

dents *should* leave their values at home before they go out to engage their brains. I don't pretend to come to the affirmative action issue without predilections. I come to it as someone who believes that America has a terrible racial history, that racism is the source of our deepest injustices, and that addressing the legacies and manifestations of racism in our public life is the most critical goal of politics and policy if we are to be a just community.

Nor do I come to this issue (or any issue) as a calculating machine, punching in various considerations and accepting the result as though the machine gave it to me or as though I were taking orders from an infallible intellectual system. I feel responsible for my analyses. At the end of the day, I want to be able to hold my head up and declare that I believe in my conclusions and that I think they are morally right.

This book is for students who want to get involved in politics more than they want to sit on the sidelines and study it. This chapter teaches you how to use the tools of *Policy Paradox* to fight for your vision of a good community. Sharpening your analytic skills will definitely make you a more effective advocate, so the tools are meant to help you develop both your analyst and your advocate selves.

In this chapter, I don't hide the fact that I support affirmative action, even though there are aspects of it that I find troubling. I show you how I use the tools of *Policy Paradox* to help me think about affirmative action, understand the politics of the issue, analyze and critique the arguments of the other side, and argue persuasively for what I believe. I don't attempt to be perfectly balanced, detached, or agnostic, but I do try to show how the main opponents of affirmative action think, what they believe, and what their best strategies are. Understanding the other side is crucial to being an effective political actor. I invite you, readers, to deconstruct both positions and to argue on your own for what you believe.

HOW THE ISSUE EVOLVED

Affirmative action in higher education is an issue with a political history, and we should start by setting the context.¹ Until at least the mid-twentieth century, many, if not most, colleges, universities, and

¹For succinct background material on affirmative action, see Benjamin Ginsberg, Theodore J. Lowi, and Margaret Weir, *We the People: An Introduction to American Politics*, 3rd. ed (New York: W. W. Norton, 2001), pp. 220–29.

Policy Paradox in Action

People have often asked me to demonstrate how *Policy Paradox* works by applying it to a policy issue. I've been intrigued by this challenge, but also, frankly, a little reluctant. What if my better mousetrap didn't catch very many mice? My sense of intrigue won out, helped along by a sense of fairness, for this is essentially the assignment I give my students.

But what policy problem should I tackle? If I took on the assignment, I wanted to think about the issue I consider the most important and most difficult in any polis, especially the American polity: How can a democracy based on majority rule respect and protect minorities? How can we have universal laws and coherent policies yet foster different cultural beliefs, mores, and ways of life? This is not exactly a crisp, well-defined problem. Was I trying to catch an elephant with a mousetrap?

I followed the advice I give students and narrowed it down to one rather more specific policy controversy: affirmative action in higher education. Then I narrowed it down still more to affirmative action for black Americans. I made this choice not because I believe other minority groups don't deserve or participate in affirmative action, but because some of the issues and politics of affirmative action are different for blacks, and, as I explained at the end of the Introduction, if this project was to be doable, I had to draw the line somewhere.

If you've read this book, you know that I don't believe anyone comes to a policy issue *tabula rasa*, value-free, uninfluenced by personal experience and social messages. Nor do I think analysts, politicians, or stu-

professional schools excluded blacks altogether or severely limited the number they admitted. Since, apart from birth, higher education is the most important entry point to the upper strata of society, university policy played a crucial role in obstructing blacks' social progress. In the late 1960s and early 1970s, spurred by the civil rights movement, many universities and professional schools began efforts to recruit more blacks into their student bodies. Unlike affirmative action in employment and government contracting, however, no government directives or policies prompted affirmative action in university admissions. Most schools that began using affirmative action in their admissions did so under strong social pressure, and because they knew that some positive measures were necessary if they were to have more black students enrolled.²

Schools began using a variety of means to recruit black students. They promoted themselves at predominantly black high schools (or colleges, in the case of professional schools). They offered summer courses to minority students to increase the students' preparedness and competitiveness, and to develop in these prospective students a bond to the school. They raised and dedicated money for scholarships for minority students. They trained their admissions officers to look for other indicators of achievement and promise besides test scores. In an effort to convert all the different considerations for admission into a single common denominator (a requirement of rational decision-making theory, you'll recall), schools sometimes converted these other factors, including sometimes the simple fact of being black, into higher test scores. And some schools reserved a certain number of places for qualified blacks.

As with every other civil rights reform that has benefited blacks, affirmative action in universities stimulated white resistance.³ In 1977, Allan Bakke, a white man whose application to medical school at the University of California at Davis had been rejected, challenged the university's affirmative action plan. Under the plan, sixteen places

² No one knows how many schools take account of race in their admissions policies, but the best estimate is that only 20 to 30 percent of all four-year colleges and universities do. William G. Bowen and Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (Princeton: Princeton University Press, 1998), p. 15.

³ This history is compellingly documented in Philip A. Klinkner with Rogers Smith, *The Unsteady March: The Rise and Decline of Racial Equality in America* (Chicago: University of Chicago Press, 1999).

were reserved for black students, and black and white applicants were considered in separate processes. Five places were reserved for children of trustees and donors. Bakke claimed that his test scores were higher than those of some blacks who were admitted, that he would have been admitted but for the black quota, and that he was a victim of "reverse discrimination." In 1978, a deeply divided U.S. Supreme Court handed down its first decision on affirmative action in higher education, in *Regents of the University of California v. Bakke*. (It was actually two decisions, because a majority couldn't agree on one.) The Court held that reserving a fixed number of slots was impermissible but that public universities could use race as one of several factors in determining who would get in.⁴

People like Allan Bakke whose names head famous court cases seem to be individuals pursuing justice for themselves, but when political issues are fought as matters of individual rights, the individuals are almost always representatives of organized groups and interests. Plaintiffs in lawsuits, as well as the many intellectuals who define an issue in public debates, are usually organized, funded, and supported by foundations, policy think tanks, and advocacy groups.

The most important opponent of affirmative action in higher education at the moment is the Center for Individual Rights, based in Washington, D.C. With funding from an array of conservative and libertarian foundations, large corporations, and some law firms, the center aims to undo affirmative action by bringing precedent-setting cases to court. The center's strategy is nothing new, however. It consciously emulates the older liberal civil rights organizations, especially the National Association for the Advancement of Colored People (NAACP), which perfected the test-case strategy and had its first major victory with *Brown v. Board of Education* in 1954.⁵ Proponents of affirmative action are no less organized than opponents, with support from civil rights organizations such as the NAACP, liberal foundations and think tanks, and associations of universities and professional schools.

⁴ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

⁵ Terry Carter, "On a Roll(back)," *ABA Journal*, February 1998, p. 54. Other good profiles of the center are Peggy Walsh-Sarnecki, "The Men Who Would End Affirmative Action," *Detroit Free Press*, August 25, 1998, available at <http://www.freep.com/news/education/qc1r25.htm> on October 26, 2000; David Segal, "D.C. Public Interest Law Firm Puts Affirmative Action on Trial," *Washington Post*, Feb. 20, 1998, p. 1; and Jean Stefani and Richard Delgado, *No Mercy: How Conservative Think Tanks and Foundations Changed America's Social Agenda* (Philadelphia: Temple University Press, 1996), pp. 49–51, 128–51.

