C. & U.L. 1, 50 (2013) ("Sadly, it seems that today's post-secondary institutions are not willing to compromise their academic elite status.").

At bottom, this dynamic reinforces that elite universities are not uncompromising affirmative action advocates. At best, they manage competing influences, constituencies, and priorities—some of which conflict with (or are perceived to conflict with) affirmative action and racial integration. At worst, one might contend that attributing ambivalence to these universities is unduly generous. On the ground, when institutions translate priorities into action, "other" goals tend to win out at the expense of affirmative action and racial inclusion more broadly.

In response, a university might insist that the Rankings' hegemony over reputation and status limits institutional choice. There is, one might say, a degree of coercion involved; one cannot simply opt-out of the "rankings game." Even if one accepts this argument,[266] it provides a justification for institutional ambivalence. But that just advances my core claim that structural forces compromise affirmative action's formal defenders from marshalling the strongest case for their own policies (and, by extension, racial integration). Or put differently, if external forces (e.g., U.S. News Rankings) prohibit elite universities from adequately representing affirmative action, we might question the outsized role these institutions enjoy when defending race-conscious admissions—in the court of law and the court of public opinion.

One final point about prestige is warranted. When elite universities reward high performance on standardized tests, that behavior reifies a narrow conception of merit that conflates student talent and potential with test scores. In other words, when Harvard says that test scores matter more than anything else, they are telling us what academic excellence entails and who deserves admission to Harvard. Just this message compromises the case for affirmative action. To begin, it suggests that any existing racial disparities are the product of actual differences in merit—not, for example, Harvard's decision to privilege metrics that measure social advantage. Moreover, when Harvard equates test scores with "merit," it reinforces the contestable claim that affirmative action constitutes a "racial preference" that intervenes against an objective and race-neutral baseline.[267] In other words, in the same breath that it defends affirmative action, Harvard endorses talking points

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[266] Some institutions privilege values other prestige. Rarely, however, are these the institutions that the public would view as elite or prestigious. *See*, e.g., Malcolm Gladwell, *Project Dillard*, REVISIONIST HIST. (July 8, 2021), https://www.pushkin.fm/episode/project-dillard/ (highlighting institutions that serve students from disadvantaged backgrounds even if it undermines their rankings).

[267] *See* Devon W. Carbado et al., *supra* note 109; Cheryl Harris, *Fisher's Foible: From Race and Class to Class not Race*, UCLA L. REV. DISCOURSE (2017).

commonly deployed to discredit affirmative action as, for example, "reverse racism."[268]

These concerns are not just theoretical. The foregoing dynamics have shaped how Harvard and UNC continue to defend their own policies.[269] As a result, in litigation that will determine the fate of race-conscious admissions, an ostensibly adversarial process features uncompromising affirmative action opponents on one side and conflicted affirmative action advocates on the other.

2. Budget Goals

Related to brand goals are what I term *budget* goals. Here, I refer to a university's pecuniary interest in maximizing revenues and limiting costs—both of which can conflict with affirmative action and broader racial integration commitments.[270]

We can start with revenues—that is, sources of university income. The tension between affirmative action and revenues follows from our preceding discussion about status goals. In the higher education context, revenues come from two primary sources: tuition and donor giving. A university's ability to charge high tuition or demand large donations turn, in large part, on its prestige. Prestige, as noted, turns on U.S. New Rankings, which overvalue metrics that advantage students with race and class privilege (that is, wealthy white students). As a result, meaningful affirmative action efforts can undercut the metrics that drive rankings, thereby compromising prestige and depressing what an institution can charge students and expect from donors.[271]

On the other side of the ledger are costs—that is, a university's expenses. Affirmative action, and the more diverse student body it produces, tends to entail additional administrative expenses. Specifically, when a

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[268] *See* Feingold, *supra* note 16.

[269] *See id.*

[270] Kim, *supra* note 280, at 958–59 ("[A]s a purely descriptive matter, there is plenty of evidence to suggest that meaningful affirmative action programs that admit more than token numbers of underrepresented minorities . . . generate more economic costs than economic benefits to universities.").

[271] Beyond impacting prestige, support for affirmative action or other antiracist efforts can decrease revenues by alienating alumni who oppose those policies. *See* Katie Robertson, *Nikole Hannah-Jones Denied Tenure at University of North Carolina*, N.Y. TIMES (May 19, 2021), https://www.nytimes.com/2021/05/19/business/media/nikole-hannah-jones-unc.html.

school reduces reliance on standardized test scores, this can increase five distinct categories of cost: (1) search costs; (2) yield costs; (3) justification costs; (4) equal environment costs; and (5) borrowing costs.[272] I discuss each in turn.

