

By the People, for the People: Interrogating the Education-Policy-by-Ballot-Initiative Phenomenon

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INTRODUCTION

If President Abraham Lincoln was right, and democracy is government of the people, by the people, and for the people, then how should democratic citizens handle situations where the methods of direct democracy serve only certain people's interests? More specifically, are direct democratic ballot initiatives a just way to make education policy, especially when the policies disproportionately affect members of underrepresented groups? These are the broad questions I take up in this essay, which I will address by focusing on education policy that primarily affects educational opportunities.

The primary purpose of this essay is to question the phenomenon of voters making education policy decisions via the ballot initiative process, as evidenced by several recent initiatives that focused on dismantling historic civil rights policies (such as affirmative action and bilingual education). Initiatives like these use direct democracy in such a way that voters have the opportunity to make education policy decisions that were previously made by education experts and policymakers. Although citizen-organized state ballot initiatives began in the early twentieth century, direct democratic initiatives have become more prevalent in the U.S. in the last two decades.¹ These measures often involve amendments to state constitutions, which, once passed, are very difficult to undo.

Presently, 24 states allow state ballot initiatives. Through the initiatives, voters in four states — California, Washington, Michigan, and Nebraska — have outlawed the use of affirmative action in higher education admissions, and in three states — California, Arizona, and Massachusetts — voters have decided to replace bilingual education with English immersion programs. Colorado and Oregon had similar, but ultimately unsuccessful, anti-civil rights initiatives on their 2008 ballots.

My primary policy concern in this essay has to do with civil rights and the equality of educational opportunity. Consider affirmative action policy, for instance, as a specific example of the education-by-ballot-initiative phenomenon. The 1990s brought a significant political backlash against affirmative action, culminating in the passage of two ballot initiatives banning affirmative action in California and Washington.² At this point, opponents of affirmative action sought legal support from the courts, leaving the ballots quiet for a time. In 2003, however, the Supreme Court decision in *Grutter v. Bollinger* supported the constitutionality of using race and ethnicity as factors in university admissions, a decision which preserved affirmative action nationally. Immediately, affirmative action opponents responded by turning their attention from the legal to the political arena through state ballot initiatives. In 2006 and 2008, voters in Michigan and Nebraska contributed to education policymaking by deciding that affirmative action in employment,

contracting, and public higher education admissions should be eliminated in their states. These new laws have had negative consequences for equality of educational opportunity and campus diversity. For example, the freshman enrollment of underrepresented students of color at the University of Michigan declined by two percent in the first full year after the state's affirmative action ban.³

In this essay I advance the argument that ballot initiatives should be seen as a risky, if not dangerous, way to make education policy.⁴ First I briefly examine how both the aggregative and the deliberative conceptions of democracy provide the context for the ballot initiative debate. I then rehearse the key arguments for and against direct democratic ballot initiatives, including what I believe to be the most devastating critique of the education-policy-by-ballot-initiative phenomenon: the argument from the tyranny of the majority. Because ballot initiatives remain popular, I conclude with a discussion of how initiative processes might be reformed to better account for issues of justice.

BALLOT INITIATIVES: A TOOL FOR DEMOCRACY OR A TOOL OF REPRESSION?

Because eliminating affirmative action negatively affects equality and diversity,⁵ I want to question whether the simple majoritarian rule exemplified by ballot initiative processes can be considered just. This issue is part of a larger dispute between aggregative democratic theorists (including proceduralists) and deliberative democratic theorists (including epistemic and substantive theorists).⁶ Briefly, aggregative conceptions of democracy consider citizens' preferences to be givens; that is, preferences are taken at face value and justifications are viewed as irrelevant to fair democratic processes. By contrast, deliberative conceptions consider citizens' reasons (that is, justifications) for their sociopolitical preferences to be central to the democratic process.⁷ Regarding the important concern that Amy Gutmann and Dennis Thompson cite — “how to make legitimate decisions for the society as a whole in the face of fundamental disagreement”⁸ — aggregative theories typically turn to majoritarian methods of governance (that is, letting voters or elected representatives decide). Gutmann and Thompson argue, however, that the aggregative conception is flawed because, among other reasons, it “fundamentally accepts and may even reinforce existing distributions of power in society.”⁹ Yet, a difficulty with deliberative conceptions of democracy is that there is no clear way to resolve disagreements and make public policy decisions, so the default is to rely on a procedure like voting, which is not necessarily a deliberative process. In addition, within deliberative democratic theory, there is disagreement over deliberation's instrumental value (its value “as a means of arriving at good policies”) and its expressive value (its value “as a manifestation of mutual respect among citizens”).¹⁰ Deliberative theorists like Gutmann and Thompson maintain that both fair procedures and substantive principles need to be part of the democratic process. I take this conclusion as a guiding assumption in this essay. It is within this context that I examine whether ballot initiatives are good ways of making education policy related to civil rights.