However, as time has passed and resistance to affirmative action has grown, many liberal organizations, leaders, and intellectuals have backed away from affirmative action, as has the Democratic Party and, importantly, the U.S. Supreme Court.⁶

In higher education, the goal of those opposed to affirmative action is to challenge every use of racial classifications in university decision making and, eventually, to overturn the *Bakke* decision that permitted schools to use race as one of many factors in admissions. Outside of university admissions policies, opponents have won important Supreme Court cases in areas where the Court had previously approved affirmative action, notably in private-sector hiring and promotion, and government contracting with private businesses. In 1989, the Supreme Court ruled that a city could not use race as a criterion in awarding its business to private contractors. The Court said that any use of racial classification, even one whose intent was benign or compensatory, would be treated as "suspect" and regarded with "strict scrutiny." Under that standard, a public body is permitted to use race classifications only if it does so in the service of a "compelling objective."⁷

In 1996, in a case remarkably similar to *Bakke*, opponents of affirmative action in higher education won an important court victory. Cheryl Hopwood, a white woman who had been rejected by the law school at the University of Texas, claimed that the university's affirmative action program discriminated against her on the basis of race. She and three other students were chosen by the Center for Individual Rights to be plaintiffs in a test case. Because the university is public, run by the State of Texas, it counts as a government entity and must therefore meet the "compelling objective" test in order to be permitted to use racial classifications. The federal appeals court for the Fifth Circuit held that creating a diverse student body was not a sufficiently compelling objective to overcome the normal prohibition on racial classifications by government. Disagreeing with part of the *Bakke* decision, the appeals court in *Hopwood v. Texas* said that Texas state universities could not consider race in any way in their admissions decisions. Texas appealed the decision, but the Supreme Court refused

to hear the case. From the point of view of opponents, the appeals court decision stands as half-empty (it doesn't apply to the entire country, only to the states in the Fifth Circuit) and half-full (it effectively abolishes affirmative action in Texas, Mississippi, and Louisiana).⁸

Two years earlier, the Supreme Court had refused to hear a case in which another federal appeals court held that the University of Maryland could not use race-based scholarships to attract minority candidates.⁹ The Supreme Court's refusal to hear these two cases, besides ending some affirmative action programs in two regions of the country, also sent important symbolic messages. It told opponents that they might well succeed in bringing similar cases in other jurisdictions. And it signaled other universities that the Court would probably not endorse their affirmative action programs if they were sued.

Think back to Chapter 10: remember how decisions can have many consequences, some of which are exactly the opposite of the nominal decision? In the *Hopwood* case, the Supreme Court was technically neutral—it stayed out of the controversy and said, in effect, "We don't have an opinion." But by staying out when it had the power to get involved, it in fact took sides—it allowed the winning side at the lower level to prevail. Michael Greve, the head of the Center for Individual Rights, has no doubt that the Supreme Court handed his organization a victory: after the Supreme Court let the *Hopwood* decision stand, money came pouring into the center. "Money chases a winner," he explained, by way of defining what he now calls "the Hopwood Effect."¹⁰

In 1997, the Center for Individual Rights brought three more important suits against public universities—the University of Washington Law School, the University of Michigan Law School, and the University of Michigan College of Arts and Sciences. (Formally, rejected students bring the suits, but the center in fact initiated and organized these suits and represents the students, just as the NAACP did for plaintiffs in earlier civil rights cases.) The center and its allies hope that eventually the U.S. Supreme Court will hear one of its cases and outlaw affirmative action. In late 2000, courts ruled on two of these cases. The federal court of appeals for the Ninth Circuit (which includes

⁶For a good description of this liberal retreat from affirmative action, see Klinkner and Smith, *op. cit.* (note 5), chap. 9.

⁷*City of Richmond v. J.A. Croson & Co.*, 488 U.S. 469 (1989). For a useful review of these cases with some excerpts from important opinions, see David M. O'Brien, *Constitutional Law and Politics*, vol. 2, *Civil Rights and Civil Liberties*, 4th ed. (New York: W. W. Norton, 2000), pp. 1388–449.

⁸*Hopwood v. Texas* 75 F.3d 932 (1996); *cert. denied* 116 S.Ct. 2581 (1996). The decision's greatest impact is in Texas, however, since public universities in both Mississippi and Louisiana are under court-ordered desegregation plans.

⁹*Podbersky v. Kirwan* 38 F.3d 147 (1994).

¹⁰Carter, "On a Roll(back)," *op. cit.* (note 5).



Washington State) held that using race as one of several factors is permissible unless and until the U.S. Supreme Court overrules its own *Bakke* decision. In Michigan, a district court judge issued a strong opinion saying that diversity is a compelling objective and that the university's current system of affirmative action is constitutionally permissible.¹¹

Meanwhile, the Center for Individual Rights joined with other opponents of affirmative action to pursue their goals in the electoral arena while still fighting in the judicial arena. In several states, they organized public referenda on proposals to prohibit affirmative action. Changing the arena of conflict allows for different people to be involved (the broad citizenry cannot vote on court cases) and different resources to be mobilized (wealthy citizens, corporations, and foundations may use dollars to influence the outcome of elections, but trying to buy judges' votes is frowned upon). California passed its Proposition 209 in 1995 to outlaw affirmative action. Washington State passed a similar referendum in 1998; its public universities are now forbidden to use racial preferences despite the appeals court decision.

This is where the politics of affirmative action in higher education now stand. The courts, especially the Supreme Court, have set the basic rules for whether and how universities may try to recruit more black students. Opponents of affirmative action have been on a twenty-five-year campaign to get courts to restrict and hopefully abolish the use

¹¹ Kenneth J. Cooper, "U.S. Courts Differ on Preference," *Washington Post*, Dec. 7, 2000, p. A10; Michael A. Fletcher, "Use of Race in Admissions Is Upheld," *Washington Post*, Dec. 14, 2000, p. A2.

of race as a criterion in any decision making about the allocation of university benefits. Supporters have been on a twenty-five-year campaign to preserve and broaden affirmative action. Courts have gradually sided with the opponents, leaving supporters trying to find creative ways to expand opportunities for black students while still obeying the law.

FIGHTING THE ISSUE WITH SYMBOLS

Early in the debate, opponents of affirmative action labeled the device of reserving a set number of places for blacks as "quotas." Over time, some began referring to *all* affirmative action as quotas. Historically, the term "quota" in education and employment described policies of schools and firms to limit the number of places available to Jews and, sometimes, Catholics. Opponents' use of the "quota" label was (and is) consciously strategic. Because the word has a bad connotation, it tarnishes the whole concept of affirmative action, even though most affirmative action does not entail reserving a fixed number of places. Here is synecdoche at work.

Supporters of affirmative action tried to counter this strategy by making the historical reference explicit and by distinguishing between good and bad quotas. The old quotas, supporters said, were ceilings and were designed to keep people out. Once the quota was filled, no more people in that category would be selected, no matter how well qualified they were. Since the 1970s, when schools, firms, or agencies have reserved places for blacks or women, their new quotas operated as floors, designed to ensure that at least a minimum number of people in the category would enter. These were good quotas, because they were intended to include rather than exclude. Affirmative action, supporters said, could be accomplished by setting targets or goals instead of fixed numbers; this was another way they distinguished the new programs from old, discredited policies.¹²

Here, it's useful to note how opponents and supporters attempt to focus attention on opposite sides of the same coin. *All* selection criteria are decision rules that include some people and exclude others. The opponents' depiction of affirmative action emphasizes the people who

¹² William Gamson and Andre Modigliani, "The Changing Culture of Affirmative Action," *Research in Political Sociology*, vol. 3 (1987), pp. 157-77, contains some vivid descriptions of the battle over language in affirmative action.

are excluded by it (whites), thereby casting it as harmful and bad. Proponents emphasize the people who are included by it (blacks), thereby casting it as helpful and good. People, including you and me, probably respond to these portrayals according to where their greater sympathies lie—with the people who will be harmed or the people who will be helped.

As an analyst, you should see that any debate about selection criteria is about distribution (in this case, of university places). And any debate about whether to change current selection criteria (or any rule, for that matter) is a conflict between people who benefit from the status quo and people who stand to gain from a change. As an advocate, part of your strategy must be to show that more people benefit from your preferred policy (no matter whether that is the status quo or a change) than from your opponents' preferred policy.