(1) Search Costs

Search costs include the time, resources, and human capital necessary to design and administer admissions systems that consider applicant race. As a general matter, mechanical and objective processes (e.g., sorting students by test scores alone) are more efficient, economical, and administrable than flexible and subjective processes (e.g. holistic review common to many elite universities). Race-conscious admissions policies can fall on either end of this spectrum.

On the mechanical end of the spectrum, a university might assign a numeric score to racial identity.[273] On the flexible end of the spectrum, a school might consider race as one of many factors within a holistic process. There are pros and cons to both. As a simple matter of cost, the former system is cheaper. Prior to 2003, a university could have employed a more mechanical race-conscious process that awarded numerical points to students on any aspect of their identity—including race. But in *Gratz* and *Grutter*, a pair of 2003 decisions, the Supreme Court held that the Constitution prohibits admissions policies that assign specific numerical scores to racial identity.[274] The Court specified that universities may consider race. But to comply with constitutional requirements, they must employ a "highly individualized, holistic review" for each applicant that considers race as one of many factors.[275]

In short, the Supreme Court identified how a university could consider applicant race consistent with the Constitution. But that method, as a bare matter of cost, is more expensive and less administrable than other ways that

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[272] *See* Kim, *supra* note 280, at 974 ("Effective administration of affirmative action programs takes up significant financial resources.").

[273] *See* Gratz v. Bollinger, 539 U.S. 244 (2003) (assigning a specific numeric score for various aspects of applicant identity including race).

[274] *See id.*

[275] *See* Grutter v. Bollinger, 539 U.S. 306 (2003) ("But the Court required schools to consider student race flexibly within a holistic review. As Justice Powell made clear in Bakke, truly individualized consideration demands that race be used in a flexible, nonmechanical way.").

a school might account for applicant race.[276] In other words, for a university to consider applicant race without violating existing precedent, it must take on the non-trivial costs associated with a flexible and holistic process.[277] Whatever one's view on affirmative action, *Grutter* and *Gratz* made it more expensive than it might otherwise be.

(2) Yield Costs

Yield costs capture the expenses required to ensure admitted students from underrepresented racial groups matriculate. For multiple reasons, students from underrepresented groups—particularly Black and Latinx students—have lower yield rates than those from other groups.[278] To begin,

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[276] In fact, the University of Michigan identified this concern when defending its more mechanical process in *Gratz*. *Gratz*539 U.S. at 275 ("Respondents contend that '[t]he volume of applications and the presentation of applicant information make it impractical for [LSA] to use the ... admissions system' upheld by the Court today in Grutter.").

[277] *See* Vinay Harpalani, DIVERSITY WITHIN RACIAL GROUPS AND THE CONSTITUTIONALITY OF RACE-CONSCIOUS ADMISSIONS, 15 U. PA. J. CONST. L. 463, 537 n.309 (2012) ("These measures may cause institutions to incur more costs, but colleges and universities have adjusted to similar circumstances in the past: after *Grutter*, institutions had to expend more resources on holistic admissions and eliminate more cost-effective point systems similar to the one struck down in Gratz."). *See also* Gratz v. Bollinger, 539 U.S. 244, 275 (2003) ("Respondents contend that '[t]he volume of applications and the presentation of applicant information make it impractical for [university] to use the . . . admissions system' upheld by the Court today in *Grutter* . . . But the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system." (internal citation omitted). The question is always: "As compared to what?" To the extent a university already employs holistic review, including racial identity as one factor among many may not significantly increase search costs. On the other hand, if the university would otherwise employ a more mechanical approach, the "holistic review" requirement attached to race is likely to yield a significant delta in cost.

[278] *See* Kimberly West-Faulcon, Obscuring Asian Penalty with Illusions of Black Bonus, 64 UCLA L. REV. DISCOURSE 592, 626 n.146 (2017) ("Universities may have ample justification for admitting African American students who fall in this category at substantially higher rates than similarly situated Asian American and white applicants because the number of such African American students is comparatively small and because the 'yield rate'—the percentage of the very high-scoring African

students from underrepresented racial groups are disproportionately low- or middle-income.[279] As a result, they need more financial assistance, which the university must often provide.[280] Additionally, there is often heightened competition among elite schools for "high performing" students of color.[281] In short, universities must expend more resources to ensure admitted students of color matriculate than they do for students from over-represented groups.