There are three key arguments in favor of direct democratic ballot initiatives: (1) they provide citizens an important opportunity for access to the democratic

process; (2) they provide a crucial check on legislators and policymakers; and (3) they stimulate increased voter education and participation. The first two arguments here come out of a proceduralist conception of democracy. There are, in contrast, three primary arguments against ballot initiatives: (1) moneyed and powerful interests play a disproportionate role in the initiatives, serving to corrupt campaigns; (2) most citizens are not informed enough to play a direct role in making education policy; and (3) the majoritarian intuition inherent in direct democracy too often tramples minority concerns.¹¹ These three arguments come out of a deliberative conception of democracy. Before I delve into each argument, let me provide some general information on direct democratic processes.

There are three methods of employing direct democracy in elections — the initiative, the referendum, and the recall — all of which allow citizens the opportunity to have a direct impact on public policy. Depending on state rules, citizens need to gather a certain number of petition signatures in order to put an issue to popular vote through one of these methods. In this essay I am concerned primarily with initiatives, also called ballot measures. Initiatives involve placing a statutory measure or constitutional amendment on the ballot.¹² Such measures have covered myriad issues of public policy, from domestic partnerships to stem cell research. In 2008 alone, states faced some 20 education-related ballot initiatives, including a proposal to ban affirmative action in public higher education, a mandate for a pay-for-performance systems for teachers, and a call to eliminate bilingual education.¹³

In his study of initiative processes related to taxes and spending, John Matsusaka concluded that initiative processes overwhelmingly have supported the views held by the majority of U.S. citizens (rather than those of special interest groups or a financially powerful few).¹⁴ Furthermore, he characterized the larger debate over ballot initiatives as being held between those, on one side, who have concerns about the sheer power of money to influence the outcomes of initiative processes and those, on the other side, who argue that initiatives serve to foster democracy. My position is different; although I see how using initiatives as a method of direct democracy can be a good idea, I am worried that, in education, egalitarian policies on the whole, and those seen as benefiting students of color in particular, are not faring well through initiative processes (as evidenced by the elimination of programs and policies aimed at increasing educational equity).

ARGUMENTS FOR BALLOT INITIATIVES

ACCESS

A strong argument in favor of direct democratic ballot initiatives is that they provide access for regular citizens to the lawmaking process. As Douglas Guetzloe contends, ballot initiatives can be thought of as “weapons of the people,” that is, “tools of direct democracy” that encourage the “free flow of ideas.”¹⁵ The effects of these initiatives can sometimes be straightforward and positive. Consider Oregon’s 1990 seat belt law. According to Richard Ellis, this initiative required “all Oregonians to buckle up.... The bill was simple, people could use their own everyday experiences to make an informed decision, the money expended to qualify and pass the measure was modest,...and the policy change did not produce a host of

unintended consequences” (*DD*, 2). I will not delve into the merits of this initiative here. Suffice it to say that some ballot initiatives can indeed be right-headed. Similarly, in education policy, some citizen-initiated measures can make good sense, in particular those measures related to local school funding or bond issues. Proponents of direct democracy like Shaun Bowler and Todd Donovan would go further, however. In fact, they maintain that “it is difficult for us...to come up with many examples of approved initiatives that participating voters did not really want.”¹⁶ The problem with this kind of justification is that participating voters may not have everyone’s best interests at heart.

A CHECK ON LEGISLATORS

Perhaps the most compelling argument for citizen-initiated ballot measures is that they provide members of the public with the opportunity to keep legislators in check. There is, however, a common misunderstanding about how citizens can indeed check legislative power. Earlier I mentioned that there are three common types of ballot measures: the initiative, the referendum, and the recall. The popular referendum serves well the purpose of checking the legislature — through it, citizens can gather petition signatures to call for a vote on recent state legislation (*DD*). The recall works, in much the same way, to call for a vote on a sitting elected official. With these avenues in place, there is therefore no need for the ballot initiative to serve as a check on policy makers.