Later we'll consider some techniques for portraying policies as benefiting "the general public," but here I want to show how just the simple device of labeling an issue can have a profound impact on political support for one side or the other. In public opinion surveys, popular support is always much higher for programs labeled "affirmative action" or "special consideration" than for programs called "quotas" or "preferences."¹⁵ This means that both sides carefully choose their labels to garner support. For example, in Houston in 1997, opponents of the city's affirmative action program collected signatures for a ballot question that read, "The city of Houston shall not discriminate or grant preferences to any individual or group on the basis of race, sex, color, ethnicity, or national origin." The city council changed the wording on the ballot to read, "Shall the charter of the city of Houston be amended to end the use of affirmative action for women and minorities . . . ?" During the week of the election, 72 percent of Houston's citizens, when asked by pollsters, said they opposed giving minorities "preferential treatment"; yet in the election, citizens rejected the proposition by a margin of 54 to 46 percent. Backers of the proposition went to court to have the vote invalidated, claiming that the city council's wording unfairly turned voters against the amendment. No doubt they were right (and the judge agreed with

them), but whether one wording was more fair than the other is debatable. When the city council asked the judge what wording they should use, she ducked the question.¹⁴

DEFINING GOALS: DISTRIBUTIVE JUSTICE

Each side fights about affirmative action first and foremost by trying to portray its view as fair. Both sides cast it as a distributive issue in which scarce but valuable opportunities are at stake: Who should receive places in universities? On the surface (that is, in their rhetoric), both sides agree that places should go to applicants according to merit, and that a rank-based distribution is fair. The more qualified the applicant, the more deserving she or he is of admission.

Once we recognize that both sides agree on an interpretation of equity—in this case, rank-based distribution according to merit—we can deepen our understanding of the conflict by examining how they define merit. Opponents of affirmative action say that race is not a proper criterion of merit. Race has nothing to do with whether someone has the background or aptitude to do academic work or to succeed in his or her chosen field. (Thus far, most supporters of affirmative action would agree. The next juncture is where they part company.) Opponents say that to use race as a criterion at all, even as just one of many factors in selecting students, is racism. Even when race is used to benefit someone rather than to harm him or her, people who are not of the preferred race are victims of discrimination. Affirmative action means that purely because of their race, white students like Allan Bakke and Cheryl Hopwood lose valuable places in schools that they otherwise would have been invited to attend.

In one of the most powerful metaphors of our time, opponents demand that public and private decision making should be "color-blind." Since 1896, when Justice John Harlan proclaimed, "Our Constitution is color-blind" in his dissent from *Plessy v. Ferguson*,¹⁵ color

¹⁴ R. A. Dyer, "Race Preference Foes Across U.S. Face Uphill Fight," *Houston Chronicle*, Nov. 9, 1997, p. A1; Clay Robison, "Texas 2-Step: Preferences—No, Affirmative Action—Yes," *Houston Chronicle*, Nov. 16, 1997, p. 1; and Pauline Arrillaga, "Court Disallows Houston Vote Upholding Affirmative Action," *Austin American-Statesman*, June 27, 1998, p. B12.

¹⁵ *Plessy v. Ferguson*, 163 U.S. 537 (1896), excerpts in O'Brien, op. cit. (note 7), pp. 1326–31. *Plessy v. Ferguson* is the infamous case in which the Supreme Court approved segregated railroad cars. It was cited in *Shelby County v. Holder*, 394 U.S. 214 (1969).

¹⁵ This labeling effect was quite clear even at the time of the *Bakke* case. Seymour Martin Lipset and William Schneider, "The Bakke Case: How Would It Be Decided at the Bar of Public Opinion?" *Public Opinion*, vol. 1, no. 1 (March / April 1978), pp. 38–44. For the most sophisticated discussion of these so-called framing effects on public opinion, see Donald M. Kinder and Lynn M. Sanders, *Divided by Color: Racial Politics and Democratic Ideals* (Chicago: University of Chicago Press, 1996).

blindness has been the preeminent symbol of racial justice for liberal advocates of civil rights, as well. Using this metaphor is so effective precisely because it harnesses a widely shared norm, a basic tenet of the American creed (if not American deed). How, then, can supporters of affirmative action endorse the ideal of color-blind justice but devalue this symbol and deprive it of its power in the hands of opponents?

No matter which side of affirmative action you're on, there's a generic lesson here: What do you do when the other side has co-opted your symbol? You search their argument for its implicit dramatic story, its depiction of good and evil and heroes and villains. Then you can question each element of the story. Supporters might dramatize opponents' argument about color blindness as a story of decline and heroic rescue:

Once upon a time, America was ruled by racism. Gradually, over a hundred years from the 1860s to the 1960s, racism was eradicated. In universities, admissions were no longer decided on the basis of race; they were decided on the basis of merit, instead. But then, starting in the 1970s with the advent of affirmative action, the country regressed and descended into a quagmire of racism and inequality. Once again, people are denied entrance to college and professional school on the basis of their skin color. Merit is no longer the sole determinant of who gets valuable university places. The nation should return to the time—or at least the ideal—of color blindness. We, the opponents of affirmative action, will lead you there.¹⁶

Dramatizing any ideal as a parable of good and evil allows you to see and expose some of the myth and, yes, idealism that surrounds it, and from there, to demonstrate how your opponents' use of the ideal can be misleading.

Having cast the opponents' position as a jeremiad (a story of decline from a golden ideal and a more virtuous era), proponents of affirmative action can question whether the golden ideal (color blindness) is possible or whether the virtuous era (meritocracy) ever existed. Color blindness, they say, is a lovely metaphor and a worthy ideal, but it is

¹⁶ Try composing a counter-narrative, one that has supporters of affirmative action claiming to rescue the nation from disaster. Trace the rises and falls of good and evil, and spell out the nature of evil. If you're inclined against affirmative action, you'll no doubt enjoy making fun of supporters, but if you're inclined to support affirmative action, all the more reason to try this exercise. Storytelling is one of the best ways to get inside the heroic mindset of your opponents.

not realistic for this nation at this time. Americans cannot be blind to race in our personal or public behavior, because skin color has been so deeply ingrained into our ways of organizing society and relating to each other that we can never be free of color-based assumptions. We take them so much for granted that we are not even conscious of them. What we call "color blindness" is often unconscious acceptance of a status quo in which it is normal for whites to have easier access than blacks to selective colleges and professional schools.

In addition to questioning the ideal of color blindness, supporters of affirmative action argue that merit, the gold standard of rank-based distributive equity, is not the pure standard we wish it to be. Colleges and professional schools have always used some admissions criteria that have nothing to do with past academic performance or future promise. They give preferences to children of alumni, big donors, and bigwigs; to students from underrepresented geographic areas; and to athletes and applicants with unusual backgrounds or special talents. Criteria such as being a relative of an alumnus or a donor may be color blind on their face, but in historically white schools, they will invariably disadvantage black applicants. It's just another form of racism, supporters charge, to *not use race* as a factor while permitting all kinds of other nonacademic considerations to enter judgments of merit.¹⁷ Opponents, however, think that *using race* as a factor in selection decisions is the worse evil. For many opponents, including the Center for Individual Rights, considering race in any way in any decision is the very definition of racism.