(3) Justification Costs

Justification costs capture a university's ongoing burden to defend—morally and legally—its right to consider applicant race. As a simple matter of doctrine, the Supreme Court has made clear that universities can employ race-conscious admissions only when race-neutral alternatives are unavailable. This mandate, in effect, places an ongoing and affirmative obligation on universities to establish that affirmative action is required to achieve student body diversity. On the ground, this sort of analysis demands a non-trivial expenditure of institutional resources. In a world of limited resources, the human capital required to conduct this work is no longer available to pursue other institutional endeavors.

More generally, affirmative action exacts justification costs anytime a private party or state actor challenges an existing affirmative action policy. On the legal front, this can entail marshalling resources to litigate civil suits or manage federal investigations. But even when challenges are not legal *per se*, universities must deploy institutional resources—e.g., communication campaigns necessary to defuse public attacks and legitimate existing practices.

American students who decide to enroll subsequent to their admission—is often significantly lower than similarly situated Asian American and white applicants."). *See also* William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case*, 39 J.C. & U.L. 53, 77-78 (2013) (observing that after Prop. 209 passed, yield rates for high performing Black and Latinx admits declined at eight UC campuses relative to their white and Asian counterparts).

[279] *See id.*

[280] Beyond yield, students from low- and middle-income families are more likely to encounter economic or other hardships while in school. The costs associated with these hardships, accordingly, fall heavier on schools that admit a higher percentage of students from low- and middle-income families. *See* Gladwell, *supra* note 288.

[281] *See id.*

(4) Equal Learning Environment Costs

Equal environment costs capture the resources required to create and maintain a learning environment that supports students from historically underrepresented groups.[282] These costs arise, in part, because most elite universities were never designed for students of color—let alone students without inherited class advantage.[283] As a result, constructing a university that permits all students to thrive requires investing in a range of resources unnecessary in more homogenous (that is, wealthy and white) environments.[284] Moreover, as student diversity increases, so does the likelihood of conflict and disagreement—challenges that require more institutional investment.

(5) Borrowing Costs

Borrowing costs capture a university's ability to access capital necessary for institutional expansion and investment.[285] Professor West-Faulcon has outlined how affirmative action (and, more broadly, inclusive admissions practices) can produce borrowing costs:

> The three major financial rating agencies—Moody's Investors Service, Standard & Poor's, and Fitch Ratings—consider average SAT scores as part of their credit analyses. Because it has become increasingly common for colleges and universities to issue bonds to raise money for major expansion projects, many institutions have a very direct financial incentive to try to increase their overall average SAT score. The fact that average SAT score is used to gauge institutional financial health as well as prestige encourages admissions

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[282] *See generally* Feingold, *supra* note 246.

[283] This backdrop helps to explain why Historically Black Colleges and Universities (HBCUs)—which were created to serve Black students—continue to better education Black students than do White Serving Institutions. *See* Stacy Hawkins, *Reverse Integration: Centering HBCUs in the Fight for Educational Equality*, 24(3) U. PA. J. L. & SOC. CHANGE 2021 (2020).

[284] *See id.*

[285] *See* Kim, *supra* note 280, at 976 ("Another reason why meaningful affirmative action programs may generate more economic costs than economic benefits to universities is that affirmative action programs may negatively impact the university's bond ratings.").

officials to place even greater weight on SAT scores as an admissions criterion.[286]

To summarize, robust affirmative action programs can exact multiple discrete but intersecting administrative costs. To be clear, I am not suggesting that these costs outweigh the benefits of, and need for, race-conscious admissions. Rather, as throughout, my goal is to excavate additional institutional priorities that can conflict with affirmative action. As with brand goals, budgetary goals complicate a university's relationship with affirmative action—even if racial inclusion is a genuine institutional prerogative. In the section that follows, I outline one final institutional commitment that can render elite universities ambivalent affirmative action advocates: risk aversion.

C. Risk Aversion

Elite universities, as with other institutions, try to minimize legal risk. For present purposes, I highlight three ways that risk aversion can disincentivize behavior necessary to tell a capacious and compelling affirmative action story. Specifically, risk aversion can: (1) chill lawful conduct; (2) chill evidence gathering; and (3) chill theory development. I discuss each in turn.

