Routledge
Taylor & Francis Group

Change: The Magazine of Higher Learning

ISSN: 0009-1383 (Print) 1939-9146 (Online) Journal homepage: https://www.tandfonline.com/loi/vchn20

The False Notion of "Race-Neutrality": How Legal Battles in Higher Education Undermine Racial Equity

Liliana M. Garces

To cite this article: Liliana M. Garces (2020) The False Notion of "Race-Neutrality": How Legal Battles in Higher Education Undermine Racial Equity, Change: The Magazine of Higher Learning, 52:2, 51-55, DOI: 10.1080/00091383.2020.1732778

To link to this article: https://doi.org/10.1080/00091383.2020.1732778

Published online: 04 Jun 2020.

The False Notion of "Race-Neutrality": How Legal Battles in Higher Education Undermine Racial Equity

By Liliana M. Garces

Affirmative action in postsecondary admissions may be the most visible area where the battles over the consideration of race in educational policy and practice have played out in the law. After decades of sustained legal attacks on the efforts of universities to implement policies that disrupt racial inequities, many in the higher education community consider recent legal decisions like *Grutter v. Bollinger* (2003) and *Fisher v. University of Texas, at Austin* (2013, 2016) as important victories that have allowed administrators and faculty to continue to consider race in admissions policies and practices. Yet I would argue that rather than helping to promote racial equity, these legal decisions have undermined it by endorsing and encouraging a color-evasive approach in educational policy and practice.

As I explain below, these decisions have changed the practice of affirmative action in ways that sidestep attention to race through a required focus on diversity and a rationale that can encourage universities not to address more systemic changes that would better promote racial equity. The decisions have also endorsed a logic of "race-neutrality" that can infiltrate our consciousness and manifest in policies and practices that undermine racial equity, not only within admissions but across campus-wide inclusion efforts. We need to consider that these legal developments and logic can lead us to ignore the very real ways in which race determines opportunity and educational outcomes. To build the practice of racial equity, we must navigate these law-imposed limitations with strategic, intentional university-led efforts that bring "race-consciousness" back into educational policy and practice.

Liliana M. Garces is an Associate Professor of Higher Education at the University of Texas at Austin and Affiliate Faculty at the School of Law. She teaches courses on higher education law, equity and diversity in higher education, and race, law, and education. Her scholarship focuses on the intersection of law and educational policy related to access, diversity, and equity in higher education.

Affirmative Action, Diluted

Race-based affirmative action started as a governmentally enforced, and then voluntarily

In Short

- Legal decisions have changed affirmative action policy in ways that sidestep attention to race by requiring a focus on diversity and providing a rationale that encourages universities not to address more systemic changes that would better address racial inequities.
- Legal decisions have also promoted a logic of "race-neutrality" that can infiltrate our consciousness and manifest in policies and practices that divert attention from race, not only within admissions but across campus-wide inclusion efforts.
- Concepts like "race-neutral" approaches in admissions render invisible students' social context and the outcomes of policies that are far from "race-neutral" but instead exacerbate racial inequity.
- Efforts to promote racial equity in education require answering these legal developments and false logic with strategic and intentional efforts that reclaim race-consciousness in educational policy and practice.

adopted, policy in the 1960s (Stulberg & Chen, 2014). It represented, at its strongest, a race-conscious approach that sought to promote equal opportunity within a social context marked by pervasive inequalities that were the consequence of centuries of racial oppression. By admitting students from historically marginalized communities to elite private and public institutions, these efforts sought to help level a very uneven playing field.

But, since the 1960s, the policy has been diluted by several legal decisions (Garces, 2014). Starting with the 1978 *Regents of the University of California v. Bakke* case, legal cases terminated affirmative action in its strongest form, allowing only for a moderate consideration of race as one of many factors in admission decisions. After *Bakke,* legal challenges to race-conscious admissions practices continued. This litigation culminated in the U.S. Supreme Court's decisions in *Grutter* and *Gratz v. Bollinger* (2003) and, most recently, *Fisher v. University of Texas, at Austin* (2016). In *Fisher,* now retired Justice Anthony Kennedy provided the deciding vote for a pragmatic approach that ultimately endorsed the constitutionality of current race-conscious admissions.

But, like *Bakke* and *Grutter*, the Court's recent decision in *Fisher* provides a very limited consideration of race, one restricted to the purpose of obtaining the educational benefits of diversity—and, importantly, not to addressing the effects of past or ongoing racial discrimination. This change in the permissible justification for race-conscious decisions in admissions required institutions to move away from directly attending to race in their admission policies, requiring instead a diversity-focused rationale.