In this kind of standoff, where each side essentially calls each other names ("racist") by slapping a label on the other's preferred policy, a convincing causal story can help to break the deadlock. Law professor Stephen Carter, who acknowledges that he has been a beneficiary of affirmative action, shows how using race to benefit blacks actually can cause them harm. When affirmative action programs judge blacks separately and differently from whites, he says, blacks are denied the benefit of competing on a par with whites. No matter how good they are, they will always be only "the best black." Not "the best," but "the best black." "The best black" carries the stigma of being the best in a

¹⁷ I find this argument persuasive in large part because, in my reading of polemical essays on affirmative action in education, I did not find a single opponent who calls for an end to any of the other nonacademic factors besides race. This suggests to me that opponents are interested more in ending the use of race in ways that benefit blacks than in making university admissions generally more meritocratic.

second-rate pool, no matter how untrue that characterization might be. By showing how one kind of affirmative action actually harms blacks, Carter shifts the debate from a focus on motivation or character to a focus on the effects of policy.¹⁸

DEFINING THE PROBLEM: SYMBOLS

If opponents' favorite metaphor is color blindness, supporters are partial to the accounting imagery of debt and compensation. They view affirmative action as compensating blacks for past disadvantages. The opinions of judges who approve of affirmative action are filled with references to "redress," "remedies," and "compensation." For example, in his opinion in the *Bakke* case, Justice William Brennan said that the medical school's affirmative action plan "compensates applicants . . . for educational disadvantages which . . . were a product of state-fostered discrimination."¹⁹

For Randall Robinson, a contemporary civil rights leader, affirmative action "will never come anywhere near to *balancing the books* here." Like a few other black leaders before him, he calls for massive reparations: "As Germany and other interests that profited *owed* reparations to Jews following the holocaust of Nazi persecution, America and other interests that profited *owe* reparations to blacks following the holocaust of African slavery. . . ." ²⁰ Thomas Sowell, a prominent black intellectual who has written widely against affirmative action, rejects the reparations demand by making another metaphor. He says blacks' demand for reparations is like today's Jews demanding to send today's Germans to concentration camps.²¹

Robinson's and Sowell's analogies illustrate the powerful norma-

¹⁸ Stephen Carter, *Reflections of an Affirmative Action Baby* (New York: Basic Books, 1991), esp. chap. 3. Here is a thought experiment for you: Is it possible to design an affirmative action program that *does* allow black applicants to compete with whites?

¹⁹ *Bakke*, op. cit. (note 4), p. 375.

²⁰ Randall Robinson, *The Debt: What America Owes Blacks* (New York: Dutton, 2000), p. 9. In "Making the Case for Racial Reparations," *Harper's*, November 2000, pp. 37–51, four leading plaintiffs' lawyers brainstorm about strategies for bringing a reparations claim against the U.S. government.

²¹ Thomas Sowell, "Affirmative Action—A Worldwide Disaster," in *The Essential Neo-conservative Reader*, Mark Gerson, ed. (Reading, Mass.: Addison Wesley, 1996), pp. 236–82, statement on p. 257. Sowell's essay first appeared in *Commentary* in 1989.

tive leaps in metaphoric argument. Between the lines, every metaphor says *this* situation is like *that* situation and, therefore, what is right in *that* case is right in *this* case. Whether or not you find an analogy compelling, as soon as you recognize it as argument-by-metaphor, you can begin to think critically. Ask yourself, "Is this situation really like that one? How? How not?" Here, I will show you how I think about these two metaphoric arguments, but before you read me, put down the book for a minute and think about how you see them.

I see Sowell's comparison as wildly wrong. In asking for reparations, no one is saying that today's blacks should enslave today's whites. It strikes me that Sowell's analogy subtly tells his audience that affirmative action is eye-for-an-eye justice, primitive and vengeful. I see Robinson's Holocaust comparison as not quite right, either, though not wildly wrong. Although it captures the horror and injustice of America's treatment of blacks, it fails to capture fully the enduring, self-perpetuating nature of racial oppression, or the ways racism infects all our social institutions and our habits of thought. On balance, I think America does owe a debt to blacks, though it is not the same debt in kind or amount that might be owed to European Jews.

But even if "America" owes a debt to blacks, who, exactly, should pay it off? Many people who oppose affirmative action do so because they believe it is unfair to burden innocent whites with a debt they didn't incur. Allan Bakke, Cheryl Hopwood, and the millions of other young white students like them did not enslave blacks or make and enforce segregationist laws. Why should they suffer to repay other people's debts?

Stephen Carter, who describes himself as "hardly an unabashed fan of affirmative action," thinks this "fairness story" is one of the weakest arguments against it. "People are routinely taxed for services they do not receive that are deemed by their government necessary to right social wrongs they did not commit." When we use tax money to bail out failing banks or provide disaster relief to places devastated by a hurricane, Carter says, "the people who bear the costs of these programs are not the people who caused the damage, but they still have to pay."²²

Note what's happening in these arguments. The two sides talk right past each other because they are not on the same ground. Opponents

²² Carter, op. cit. (note 18), p. 17.

understand compensation as a distributive issue. In this case, a burden instead of a benefit must be allocated, but the principle is still the same: The burden must be distributed according to some legitimate principle of merit or deservingness. White university applicants do not deserve the punishment of having to pay America's debt to black people if they didn't personally cause harm to blacks. Supporters (here I count Carter, since he supports limited use of racial preferences in university admissions²³) jump outside the equity framework altogether and argue instead about "the public good" or "the benefit to society as a whole." They see the very purpose of society as joining together so the weak can be helped by the strong. In this view, it makes no sense to talk about who owes whom what. The only important question is what's best for society.

DEFINING THE GOALS: EFFICIENCY

Listening to most debates about affirmative action (including the one I've been conducting so far), one might think the issue is fought entirely on the territory of equity. But in tracing America's fitful struggle for racial equality, Philip Klinkner and Rogers Smith demonstrate that progress was made only when leaders argued for racial justice on efficiency grounds. President John Kennedy, explaining why he was introducing a civil rights bill, tutored the nation in economics: "Race discrimination hampers our economic growth by preventing maximum development and utilization of our manpower. It hampers our world leadership by contradicting at home the message that we preach abroad. . . . It increases the cost of public welfare, crime delinquency and disorder." Kennedy did conclude that the main reason to strive for equality was not "the economic waste of discrimination" but "because it is right." But as Klinkner and Smith note, this was one of the rare times in the great civil rights era that morality entered the political discourse of white leaders. Mostly, the talk was of the Cold War, of how racism sapped our national strength by preventing us from using "every available resource," and of how American racism was driving other nations into the communist fold because it was a poor advertisement for democracy.²⁴ Even today, long after the Cold War, proponents often argue that affirmative action is good business policy because it makes the best use of human resources.

²³ *Ibid.*, pp. 84–88.

²⁴ Klinkner and Smith, *op. cit.* (note 3), chap. 8.

Opponents, naturally, argue that affirmative action reduces efficiency. In the most common inefficiency argument, affirmative action lets in people who are less competent than pure merit standards would admit, thereby reducing the productivity of the organization that uses it.²⁵ Many opponents of affirmative action in college admissions believe it lowers the graduation rate of black students, a serious inefficiency. How does affirmative action do this? In each school, affirmative action admits black students with, on average, test scores lower than those of white students. On each campus, the black students are then out of their league—"misplaced" or "mismatched"—so they either fail out or get discouraged and drop out.²⁶ The resources invested in dropouts are wasted. A more efficient policy, opponents argue, would let tests sort students so that each school would have students with fairly similar test scores. (Note the interesting causal story embedded here—inefficiency is the problem and affirmative action is its cause. We'll come back to it in a moment.)

The only way to refute efficiency arguments is with studies measuring the ratio of outputs to inputs. Two former university presidents, both staunch defenders of affirmative action in admissions, conducted such a study. They found that black students have higher graduation rates at elite colleges than at less-selective colleges—yet elite colleges are precisely where opponents claim the gap between black and white test scores is greatest and therefore should be most devastating to blacks' performance and success.²⁷ But many supporters highlight another finding even more: affirmative action graduates of elite schools (who wouldn't have been admitted without affirmative action) were more likely than white graduates to hold civic and community leadership positions later in life. If stimulating public service is a goal of education in addition to enhancing individual career mobility, then affirmative action seems to be more efficient.