1. Chill Lawful Behavior

To begin, risk aversion threatens affirmative action (and, more broadly, racial inclusion) because it can lead a university to eliminate, suspend, or otherwise limit lawful race-conscious behavior. As one example, recall how UC responded to Proposition 209 and SP-1.[287] After voters and the Regents adopted these measures, UC eliminated all race-conscious practices across sites of university governance. This extended beyond admissions practices to, for example, recruitment and retention efforts.[288]

This response can be understood as risk aversion leading a university to terminate lawful behavior. Consider the following: To begin, UC could have raised multiple arguments to challenge the measures—both concerning their general force and specific application vis-à-vis race-conscious practices. For example, UC could have argued that Prop. 209, because it prohibits

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[286] West-Faulcon, *supra* note 111, at 1105. *See also* Gladwell, *supra* note 288.

[287] *See* West-Faulcon, *supra* note 111.

[288] *See supra* Part II.2(2) (discussing UC response to Prop. 209 and SP-1).

"preferential treatment," permits race-conscious practices that mitigate racial advantages white students tend to enjoy in admissions and on campus.[289] Beyond conceding available legal arguments, UC also adopted a broad reading of Prop. 209's scope that included recruitment and retention practices. But as noted above, the term "preferential treatment" is far from self-defining. UC could have adopted a more aggressive posture that confined Prop. 209's mandate to admissions. It chose not to—and instead terminated multiple race-conscious programs that benefitted the university and arguably escaped Prop. 209's mandate.

The point is not that UC would have necessarily prevailed. Rather, it is that UC adopted a conservative strategy that prioritized reducing legal exposure.[290] Put differently, given UC's earnest commitment to racial inclusion, it is hard to explain this response without accounting for risk aversion—a competing institutional concern.

More recent examples include universities who dropped existing race-conscious programs after receiving formal or informal complaints. In 2019, Texas Tech University Health Sciences Center School of Medicine abandoned its long-standing race-conscious admissions policy following threats of federal action. [291] This example is noteworthy, in part, because existing Supreme Court law entitled Texas Tech to consider applicant race as part of a holistic process to ensure a racially diverse student body. In other words, the law was on the university's side. Nonetheless, the threat of a federal investigation—and the costs involved—led the school to pull its program.

This dynamic has been amplified since President Trump issued his initial "anti-CRT" Executive Order in 2020. In the wake of that order—which a federal court subsequently enjoined—Stanford University directed employees to avoid references to "structural or systemic racism" within

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[289] *See supra* Part II.2.(2) (outlining arguments UC could have made to defend the continued use of race-conscious admissions).

[290] Risk aversion concerns continue to animate UC's public Prop. 209 guidance. *See* Guidelines for Addressing Race and Gender Equity in Academic Programs in Compliance with Proposition 209, Office of General Counsel, University of California (July 2015), https://diversity.universityofcalifornia.edu/files/documents/prop-209-guidelines-ogc-full.pdf.

[291] *See* Michelle Hackman, *U.S. Requires Texas Tech Med School to End Use of Race in Admissions Decisions*, WALL ST. J. (Apr. 9, 2019), https://www.wsj.com/articles/trump-administration-to-require-texas-tech-to-end-use-of-race-in-admissions-decision-11554829163.

"Diversity Trainings."[292] The response provoked immediate and widespread backlash.[293] One vein of critique highlighted how Stanford—by prohibiting discussion of terms such as "structural racism"—transcended Trump's actual Executive Order.[294] Following public outcry, Stanford reversed course. But their behavior was far from unique. Even today, teachers across the country report self-censorship of what they believe to be legal conduct—for fear of legal and political backlash.[295]

2. Chill Evidence Gathering

Even for universities that employ affirmative action, risk aversion can dissuade institutions from gathering and analyzing evidence that would fortify the legal case for their existing program. Specifically, institutions may be reluctant to compile evidence of past or present racial discrimination.[296] Why the reluctance? Because even if evidence of discrimination would strengthen the case for affirmative action, it might also expose the university to legal liability.[297]

This concern is not new. For decades, judges, scholars, and intervenors have cited this tension to explain why universities cannot adequately defend

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[292] *See* Khari Johnson, *Stanford rushes to comply with Trump Executive Order Limiting Diversity Training*, Venture Beat (Nov. 17, 2020), https://venturebeat.com/2020/11/17/stanford-rushes-to-comply-with-trump-executive-order-limiting-diversity-training/.