PARTICIPATION

Direct democracy is at its best when it stimulates the active participation of citizens in the democratic process. Daniel Smith and Caroline Tolbert argue that, although they understand the potential dangers of direct democracy by ballot initiative, initiative processes can in fact be very positive for democratic practices. This is both because they provide members of the public with education regarding the issues at hand, and because voter turnout increases when such initiatives are on the ballot.¹⁷ In addition, Bowler and Donovan find that voters are more capable than political scientists often give them credit for, that is, they are more capable of becoming informed about the issues that are up for vote and, therefore, more capable of casting a thoughtful vote.¹⁸ One argument that Bowler and Donovan make is that initiative campaigns actually promote voter engagement, especially at the partisan level; they also argue that voters use the state ballot guides to learn about the issues on the ballot, and that such a resource, though simple, usually provides what voters need in order to make an informed decision. Similarly, Donovan, Bowler, and David McCuan’s research show that voters get their information from official ballot summaries and media coverage of the ballot initiatives, rather than from campaign advertisements and messages.¹⁹ Of course, such confidence in official ballot summaries and the media may be misplaced; ballot summaries are notoriously confusing and misleading,²⁰ and the media rarely provide the public with substantive information about ballot issues.²¹

I am wary of ballot initiatives as a strategy for making education policy, because ballot initiatives put democracy and social justice at risk. Abuses of power, lack of

substantive information, and concerns about minority rights top the list of reasons why I hold this position.

ARGUMENTS AGAINST BALLOT INITIATIVES

POWER AND CORRUPTION

Several studies of ballot initiatives have concluded that the effects of initiative campaigns on the democratic process frequently can be dangerous, with one primary reason being that such campaigns are easily corrupted by the influence of money and power.²² The concern is that an individual or special interest group can use personal wealth or influence to bring an issue before voters. An example is relevant here: In Oregon, in 2008, a perennial ballot initiative figure, Bill Sizemore, registered a proposed ballot initiative to put a two-year cap on the amount of time that English-language learners (ELLs) can receive bilingual instruction. Sizemore opposes bilingual education, endorsing instead an English immersion approach. Both educators and immigrant rights groups are critical of the immersion approach, arguing that it limits educational opportunities and that ELLs should be provided with native language instruction and English as a Second Language (ESL) classes for as long as necessary before being mainstreamed into all-English classrooms. This is a classic example of a wealthy and powerful individual (Sizemore is a former candidate for Governor of Oregon) putting a pet issue up for popular vote. The larger question relevant to this essay is whether one person should be able to exercise such power over the ballot.

Similarly, the campaigns for the initiatives, and the wording of the initiatives themselves, can be deceptive and misleading. Whether intentional or unintentional, the net result is that voters may think they are voting for one thing when in fact they are voting for something quite different. Even America's founders anticipated the problem of deception in direct democracy. As James Madison wrote, "there are particular moments in public affairs, when the people stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament."²³

Two education policy examples illustrate this point about deception: In 2000, Arizona was voting on an anti-bilingual education initiative entitled "English for the Children." This title implied that the supporters of bilingual education were not already concerned about teaching English to non-native speakers. In addition, all of the anti-affirmative action ballot initiatives on which states have voted have been entitled "Civil Rights Initiatives," when they actually aim to abolish a traditional civil rights policy. In Colorado, the chief spokesperson for the proposed anti-affirmative action initiative, Jessica Peck Corry, claimed that it would not eliminate affirmative action. When questioned further, she explained that it would just require that all affirmative action and equal opportunity programs include white people and men.²⁴

Ellis points out that the way initiatives are worded and framed makes a huge difference in terms of whether or not people support them. For example, people react

more negatively to the phrase “preferential treatment” than they do to the phrase “affirmative action” (*DD*, 77). This affects the way people vote. The wording of all of the anti-affirmative action proposals passed — in California, Washington, Michigan, and Nebraska — omitted the phrase “affirmative action.”²⁵ When a Houston, Texas, ballot initiative proposed to end “affirmative action” in public employment and contracting, however, the measure was defeated.