²⁵ For a comprehensive review of the literature on efficiency effects of affirmative action, see Harry Holzer and David Neumark, "Assessing Affirmative Action," *Journal of Economic Literature* vol. 38, no. 5 (2000): 483–568. They found little evidence that it causes declines in economic performance, and strong evidence that it accomplishes its goal of increasing black opportunities and income.

²⁶ The most forceful exponents of this theory are Dinesh D'Souza, *Illiberal Education* (New York: Free Press, 1991), p. 43; and Stephan Thernstrom and Abigail Thernstrom, *America in Black and White* (New York: Simon and Schuster, 1997), pp. 405–12.

²⁷ Bowen and Bok, *op. cit.* (note 2). See also the very lucid review of Bowen and Bok's book by Ronald Dworkin, "Affirming Affirmative Action," *New York Review of Books*, October 22, 1998, pp. 91–102, discussing Thernstrom and Thernstrom's "mismatch" theory as well.

I, too, believe that enhancing students' capacity for leadership is an important goal of education, but I use this example to illustrate some tools of political strategy. Because efficiency is hallowed ground in American politics, one way to be persuasive is to demonstrate that your preferred policy is more efficient. You can make a policy look more or less efficient just by choosing what outcomes to count. And you can critique opponents' efficiency claims by insisting that they are looking at the wrong outcomes.

Now step back for a moment and remember that efficiency is not a goal in itself—it's just a formula for the best means to get there once you know where you're going. Therefore, the most powerful way to analyze and critique efficiency arguments is to ask yourself, "Do I accept the goal that the argument assumes?" For example, consider Professor Richard Epstein's argument about efficiency and antidiscrimination laws. It runs like this: The more diversity of tastes and preferences within a group, the harder it is for the group to reach agreement. (By "tastes and preferences," Epstein means people's tastes for anything, from what kind of music they like to hear while they're working to what color skin they like their associates to have.) Homogeneity makes a group easier and cheaper to manage. Therefore, "voluntary sorting can reduce the cost of making and enforcing group decisions." Because affirmative action restrains people from sorting themselves into homogeneous groups with similar tastes, it raises the cost of social governance.²⁸

For most of us, racial integration and living harmoniously in a diverse society are worthy goals.²⁹ Libertarians such as Epstein think the best way to buffer the tensions of diversity is to let people segregate themselves into homogeneous enclaves. They should be able to sort themselves by whatever characteristics are important to them, including race. As a libertarian and champion of free markets, Epstein claims to want voluntary segregation because it is efficient. But people who aspire to a harmonious, racially integrated community wouldn't accept his means, no matter how efficient, because his means can never lead to their goal.

²⁸ Richard Epstein, *Forbidden Grounds: The Case against Employment Discrimination Laws* (Cambridge: Harvard University Press, 1992), esp. pp. 59–69.

²⁹ At least, integration is an ideal we tell ourselves we want, but in practice we're somewhat ambivalent about it, blacks and whites. For a sensitive, balanced, and riveting exploration of this argument, see Leonard Steinhorn and Barbara Diggs-Brown, *By the Color of Our Skin: The Illusion of Integration and the Reality of Race* (New York: Plume/Penguin, 2000).

DEFINING THE PROBLEM: CAUSAL STORIES

The affirmative action debate is rich with causal stories. To explain racial discrepancies in income, occupations, political power—and rates of acceptance to universities—proponents of affirmative action sketch out a long series of obstacles to blacks from the time of slavery to the present day. Whites' efforts to maintain and justify slavery steadily shaped laws, institutions, and cultural understandings that now operate almost as machines programmed to subordinate blacks. In Randall Robinson's succinct metaphor, blacks continue to be harmed by "the savage time-release social debilitations of slavery."³⁰ Call it *mechanical cause* (in my framework of Chapter 8), but recognize that it started as *intentional cause*—the deliberate, conscious, calculated construction of a system of slavery and racial subordination.

Opponents of affirmative action believe that poverty and poor schools, not lingering racism, are the main causes of racial disparities in rates of admission to higher education. Some also think much of the disparity results from unforeseen side effects of liberal educational reforms, such as overly lax discipline and academic standards for blacks (*inadvertent cause*). Some suggest that black students, believing they can coast on affirmative action, don't work as hard as white students (*intentional cause*).³¹ *The Bell Curve* famously argued that intelligence is genetically determined and blacks are genetically inferior to whites (*accidental or natural cause*).³²

What can we learn about political strategy once we have mapped out the causal stories in a fight? Remember that two types of causal theories are relatively strong (intention and accident). Intentional causal stories are strong because they outrage people; they suggest conspiracy or willful malevolence. Accidental causal stories are strong because they checkmate policy activists; after all, if a problem is caused by accidents of fate or nature, no human intervention can prevent it (though policies can alleviate some of its consequences). The other two types of stories are relatively weak (mechanical cause and inadvertent

³⁰ Robinson, op. cit. (note 20), p. 8, emphasis added.

³¹ Charles Murray, "Affirmative Racism," in *Debating Affirmative Action*, Nicolaus Mills, ed. (New York: Delta Books, 1994), pp. 191–208 (originally published in *New Republic*, Dec. 31, 1984); and Thernstrom and Thernstrom, op. cit. (note 26), esp. pp. 397–405 and 421–22.

³² Richard J. Herrnstein and Charles Murray, *The Bell Curve: Intelligence and Class Structure in American Life* (New York: Free Press, 1994).

cause), because they don't pin much moral responsibility on anyone. If you want to make a persuasive argument in a political controversy, use a strong causal story. And as you analyze a policy fight, watch how the two sides try to promote their own strong theories of cause while muting the other side's strong theories with weaker ones.

In the affirmative action debate, the genetic inferiority story is a nuclear weapon because it devastates any possibility of achieving racial equality. And like real nuclear weapons, the genetic inferiority story is so potent—and so morally abhorrent—that it's almost unusable. More commonly, opponents tell a story of inadvertent cause to counter proponents' stories of intentional discrimination: blacks lag behind whites because of a host of complicated factors, including some unintended side effects of liberal social policies. But to gain more clout than the inadvertent cause story yields, opponents sometimes craft their analyses in the form of an accident story. This story begins by observing a "black-white gap" in test scores or noting that blacks "underperform" whites in tests and grades. The gap exists, and although we don't fully understand why, the gap is "a reality" that we can't change in the short run. Most especially, affirmative action will not change it.³³

Supporters' strongest causal argument is again intention. They tell a variation of a conspiracy story: Not using race as a factor in admissions decisions when we do use other non-merit factors is covert racism. By opposing affirmative action (supporters say), whites are trying to preserve their dominance. In the words of law professor Derek Bell, opposition to race-based affirmative action reflects an "unstated understanding by the mass of whites that they will accept large disparities in economic opportunity to other whites as long as they have a priority over blacks and other people of color for access to these opportunities."³⁴

³³Ten years before he co-authored *The Bell Curve*, Charles Murray wrote, "[T]he problems [of affirmative action] are more or less driven by realities we have very little hope of manipulating in the short term except by discarding laws regarding preferential treatment. People do differ in acquired abilities. Currently, acquired abilities in the white and black populations are distributed differently." Murray, *op. cit.* (note 31), p. 201; Thernstrom and Thernstrom, *op. cit.* (note 26), also exemplifies this kind of causal story.

³⁴Derek Bell, *Race, Racism and American Law*, 3rd ed. (Boston: Little, Brown, 1992), p. 896.

FIGHTING FOR SOLUTIONS: RIGHTS AND POWERS

What of solutions? It all depends on what we define as the problem. For supporters of affirmative action, racial disparities in wealth, status, and power are both evidence and result of lingering subjugation. Subjugation is the problem, and affirmative action is the policy solution. For opponents, affirmative action itself is the problem. Affirmative action is discrimination and a violation of individual rights. Affirmative action is what is to be undone, and rights litigation is the solution. Since *Bakke*, affirmative action has been fought primarily in the courts and cast as a matter of rights. But in fact, every type of policy instrument comes into play in this debate.