[293] *See id.*

[294] Michele Dauber, Twitter (Nov. 16, 2020), https://twitter.com/mldauber/status/1328235391019728896?s=20&t=jtGdUTtP7hmBkjhkBuW-Zg.

[295] *See* Eesha Pendharkar, *Efforts to Ban Critical Race Theory Now Restrict Teaching for a Third of America's Kids*, Education Week (Jan. 27, 2022), https://www.edweek.org/leadership/efforts-to-ban-critical-race-theory-now-restrict-teaching-for-a-third-of-americas-kids/2022/01.

[296] Alan Jenkins raised this precise concern when he observed that "by proffering evidence of the racial disparities that would exist absent the use of race-sensitive policies, affirmative action defendants expose themselves to potential liability to minority applicants." Jenkins, supra note 12, at 308–09.

[297] *See id.*

their own programs.[298] The following articulation, from the *Gratz* intervenors, is illustrative:

> [C]ourts in other cases have repeatedly recognized, even those educational institutions that purport to defend affirmative action admissions policies are unlikely to proffer defenses that would call attention to their own past, let alone any present, discrimination.[299]

This is not to suggest that concern about legal risk is the only dynamic that incentivizes universities to downplay evidence of discrimination.[300] As noted above, such evidence might also cut against a school's brand goals.[301]

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[298] United Steel Workers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 210 (1979), (Blackmun, J., concurring) (suggesting that "on the one hand they face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks."); Memorandum in Support of Proposed Defendant-Intervenors' Motion to Intervene, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. 308 F.R.D. 39 (D.Mass.), aff'd., 807 F.3d 472 (1st Cir. 2015) (No. 14-cv-14176); Memorandum of Law in Support of Proposed Defendant-Intervenors' Motion to Intervene at 15, Students for Fair Admissions, Inc. v. Univ. of N. Carolina, 319 F.R.D. 490 (M.D.N.C. 2017) (No. 14-cv-954).

[299] See Gratz Motion to Intervene, Gratz v. Bollinger, 183 F.R.D. 209 (E.D. Mich. 1998), *rev'd sub nom Grutter v. Bollinger*, 188 F.3d 394 (6th cir. 1999) (No. 97-CV-75231-DT) (citing Baker v. City of Detroit, 504 F. Supp. 841, 849 (E.D. Mich. 1980), *aff'd sub nom*. Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1983) ("One way to minimize the employer's dilemma in a reverse discrimination case is to allow intervention by parties who have an incentive to introduce evidence of past discrimination.); Podberesky v. Kirwan, 838 F. Supp. 1075, 1082 n.47 (D. Md. 1993), *vacated*, 38 F.3d 147 (4th Cir. 1994), *amended on denial of reh'g*, 46 F.3d 5 (4th Cir. 1994) ("It is worthy of note that the University is (to put it mildly) in a somewhat unusual situation. It is not often that a litigant is required to engage in extended self-criticism in order to justify its pursuit of a goal that it deems worthy. All other matters aside, UMCP administrators are to be commended for the moral courage that they have demonstrated in undertaking this self-examination with an admirable degree of candor.").

[300] Lawrence, *supra* note 154, at 956–57 ("Perhaps the University's rejection of the remedial defense can be explained by its concern that by admitting its own discriminatory practices it would expose itself to liability vis-a-vis minority applicants and students.").

[301] *See id.* (arguing that a "University's reluctance to admit past and present discrimination is . . . the faculty's and administration's reluctance to examine and admit their own participation in racism and to give up the advantages the current system affords them.").

Still, risk aversion remains a motivating force that renders universities compromised affirmative action advocates.

3. Chill Theory Development

A final consequence of risk aversion implicates theory development. One can think of this as a companion to the discussion on evidence gathering. In that context, self-interest dissuades universities from gathering facts that might reveal unlawful racial discrimination. A similar motivation can dissuade universities from endorsing theories of discrimination that, if legally cognizable, could implicate the university.

The ongoing Harvard litigation offers a useful case study. One of the plaintiff's principal claims is that Harvard discriminates against Asian American applicants. To prevail on this count under governing caselaw, the plaintiffs must establish discriminatory purpose or intent. Evidence of disparate impact, alone, is insufficient.[302] This doctrinal backdrop poses a significant hurdle for the plaintiffs. Even with evidence that Asian applicants face disparate treatment within Harvard's admissions process, the district court and First Circuit rejected the claim because the plaintiffs could not prove intent.[303] In so doing, the courts inoculated from legal scrutiny anti-Asian discrimination that occurred before (but was infused within) Harvard's review of applicants and the role of implicit biases.[304] To place this dynamic into sharper relief, even as the district court dismissed this discrimination

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[302] One exception comes from Title VI's implementing regulations, which contain a disparate impact provision. *See* Feingold, *supra* note 16 (discussing Title VI's implementing regulations).