How does a focus on diversity limit racial equity? Studies have helped us to understand how the language of diversity allows individuals to sidestep discussions about race and equity (Berrey, 2015). As a goal, diversity can also allow for a symbolic commitment to the numeric representation of students of color on college campuses while not calling for the type of systemic interventions that address racial inequality. Such interventions might involve reconsidering reliance on standardized testing in admissions, which studies show disproportionately hurt students of color. Faced with actual or potential legal challenges, colleges and universities have avoided these more systemic changes. Instead, they have argued—and the Court has endorsed—that they need not choose between a reputation for excellence (which, under our current system, a reliance on standardized test scores indicates) and a commitment to diversity.

In addition, as I have argued elsewhere (Garces, 2019), after these legal decisions and the lack of systemic reform, what remains is not affirmative action in its most robust form or even an approach that addresses centuries of past oppression and ongoing racial discrimination. What remains is a basic practice that merely ensures that the experiences of students of color are considered alongside those of White applicants.

We should not lull ourselves into believing that this practice represents anything more than a reasonable, but limited, approach under significant constraints. Admissions officers and faculty members who are making important decisions about how to shape a student body should be able to consider all aspects of an applicant's identity. In fact,

> *Calling standardized tests 'race-neutral' masks how race plays a role in these measures. And in calling it 'race-neutral'—as the legal system encourages us to do so—we help promote a notion of color-blindness, or color-evasiveness, that renders invisible students' social context and the outcomes of policies that are far from 'race-neutral,' but instead exacerbate racial inequity.*

not doing so harms students of color whose opportunities and educational pathways have inevitably been shaped by race.

Yet, as legal challenges continue with new cases against the University of North Carolina at Chapel Hill and Harvard making their way through the lower courts, I worry that administrators and others in the higher education community (and I include myself in these efforts) may perpetuate this misconception. As the legal battle over race-conscious admissions continues with these cases, we should remember that what remains is affirmative action, diluted: a band-aid that in many respects allows a broken system to continue. This broken system relies on measures (i.e., standardized tests) that many consider to be objective measures of academic merit, potential, or talent, but as research robustly confirms, are better measures of wealth and privilege primarily enjoyed by White student applicants.

The False Notion of "Race-Neutrality"

Similarly, under the current legal system, these very same measures (standardized tests) are also deemed "race-neutral." In this legal world, a policy is "race-neutral" when its language or intent does not confer an individual benefit, such as an offer of admission or a scholarship, based on that individual's race or ethnicity. The problem is that this legal definition is based on the false assumption that policies or practices that structure opportunity by race and that have racial consequences can be deemed "race-neutral" because they do not explicitly name race. Calling standardized tests "race-neutral" masks how race plays a role in these measures.

And in calling it "race-neutral"—as the legal system encourages us to do so—we help promote a notion of color-blindness, or color-evasiveness, that renders invisible students' social context and the outcomes of policies that are far from "race-neutral," but instead exacerbate racial inequity.

This logic of "race-neutrality" is also promoted in other legal requirements. Namely, institutions need to demonstrate through evidence that "race-neutral" approaches to admissions are not as effective as those that more directly attend to race. This is one of the elements of the "narrow tailoring" requirement of the main legal test (i.e., strict scrutiny) that justices have used to evaluate the constitutionality of race-conscious admissions. And to avoid the threat of lawsuits, some postsecondary institutions have simply adopted outright "race-neutral" policies and practices in admissions.

> Connections and attention to race are important to inform policies and practices that expand access and support the success of students of color. They are necessary to address the microaggressions, racial battle fatigue, and racial trauma that minoritized populations on college campuses experience.

This ideology of "race-neutrality" shrouds attention to race. A robust body of research in fact demonstrates how the notion of "race-neutrality" makes it more difficult to connect historical legacies of racial exclusion and oppression to contemporary manifestations of racial inequity and ongoing racial discrimination (e.g., Bonilla-Silva, 2014). Such concepts as "race-neutral" approaches can also result in the use of colormute (Pollock, 2009) language that prevents discussions about the ways opportunities are not racially equal. Without this language, it becomes harder to name a social context marked by racial inequities and to check against racial biases.