Until the 1970s, race classifications had always been used in ways that harmed blacks. Civil rights advocates of the 1950s and 1960s sought to create rights for black people to be treated without regard to race. After eliminating many laws that denied blacks rights and privileges on account of their race, these advocates turned to using race consciously in order to help blacks. That is the essence of affirmative action. Yet making decisions on the basis of race, even partially on the basis of race, is the very evil civil rights advocates were fighting. Now opponents of affirmative action, who also identify themselves as civil rights advocates, want to eliminate racial classifications from public life.

Thus, the contest of rights in higher education might be described in the following way: Opponents of affirmative action seek to create a right for all students, white and black, to be treated without regard to race. Proponents seek to preserve the right of universities, enunciated in *Bakke*, to use race classifications in ways that benefit society as a whole. These are deliberately generous-spirited descriptions. Proponents of affirmative action would describe opponents as seeking to preserve a system that benefits white students, while opponents would describe proponents as seeking to create a right that benefits black students. Let's briefly look at some ways this contest of rights is politically constructed.

Probably the most fundamental principle of politics is this: Try to stage the fight in an arena where the rules and the fans are on your side. Savvy political actors, if they lose in one arena, will try to move the contest to another venue, in which they have a better chance of success. In Michigan, opponents of affirmative action tried first to pass a ban on affirmative action in the state legislature. When the bill failed, they shifted the arena of conflict from the legislature to the courts and



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from the state to the federal level. One Michigan state legislator told a reporter, "We were not going to get anywhere through the legislative process. It was clear if we were going to get anywhere it was through the court process."³⁵ Four conservative legislators contacted the Center for Individual Rights for help, offering to make the University of Michigan a national test case and to use their clout with state newspapers to solicit potential plaintiffs. By challenging the University of Michigan with federal law (the suit invokes the equal protection clause of the Fourteenth Amendment and several Supreme Court decisions on affirmative action), the opponents were able to take their issue out of state politics and into the federal courts and the national media—where, they hope, they will be in the majority instead of the minority.

Recall from Chapter 14 how organizations self-consciously choose plaintiffs who will have the broadest possible appeal and will represent their side of the issue in the best light. Choosing a good plaintiff is as much a matter of public relations as of law. The NAACP used this strategy to fight segregation. Now the Center for Individual Rights uses it to fight affirmative action. In 1997, to launch a suit against the University of Michigan, lawyers from the center interviewed a dozen finalists from a pool of one hundred "applicants" for the job of plaintiff. The pool was generated by the four conservative state legislators, who issued a press release soliciting phone calls from students who felt they had been unfairly rejected from the University of Michigan. Ultimately, the lawyers chose Jennifer Gratz to be the lead plaintiff. The lawyers thought she would have the stomach to fight a suit all the way to the Supreme Court. She had no misgivings and she believed passionately that people should not be judged according to race. The lawyers thought she would be able to handle all the publicity, because, as a former cheerleader and homecoming queen, she was used to being in the public eye. And although the lawyers "balanced the ticket" by choosing a male student as co-plaintiff, they consciously made the lead plaintiff a female. According to one of the center's lawyers, "This just resonates differently than if it were a man. The perception of a man bringing a lawsuit like this is that he's an angry white male and that he's bitter. . . . She's appealing in a way that maybe not all white males would be."³⁶

³⁵ State Representative David Kaza, quoted in Walsh-Sarnnecki, op. cit. (note 5).

³⁶ Details about the plaintiff selection process and quotations are from Lisa Belkin, "She Says She Was Rejected by a College for Being White. Is She Paranoid, Racist, or Right?" *Glamour*, November 1998, pp. 278–81.

Defendants are by definition on the defensive. Their lawyers don't have the luxury of choosing the most appealing defendant from a pool of candidates because plaintiffs name their own defendants. Defendants, once having been named, must make themselves appear as appealing as possible. The best way to do this is to cast themselves as standing for a widely accepted moral or political principle and as representatives of the broad public interest.

Traditionally, educational affirmative action has been framed as a benefit to black students, even by its supporters. Very few studies of affirmative action have asked whether and how it might benefit people other than the students who get admitted because of it. As university programs came under attack as harmful to whites, however, supporters began to portray affirmative action as benefiting not just minority students but all students, indeed all of society.³⁷ The University of Michigan and other supporters, for example, commissioned studies to show that diversity among a student body creates a better educational experience for *all* students. Certain intellectual, social, and leadership skills, these studies find, are more likely to develop when students confront others who are different from themselves.³⁸ In purely legal terms, supporters are trying to persuade courts that diversity in student bodies is a "compelling governmental objective" and thus justifies the use of racial classifications. In more pragmatic political terms, however, this argument is part of a strategy to redefine affirmative action as serving the greater good of societal well-being, in contrast to the narrower interests of the plaintiffs in obtaining admission.

FIGHTING FOR SOLUTIONS: RULES

Because opponents think race should never be allowed to influence selection decisions, they would like to reform university admissions so

³⁷ See Bowen and Bok, op. cit. (note 2).

³⁸ For descriptions of the strategy, see Nicholas Lehmann, "The Empathy Defense," *New Yorker*, Dec. 18, 2000, pp. 46–51; Jacques Steinberg, "Defending Affirmative Action with Social Science," *New York Times*, December 17, 2000, p. 29. For examples of the argument and evidence, see Bowen and Bok, op. cit. (note 2); Patricia Gurin, "Expert Report of Patricia Gurin," in *Graz et al. v. Bollinger et al.*, No. 95-75321 (E.D. Michigan), available at <http://www.umich.edu/~urel/admissions/legal/expert/gurintoc.html>, on February 4, 2001; and Gary Orfield and Dean Whitley, "Diversity and Legal Education: Student Experiences in Leading Law Schools," Report of the Civil Rights Project of Harvard University, Cambridge, Mass., 1999.

that only "race-neutral" rules are used. If we could increase minority enrollments without using race as a criterion, wouldn't we be closer to our goal of a color-blind society?

One sort of race-neutral rule is exemplified in the percentage plans used by the state universities of California, Texas, and Florida. After opponents won ballot initiatives to eliminate race-based affirmative action in state universities, each state adopted rules that guarantee admission to students whose grades put them at the top of their high school classes. In Florida, the top 20 percent get in, in Texas the top 10 percent, and in California the top 12.5 percent. These plans have been widely deemed successful. After the first year of Florida's plan, Governor Jeb Bush announced that it had raised black and Hispanic enrollment at the University of Florida by 33 and 19 percent, respectively.

The best way to fight against a proposed rule (other than buying opposition to it, of course) is to show that it won't work to accomplish a commonly held goal. Proponents of affirmative action point out that percentage plans do not in themselves increase minority enrollment in universities unless they are supplemented with race-based strategies. Thus, for example, in the same press conference at which Governor Bush announced Florida's success, the provost of the University of Florida explained that it had "worked closely with three predominantly minority high schools" and had dispensed an extra \$200,000 in grants to minority students.³⁹ Supporters of race-based affirmative action generally argue that universities cannot increase minority enrollment without using some race-conscious measures, as Florida did.

Many opponents of affirmative action call for class-based affirmative action to replace the current race-based plans. They believe that socioeconomic disadvantage, not racial discrimination, is now the main barrier to university entrance. Whites as well as blacks suffer socioeconomic disadvantages. If we truly want to compensate people who are disadvantaged, class-based affirmative action is the way to do it. Moreover, race-based affirmative action, they point out, often benefits middle-class blacks. A class-based system would aim help at the people who really need it.⁴⁰

³⁹ Jeffrey Selinger, "Florida's Universities See Rise in Minority Enrollment after End of Racial Preferences," *Chronicle of Higher Education*, Sept. 8, 2000, p. A40.