[303] The evidence of disparate treatment implicates facially race-neutral components of Harvard's admissions process. *See* Feingold, *supra* at 251 (explaining that evidence of anti-Asian bias, because it tends to benefit white applicants, derives from facially race-neutral components of Harvard's admissions process).

[304] SFFA v. Harvard, 397 F. Supp. 3d 126, 171 (D. Mass. 2019) ("Taking account of all the available evidence, it is possible that implicit biases had a slight negative effect on average Asian American personal ratings, but the Court concludes that the majority of the disparity in the personal rating between white and Asian American applicants was more likely caused by race-affected inputs to the admissions process (e.g. recommendations or high school accomplishments) or underlying differences in the attributes that may have resulted in stronger personal ratings.").

claim, it noted that Harvard's admissions "process would likely benefit from conducting implicit bias trainings for admissions officers."[305]

For present purposes, the key take-away is that, from a risk-aversion perspective, Harvard benefits when antidiscrimination law requires plaintiffs to prove intent. Under such a regime, Harvard can evade most—if not all—claims of discrimination that attack facially race-neutral dimensions of its admissions process (among other sites of institutional governance). For this reason, Harvard has no obvious incentive to advocate for a thicker conception of discrimination that encompasses, for example, disparate impact or unintentional disparate treatment. This played out in the litigation. As one would expect, Harvard contested the discrimination claim by citing the absence of discriminatory intent.[306]

This response might strengthen Harvard's position vis-à-vis discrimination claims. But it neither benefits affirmative action nor affirmative action's standard beneficiaries: students from underrepresented racial groups. To begin, existing antidiscrimination doctrine insulates standard institutional arrangements from legal scrutiny—even if those policies or practices reproduce racial inequality. In this sense, Harvard is actively entrenching a legal regime better suited to perpetuate than remedy the status quo. But the effects extend even more directly to affirmative action. If courts accepted disparate impact or unintentional disparate treatment as cognizable discrimination, that would immediately broaden the remedial rationales available to affirmative action advocates. In other words, when Harvard defends a narrow conception of unlawful discrimination, it

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[305] *See id*. at 204.

[306] *See, e.g.*, Brief for Defendant-Appellee, *Students for Fair Admission v. Harvard*, 2020 WL 2521577 at *48 ("The district court found that the statistical evidence "does not demonstrate any intent by admissions officers to discriminate," or otherwise show that "Harvard has engaged in improper intentional discrimination." This finding was well supported.") (internal citations omitted).

undercuts its own ability to justify race-consciousness as essential anti-discrimination.[307]

CONCLUSION

We are at pivotal political moment. 2020's global uprising for racial justice triggered a rightwing campaign against antiracism itself. Affirmative action is again headed to the Supreme Court. Even if the outcome appears inevitable, affirmative action litigation—and the public discourse it generates—remains a site of broader contestation over the ongoing relevance of race and racism in America—and the need, if any, for race-conscious reform. In effect, Harvard and UNC are now the last line of defense between affirmative action and a hostile Court. They enjoy an outsized opportunity to shape our national conversation about who we are as a nation. Despite this privileged position, institutional elements common to elite universities render Harvard and UNC far from zealous affirmative action advocates. As a result, our formal affirmative action champions will likely compromise their own policies and weaken broader efforts to reckon with America's legacy of racial subordination. For those committed to antiracist reform and multiracial democracy, it is critical to understand why affirmative action's formal champions remain ambivalent advocates. Doing so is unlikely to alter the trajectories of ongoing litigation, but it can help chart a path for what comes after affirmative action.

[307] Beyond legal risk aversion, a motivating factor may be the university's desire to retain autonomy over its admissions practices. *See* Jenkins, supra note 12, at 314 ("In the affirmative action context, defendants have an interest not only in avoiding liability, but also in maintaining selection criteria and other operating procedures that are easy to administer, relatively inexpensive, and enjoy broad support. Beneficiaries, in contrast, are generally unconcerned with the particular mechanisms that are used, so long as they are fair and preserve equal opportunity.").