From my research, I have learned that this false notion of "race-neutrality" also contributes to a logic of reverse discrimination (Garces & Bilyalov, 2019), a logic that opponents of race-conscious policies have strategically used to fuel attacks on affirmative action. Indeed, in a social context where opportunities are shaped by race, the notion of reverse discrimination makes no sense. But the concept of "race-neutrality" makes it seem logical. In other words, when we refer to standardized test scores as "race-neutral" (and thereby objective) measures of merit—covering up the ways access to quality guidance counselors, private tutors, and test prep services (to name a few) are shaped by race—we allow for the consideration of other factors in admissions, like race, to be deemed unfairly "preferential" and discriminatory.

Ultimately, when race-consciousness is not front and center—as is the case when we refer to admissions and other postsecondary practices that are racialized and have racial consequences as "race-neutral"—we allow for distorted narratives about racial discrimination to continue and exacerbate existing racial inequities.

Reclaiming Race-Consciousness in Policy and Practice

To be sure, administrators still need to navigate the requirements of legal decisions, such as considering whether approaches that are deemed "race-neutral" under the law can be practical and workable. And lawyers should continue to defend race-conscious admissions in ongoing legal battles, as they have done in past cases with legal briefs that draw from the lessons of research to demonstrate the lack of workable "race-neutral" alternatives to race-conscious admissions for achieving a racially diverse student body.

However, efforts to promote racial equity in education also require answering these legal developments with strategic and intentional efforts that reclaim race-consciousness in educational policy and practice. To reclaim race-consciousness, we need university-led efforts that promote understandings of diversity and

diversity-related policies and practices with historical and contemporary manifestations of race at the structural, organizational, and individual level.

These connections and attention to race are important to inform policies and practices that expand access and support the success of students of color. They are necessary to address the microaggressions, racial battle fatigue, and racial trauma that minoritized populations on college campuses experience. They are critical for helping White students understand how a legacy of racial oppression shapes their racial advantages and for administrators to help promote and sustain the type of cross-racial interactions that generate the educational benefits of diversity. And they are necessary for administrators to understand the ways policies and practices may inadvertently privilege White students and exacerbate racial disparities.

For instance, a race-conscious lens can help empower administrators and educators to understand how race-based beliefs (e.g., low expectations for the intellectual ability of students of color and high expectations for those of White students) can manifest across areas of the institution (e.g., admissions committees, faculty hiring committees, classrooms) to shape opportunity and behavior and ultimately influence student success. It can help administrators consider how units (e.g., ethnic organizations, multicultural centers), programming (e.g., racial dialogues), and curriculum (e.g., ethnic studies) that address the marginalized experiences of students of color, particularly at predominantly White campuses, is necessary, not counterproductive, for racial equity and other campus inclusion efforts.

Introducing such a race-conscious lens in educational practice is not only legally permissible, but critical to enable university administrators to obtain the educational benefits of diversity, particularly on predominantly White campuses where students of color regularly experience racial discrimination and hostility. Attending to race—not allowing it to be erased, particularly by legal developments and the law's false logic—is fundamental for achieving racial equity.

Orcid

Liliana M. Garces https://orcid.org/0000-0002-8224-0512

References

- Berrey, E. (2015). *The enigma of diversity: The language of race and the limits of racial justice*. Chicago, IL: University of Chicago Press.
- Bonilla-Silva, E. (2014). *Racism without racists: Color-blind racism and the persistence of racial inequality in the United States* (4th ed.) Lanham, MD: Rowman & Littlefield.
- Garces, L. M. (2014). Aligning diversity, quality, and equity: The implications of legal and public policy developments for promoting racial diversity in graduate studies. *American Journal of Education*, *120*(4), 457–480.
- Garces, L. M. (2019, February 6). Affirmative action is not what's at stake in the UNC Chapel Hill and Harvard Lawsuits. *The Hill*. Retrieved from https://thehill.com/opinion/civil-rights/428556-affirmative-action-is-not-whats-at-stake-in-unc-chapel-hill-and-harvard
- Garces, L. M., & Bilyalov, D. (2019). Navigating the quicksand: How postsecondary administrators understand the influence of affirmative action developments on racial diversity work. *Teachers College Record*, *121*(3), 1–40.
- Pollock, M. (2009). *Colormute: Race talk dilemmas in an American school*. Princeton, NJ: Princeton University Press.
- Stulberg, L. M., & Chen, A. S. (2014). Affirmative action in undergraduate admissions: A comparative analysis of institutional change in higher education. *Sociology of Education*, *87*(1), 36–52.