⁴⁰ See, for example, William Julius Wilson, "Race-Neutral Programs and the Democratic Coalition," *American Prospect*, No. 1 (Spring 1990), pp. 74–81.

Proponents resist this solution, too, by trying to show that it won't by itself increase minority enrollment. Even though black families are far more likely than white families to be poor, low-income whites vastly outnumber low-income blacks. The race disparity is even greater when we consider high school students with high test scores—the ones selective colleges are after. To increase minority student enrollments through class-based affirmative action, selective colleges would have to reserve six times as many places for low-income students as they now reserve for minority students, and they would have to spend more money on financial aid than they currently do.⁴¹ In the absence of additional race-conscious measures, class-based affirmative action will benefit far more whites than blacks.

Hard-core opponents such as the Center for Individual Rights seek to prohibit any special treatment for minority students, including minority scholarships or mentoring and enrichment programs for high school students.⁴² If these opponents succeed, supporters say, percentage plans and other race-neutral methods will certainly fail to boost minority enrollments.

The "neutral rule" is a potent symbol. A neutral rule, remember, is one that doesn't give any advantages or disadvantages to different groups of people. It is perfectly fair. But as we saw in Chapter 12, all rules benefit some people and harm others. Rule-neutrality is a political ideal and something of a myth. Labeling a rule as neutral—race-neutral, budget-neutral, anything-neutral—is a strategy to drape the rule with an image of fairness. Beneath the imagery, though, "neutral" with respect to anything means preserving the status quo distribution of that thing. If you are the side that wants to maintain the status quo distribution with respect to criterion *X*, you will call for an *X*-neutral rule. If you are the side that wants to redistribute something, you will need to show how an apparently neutral rule in fact benefits some people more than others.

⁴¹ Robert Bruce Slater, "Why Socioeconomic Affirmative Action in College Admissions Works against African Americans," *Journal of Blacks in Higher Education*, no. 8 (Summer 1995), pp. 57–59; Thomas Kane, "Misconceptions in the Debate over Affirmative Action in College Admissions," in *Chilling Admission: The Affirmative Action Crisis and the Search for Alternatives*, Gary Orfield and Edward Miller, eds. (Cambridge: Harvard Education Publishing Group, 1998), pp. 17–31.

⁴² *Racial Preferences in Higher Education: The Rights of College Students* (Washington, D.C., Center for Individual Rights, 1998), pp. 8–9.

FIGHTING FOR SOLUTIONS: INCENTIVES

In most controversies that are framed as rights, no one relies on incentives to make people change their behavior. We think of rights as absolute and want rules to make sure rights are securely protected. Nevertheless, incentives still play a large part in the affirmative action debate, because the *idea* of incentives is so important to our understanding of human motivation. Even when the main policy solutions under consideration are not incentive-based, political actors can be persuasive by showing that their preferred policy solution creates good incentives or that their opponents' preferred option creates bad incentives. Describing incentives as helpful or harmful is an effective way of saying that a solution will or won't work.

As we saw in the earlier discussion of causal stories, some opponents charge that affirmative action policies create disincentives for black youth to work hard at their studies. If you can get into a good school without working hard, why study?⁴³ At a more general level, many opponents believe affirmative action of any kind encourages potential beneficiaries to think of themselves as helpless victims and thereby induces passivity instead of motivating them to strive. In the words of Shelby Steele, "Victimization is what justifies preference, so that to receive the benefits of preferential treatment one must, to some extent, become invested in the view of oneself as a victim. In this way, affirmative action nurtures a victim-focused identity in blacks and sends us the message that there is more power in our past suffering than in our present achievements."⁴⁴ Many supporters think affirmative action creates *good* incentives. When the number of black students in selective colleges grows, black teens can imagine themselves in college and can hope to get in. Desire and hope are the best incentives to study hard.

Both views are speculative. In the absence of good evidence, political actors try to make their interpretation of incentive effects persuasive by drawing on larger views of human psychology and claiming that their interpretation of incentive effects flows from "human nature."

The opponents' theory rests on a view that people naturally try to work as little as possible to get whatever they need or want. In the words of tennis star Arthur Ashe, "Affirmative action tends to under-

mine the spirit of individual initiative. Such is human nature; why struggle to succeed when you can have something for nothing?"⁴⁵ American culture features a strong narrative that blacks are lazy, much lazier than whites. The hypothesis that affirmative action tempts black youth to slack off taps into this larger cultural myth and gains some of its plausibility by being consistent with the myth.⁴⁶

Supporters' ideas about the incentive effects of affirmative action rest on a different psychology: People are naturally *hardworking* but will stop working hard at anything if they learn from experience that their effort makes no difference. Affirmative action encourages hard work because it teaches students that if they study hard, their efforts won't be futile. This hypothesis taps into another American cultural story—one that says people may differ in knowledge, talents, and skills, but they share the same emotional and psychological makeup.

You can often gain some persuasive leverage in a debate about incentive effects by revealing the underlying assumptions about human nature. In the affirmative action debate, as in most, both sides overgeneralize. They assert or assume that "people" react a certain way. It's a safe bet that human motivations are highly complex, so you can at least help get a conversation unstuck by revealing these assumptions, holding them up to the light, and asking people to think hard about them.

IMPLEMENTING SOLUTIONS: NUMBERS

To implement affirmative action, ultimately we have to face what is perhaps the most difficult question: Who counts as black? This one makes counting votes for the 2000 presidential election look like kindergarten. Remember (from Chapter 7) that counting anything requires making categorical judgments—"counting as." Sometimes the very "countability" of a phenomenon is the real source of debate. And sometimes people resist counting a phenomenon because they understand that once we enumerate something, it begins to count in another sense: it matters for politics and influences social decisions.

Race, it turns out, is just such a phenomenon. Apart from all the

⁴³ Arthur Ashe and Arnold Rampersand, *Days of Grace: A Memoir* (New York: Ballantine, 1995), p. 170.

⁴⁴ I think there is a racist tinge to this theory because no one makes comparable arguments about the kinds of preferences that ordinarily go to white students, such as preferences for children of alumni.

⁴³ See, for example, Thernstrom and Thernstrom, *op. cit.* (note 26), pp. 421–22.

⁴⁴ Shelby Steele, "A Negative Vote on Affirmative Action," in Mills, *op. cit.* (note 31), pp. 57–47, quotation on p. 42 (orig. published in *New York Times Magazine*, May 13,

other issues in affirmative action, the problem of how to count people's race is highly contested.⁴⁷ The minute we need to count race, we have to decide how to count people whose parents and grandparents are not of the same race, or who have what we call "mixed" ancestry. The very idea of "mixed" presumes that there is such a thing as "pure" racial ancestry. Most scientists now agree that race is not a biological category but a social construct, and that it is impossible to count people as being "of a race."⁴⁸

One objection to race-based affirmative action, then, is that it forces us to categorize people into races. It gives a certain reality to a social construct that has no biological basis. Counting by race perpetuates racial thinking and may exacerbate racial resentments. Both opponents and supporters of affirmative action are deeply troubled by this problem. For some opponents of affirmative action, this danger is the main reason we should end it,⁴⁹ and some liberals turned against affirmative action because they believe counting race for any purpose is illegitimate and dangerous.⁵⁰ Some opponents also fear that racial counting is the nose of the camel in the tent—once we create special benefits for anybody on the basis of racial ancestry, we'll be required to do it for almost everybody.⁵¹ In the 2000 census, the proliferation of racial categories as well as the possibilities for people to identify themselves as more than one race seemed to confirm these fears.

Hard-core supporters of affirmative action believe that our society is already highly race-conscious, so race-conscious policies can't and don't exacerbate racial thinking. Moreover, they believe, race-conscious policies are the only way to counter both unconscious and conscious racism. Racial classifications subjugated blacks in the first

place. We can't undo this subjugation without using the same classifications.⁵² Opponents think skin color is not, nor should it be used as a proxy for individual merit, disadvantage, or viewpoints. They do not want to count race because they think it cannot be used as a positive tool.