INFORMATION

In his critique of America’s democratic system, Jim Holt pointed out, “Most citizens have no economic incentive to learn enough about what politicians do to vote intelligently. Nearly half of American voters acquiesce in their infantilization by not voting at all.”²⁶ I am not sure I would go as far as Holt does here, but I do think that it is problematic to leave important questions of educational justice in the hands of voters who may not be meaningfully informed on relevant policy issues and consequences. Proponents of direct democracy would downplay this concern, pointing out that there is no guarantee that experts or legislators would make better (that is, more equitable) education policy than voters, citing, for example, the often criticized No Child Left Behind Act. However, a crucial foundation of representative democracy is that legislators are accountable to the people. By contrast, the voters are not accountable to anyone.

Even the most informed voters rely on the media for much of their ballot information. Recent research on print media coverage of the anti-affirmative action initiative on Michigan’s 2006 ballot found that such coverage often does not provide meaningful or substantive information on ballot initiatives.²⁷ This is one reason that Ellis maintains, “When a policy has complex and far-reaching consequences for government and society, the initiative process is a particularly poor lawmaking instrument” (*DD*, 3). I am not trying to make the argument that U.S. citizens cannot be trusted with important democratic responsibilities; rather, I am arguing only that direct democracy is not the best way for citizens to exercise such responsibilities regarding issues of education policy and social justice. The issue of minority interests is key to my position.

MINORITY CONCERNS

There were important reasons that the framers of the U.S. Constitution advocated for a representative democracy rather than a direct democracy, including their belief that there would be problems with majorities trumping minorities in decisions regarding controversial issues.²⁸ In 1829, at Virginia’s Constitutional Convention, Madison warned: “In Republics, the great danger is, that the majority may not sufficiently respect the rights of the minority.”²⁹ 180 years later, Madison’s concern is substantiated by the ballot initiatives I have discussed, which are aimed at constraining the educational opportunities of people of color and ELLs.

According to Matsusaka, the primary point of disagreement about initiatives concerns whose interests are being served. Indeed, a breakdown of the vote on Michigan’s Proposal 2 shows that voters neglected minority concerns.³⁰ This point — what Lani Guinier calls the “tyranny of the majority”³¹ — is perhaps the most

crucial reason to be skeptical about the education-policy-by-ballot-initiative phenomenon. According to Guinier, “In a racially divided society, majority rule may be perceived as majority tyranny.”³² With direct democratic ballot initiatives on education policies that are related to equality of educational opportunity, the problem of the tyranny of the majority is all too prevalent.

This brings us back to the question with which I opened this essay: Are ballot initiatives a just way to make education policy when such policy will disproportionately affect members of underrepresented groups? After considering the pros and cons of ballot initiatives, I conclude that the answer is no. Education policy is often concerned with the most profound issues of opportunity and justice in American society. Although citizens are capable of fair thinking on these issues, the arguments outlined above regarding problems of abuses of power, corrupt campaign practices, the difficulty of obtaining substantive information, and the ease of neglecting minority interests make it too risky to leave many equity-minded education policy questions to the public at large. Of course, certain questions are better suited for the ballot initiative process, such as those related to school district bond issues. In any education policy ballot question, though, the crucial element is public dialogue and deliberation. Guinier puts it well: “Public dialogue is critical to represent all perspectives; no one viewpoint should be permitted to monopolize, distort, caricature, or shape public debate. The tyranny of The Majority is just as much a problem of silencing minority viewpoints as it is of excluding minority representatives or preferences.”³³

It is, however, fairly easy to argue against education policy ballot initiatives in theory. Yet direct democratic ballot initiatives are a political reality. In the concluding section, I discuss ways to mitigate the potential harm that unjust ballot initiatives can cause.

DEMOCRATIC LIMITS ON BALLOT INITIATIVE PROCESSES

To be sure, some initiatives are useful tools of direct democracy. For this reason, I would not advocate eliminating all ballot initiative processes. But significant reform is needed in order for ballot initiative processes to avoid eroding principles of fairness and justice, in violation of the tenets of both aggregative and deliberative democracy.³⁴ Recall the defects of direct legislation: “congested ballots and confused voters, deceptive titles and multiple subjects,...rich individuals bankrolling pet initiatives, and the pervasive influence of organized special interest groups” (*DD*, 192). Add to this list the easy trampling of minority concerns, which is a major — if not the most significant — defect. When it comes to education policy, ballot initiative reform is crucial, given the threat that initiatives pose for equality of educational opportunity.