Supporters push for defining black or minority status broadly including everyone who considers him or herself to be of mixed race or anything but white. In the Michigan suit, the University of Michigan argues that by literally expanding the diversity of the student body, it can best teach all students that there is no single black or minority point of view. Furthermore, a greater mix of different kinds of students in classes and dorms lifts the burden off a few black students to articulate or stand up for the mythical "minority view."⁵³

For its supporters, affirmative action in higher education is itself a persuasion strategy. By interrupting the *de facto* dynamics of racial segregation and deliberately crafting integrated educational experiences, affirmative action, they believe, teaches people the values, skills, and habits of diversity. But this kind of cultural transformation goes much, much deeper than advertising or political speeches, and it suggests the two faces of persuasion: When have we crossed from informing and educating to propagandizing and indoctrinating? What are the boundaries of legitimate persuasion in a democracy?

Most Americans, says political theorist Andrew Koppelman, probably believe two contradictory things about government persuasion. On the one hand, "part of what defines a free society is that it is none of government's business what citizens believe and . . . shaping citizens' beliefs is not a legitimate task of a liberal state." On the other hand, "racism, sexism, and similar ideologies are so evil and destructive of the proper workings of a free society that the state should do whatever it can to eradicate them."⁵⁴ Our positions on affirmative action depend in large part on how we weigh these two beliefs. As an astute analyst or advocate, you would do well to unravel people's assumptions about

⁴⁷For an excellent political history of counting race in censuses, see Melissa Nobles, *Shades of Citizenship* (Stanford: Stanford University Press, 2000).

⁴⁸*Ibid.* For a thoughtful meditation on this interplay between the science and politics of racial ideas, see K. Anthony Appiah and Amy Gutmann, *Color Conscious: The Political Morality of Race* (Princeton: Princeton University Press, 1996).

⁴⁹See for example Stephan Thernstrom, "One Drop—Still: A Racialist's Census," *National Review*, April 17, 2000, pp. 35–37.

⁵⁰Nathan Glazer is one prominent liberal who came to oppose affirmative action largely for this reason. See his *Affirmative Discrimination* (New York: Basic Books, 1975). He later reversed himself again, saying he now believes race-conscious policies are necessary to overcome racial disparities in education. See "In Defense of Preference," *New Republic*, April 6, 1998, pp. 18–21, 24.

⁵¹Michael Lind, "The Diversity Scam," *New Leader*, July/August 2000, pp. 9–29.

⁵²See for example, Randall Kennedy, "Persuasion and Distrust: The Affirmative Action Debate," in Mills, op. cit. (note 31), pp. 48–67.

⁵³Jacques Steinberg, "Defending Affirmative Action with Social Science," *New York Times*, December 17, 2000, p. 29. For the University of Michigan's expert legal briefs concerning the value of diversity, see <http://www.umich.edu/~urel/admissions/legal/expert.html> (visited on February 4, 2001).

⁵⁴Andrew Koppelman, *Antidiscrimination Law and Social Equality* (New Haven: Yale University Press, 1996), p. 1.

the two faces of persuasion in any political debate, but especially in one that involves education.

FINDING YOUR WAY THROUGH THE PARADOXES

When you get lost, come back to goals. Ask yourself again and again what you are trying to achieve and why you believe it is right. Ask yourself what the political actors you are studying want to achieve. When you analyze different problem definitions, consider them from the point of view of goals. Ask of every problem definition, "What's wrong or what's missing according to the author of the story?" Does an analysis lead down a different path and presume a different goal than the one the authors say they're after, or the one their opponents are after?

When you come to solutions, ask yourself how different potential solutions help achieve the stated goal, or *your* goal. Walk yourself through the mechanisms. Read between the lines again to see whether opponents might be seeking a different goal than the nominal one everyone agrees upon.

In the affirmative action controversy, I think most people on both sides want an integrated society in which race doesn't determine people's life chances in any way. But I read the two sides' positions as indicative of more or less patience for getting to the goal, and more or less tolerance for racial stratification as a semipermanent feature of American life.

The advantages of citizen choice extend not only to economic matters but also to social issues. Some people do not wish to live near homosexual enclaves; others like an anything-goes bohemian environment. Some people want bans on smoking in public places; to others, such restrictions feel authoritarian. Federalism permits various constituencies to sort themselves out and live peacefully in parallel.

Michael Greve⁵⁵

No nation can enslave a race of people for hundreds of years, set them free bedraggled and penniless, pit them, without assistance in a hostile environment, against privileged victimizers, and then

reasonably expect the gap between the heirs of the two groups to narrow. Lines, begun parallel and left alone, can never touch.

Randall Robinson⁵⁶

Many people reluctantly support affirmative action in universities but they favor it nonetheless because they know that without it, the proportion of black students in selective schools would fall even lower than it already is, and such a diminution is unacceptable to them.⁵⁷ In contrast, many opponents believe that although the numbers of black students in selective schools would drop without affirmative action, black students could still get an education in the majority of schools that are not very selective. If undergraduate colleges used strictly color-blind admissions standards, Stephan and Abigail Thernstrom write just as many black students would still go to college. But "some of the black students now at [the University of] Michigan would find themselves at Western Michigan or Wayne State."⁵⁸ Moreover, they argue sorting students into different campuses where their test scores are relatively homogeneous is good for minority students, because the chances of graduating rise when their scores are not too far below the college mean.⁵⁹ Echoing the Thernstroms, Michael Greve, head of the Center for Individual Rights, argues that this racial stratification in which blacks attend less-prestigious schools is "a blessing in disguise. Under color-blind admissions standards, he says "minority student like white students, are sorting themselves into institutions from which they are likely to graduate."⁶⁰ These opponents, it seems to me, are willing to tolerate some significant racial stratification over the medium-to-long run in order to achieve their more important goal of color blindness.

Supporters are not willing to tolerate this kind of sorting, even temporarily, because they believe that only in integrated, diverse classrooms and workplaces will whites and blacks ever get to know on another as individuals and dislodge their stereotypes. In selecting

⁵⁶From *The Debt: What America Owes Blacks* (New York: Dutton, 2000), p. 74.

⁵⁷Glazer, "Defense of Preference," op. cit. (note 50) is a good example. Also see Andrew Hacker, *Two Nations: Black and White* (New York: Scribner's, 1992).

⁵⁸Thernstrom and Thernstrom, op. cit. (note 26), p. 421.

⁵⁹*Ibid.*, p. 411.

⁶⁰Michael Greve, "The Vanity of Diversity," *Weekly Standard*, July 20, 1998, copy of article obtained at <http://www.cir-usa.org/msgwks798.htm> on October 26, 2000.

⁵⁵From "Making Government Compete," *American Enterprise* 11 (1): 48.

class, supporters think, universities are not just distributing symbolic and material benefits (a college education, or even prestige and future earnings) to individuals. They are creating a certain kind of learning environment, one that prepares people to live and lead in a racially and culturally diverse society. When supporters evaluate affirmative action in higher education, they look beyond graduation rates and earnings to indicators of societal health. They ask whether white and black students in integrated schools are more likely to have interracial friendships, to learn how to get along with people of different races or cultures, to have good rapport with people who hold different beliefs, and to assume leadership positions in their communities.⁶¹ They ask whether discussions in integrated classes consider a broader range of opinions and issues, whether the coursework is more challenging, and whether alternative views are taken more seriously.⁶² These are admittedly hard things to measure. But they are indicative, I think, of the vision of society that affirmative action's supporters cherish.

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⁶¹ Bowen and Bok, op. cit. (note 2), chaps. 6 and 8.

⁶² Orfield and Whitley, "Diversity and Legal Education," op. cit. (note 38).