Supporters of such reform have advocated huge changes to the system, such as requiring all ballot initiatives to succeed only by a supermajority of votes (*DD*). Supporters also have advocated more moderate reforms: increased voter information; greater transparency of campaign finance information, so that voters can assess the motives of the initiative funders; the availability of public subsidies to ballot

campaigns in order to mitigate the role of money in the process; and more detailed voter guides with pro and con information, along with independent analyses of the initiative's likely consequences.³⁵

I agree with these suggestions, and I want to add one broader point: reforms of the ballot initiative process need to reflect the best democratic impulses. That is, they need to change the system so as to eliminate — or at least mitigate — the significant flaws in the current process. One way to do this in a democratic manner is to follow Gutmann's two principled limits on political authority: nonrepression and nondiscrimination.³⁶ The principle of nonrepression, in particular, limits the state's ability to use education "to restrict rational deliberation of competing conceptions of the good life."³⁷ Ballot initiatives proposing to end civil rights policies like affirmative action too often violate the principle of nonrepression by serving to restrict self-determination and social contexts of choice for students of color.³⁸ Consider that, after the 1996 passage of Proposition 209, California experienced a sharp decline in the number of underrepresented students of color applying and admitted to state universities, along with a significant drop in the number of minority students enrolled at prestigious state law schools.³⁹ Thirteen years later, the numbers of students of color in the University of California system have rebounded somewhat, but these numbers have not kept pace with the increasing proportions of students of color in the state, and they have actually decreased at the two most selective campuses.⁴⁰

The opportunity constraints for underrepresented students of color reveal majority tyranny in action. According to Gutmann,

If democracies are to govern themselves, they must remain free to make mistakes in educating their children, as long as those mistakes do not discriminate against some children or prevent others from governing themselves freely in the future. The promise of the principles of nonrepression and nondiscrimination is just this: to support a strong democracy without sanctioning majority tyranny or sacrificing self-government in the future.⁴¹

The negative consequences of anti-affirmative action ballot initiatives exemplify the very outcomes of which Gutmann is wary.

In this essay, I have attempted to shed light on whether education policy making through direct democracy may serve to neglect minority rights, resulting in the legally sanctioned denial of equality of educational opportunity to students of color. I have argued that the promise of a democratic form of government that is by and for the people cannot be met if by "the people" we only mean certain people, that is, wealthy people and white people, powerful people and English-speaking people. In the last thirteen years, ballot initiatives on affirmative action and bilingual education policy have violated Gutmann's key democratic principle of nonrepression. Only when this situation changes can we meaningfully reach the promise of Lincoln's words and have a government by and for *all* the people.

1. Daniel Smith and Caroline Tolbert, *Educated by Initiative: The Effects of Direct Democracy on Citizens and Political Organizations in the American States* (Ann Arbor: University of Michigan Press, 2004).

2. Proponents call these “civil rights initiatives,” but I prefer not to perpetuate that misleading characterization.
3. Marisa Schultz, “U-M Reports Slight Decline in Minority Enrollment,” *Detroit News*, October 20, 2008.
4. I restrict my arguments here to ballot initiatives on education policy related to civil rights. These arguments may be applied to related initiatives (for example, proposed bans on gay marriage), although I cannot specifically address these herein.
5. Frances Contreras, “The Reconstruction of Merit Post-Proposition 209,” *Educational Policy* 19, no. 2 (2005): 371–395; Michele S. Moses, Patricia Marin, and John T. Yun, “Affirmative Action’s Fate; Are 20 More Years Enough?” (paper presented at the annual meeting of the American Educational Research Association, New York, April 2008); Lauren Saenz, *The Status of Minorities and Women in Colorado’s Higher Education Institutions* (Denver, Colo.: Piton Foundation, 2008).
6. Robert Goodin, *Reflective Democracy* (Oxford: Oxford University Press, 2003); Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton, N.J.: Princeton University Press, 2004); Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2002).
7. Gutmann and Thompson, *Why Deliberative Democracy?*; Young, *Inclusion and Democracy*.
8. Gutmann and Thompson, *Why Deliberative Democracy?* 14.
9. *Ibid.*, 16.
10. *Ibid.*, 21.
11. David S. Broder, *Democracy Derailed: Initiative Campaigns and the Power of Money* (New York: Harcourt, 2000); Richard Ellis, *Democratic Delusions: The Initiative Process in America* (Lawrence: University Press of Kansas, 2002); John Matsusaka, *For the Many or the Few: The Initiative, Public Policy, and American Democracy* (Chicago: University of Chicago Press, 2004); and Larry Sabato, Howard Ernst, and Bruce Larson, eds., *Dangerous Democracy? The Battle over Ballot Initiatives in America* (Lanham, Md.: Rowman and Littlefield, 2001). *Democratic Delusions* will be cited as *DD* in the text for all subsequent references.
12. Smith and Tolbert, *Educated by Initiative*.
13. Katie Ash, “Education in Spotlight on Statewide Ballots,” *Education Week*, October 8, 2008, 14–15.
14. Matsusaka, *For the Many or the Few*.
15. Douglas Guetzloe, “Initiative Politics,” in *Dangerous Democracy?* eds. Sabato, Ernst, and Larson, 32.
16. Shaun Bowler and Todd Donovan, *Demanding Choices: Opinion, Voting, and Direct Democracy* (Ann Arbor: University of Michigan Press, 2000), xi.
17. Smith and Tolbert, *Educated by Initiative*.
18. Bowler and Donovan, *Demanding Choices*.
19. Todd Donovan, Shaun Bowler, and David McCuan, “Political Consultants and the Initiative Industrial Complex,” in *Dangerous Democracy?* eds. Sabato, Ernst, and Larson.
20. Sabato, Ernst, and Larson, eds., *Dangerous Democracy?*
21. Michele S. Moses and Lauren Saenz, “Hijacking Education Policy Decisions: The Case of Affirmative Action,” *Harvard Educational Review* 78, no. 2 (2008): 289–310.
22. Broder, *Democracy Derailed*; Ellis, *Democratic Delusions*; Larry Sabato, Howard Ernst, and Bruce Larson, “A Call for Change: Making the Best of Initiative Politics,” in *Dangerous Democracy?* eds. Sabato, Ernst, and Larson.
23. James Madison, *Federalist*, no. 63, <http://press-pubs.uchicago.edu/founders/documents/v1ch4s27.html>.
24. Jessica Corry, “Yes on 46 for Equal Opportunity,” *Denver Post*, October 15, 2008.
25. The wording: “The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”
26. Jim Holt, “Export This?” *New York Times Magazine*, April 23, 2006, 18.

27. Moses and Saenz, "Hijacking Education Policy Decisions."
28. Sabato, Ernst, and Larson, "Introduction," in *Dangerous Democracy?* eds. Sabato, Ernst, and Larson.
29. James Madison, "Speech in the Virginia Constitutional Convention," http://www.constitution.org/jm/18291202_vaconcon.htm.
30. For example, the breakdown of the vote showed that 55% of men and just 39% of women voted for MCRI. The vote breakdown by race and ethnicity showed that 56% of Whites voted "Yes," as compared with only 12% of African-Americans and 27% of Latino/as. ("Detroit News Statewide Exit Poll," *Detroit News*, November 8, 2006, http://info.detnews.com/pix/2006/pdf/elect_props.pdf).
31. Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy* (New York: The Free Press, 1994).
32. *Ibid.*, 3.
33. *Ibid.*, 19–20.
34. Goodin, *Reflective Democracy*.
35. Sabato, Ernst, and Larson, "A Call for Change."
36. Amy Gutmann, *Democratic Education* (Princeton, N.J.: Princeton University Press, 1999).
37. *Ibid.*, 44.
38. Michele S. Moses, *Embracing Race: Why We Need Race-Conscious Education Policy* (New York: Teachers College Press, 2002).
39. Contreras, "The Reconstruction of Merit"; Thomas J. Espenshade and Chang Chung, "The Opportunity Cost of Admission Preference at Elite Universities," *Social Science Quarterly* 86, no. 2 (2005): 293–305; William Kidder, "The Struggle for Access from Sweatt to Grutter," *Harvard BlackLetter Law Journal* 19 (2005).
40. Moses, Marin, and Yun, "Affirmative Action's Fate."
41. Gutmann, *Democratic Education*, 97–98.

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