

RESPONSE TO THE CENTURY FOUNDATION'S REPORT ON AFFIRMATIVE ACTION IN HIGHER EDUCATION

On October 3, 2012, the Century Foundation issued a report entitled *A Better Affirmative Action*, principally authored by Richard Kahlenberg. The signatories to this response – the NAACP Legal Defense & Educational Fund, Inc. (LDF), the Mexican American Legal Defense and Educational Fund (MALDEF), The Leadership Conference on Civil and Human Rights/The Leadership Conference Education Fund (The Leadership Conference), the Asian American Justice Center (member of Asian American Center for Advancing Justice), the Asian American Legal Defense and Education Fund (AALDEF), the Poverty & Race Research Action Council (PRRAC) and National Women's Law Center (NWLC) – each acknowledge the Century Foundation's long record of promoting equal opportunity. However, this report embraces a false choice that is counter-productive to that goal. We are particularly disappointed that the report was published one week before the U.S. Supreme Court will hear oral argument on the University of Texas's diversity admissions policy. In these circumstances, we feel compelled to respond.

It is a perversion of the legacy of Dr. Martin Luther King Jr. to suggest, as the report does, that he rejected race-conscious affirmative action and measures to specifically address racial inequality broadly. While it is true that Dr. King made class injustice a central focus of his activism, it is beyond doubt that he also recognized the importance of squarely confronting racial injustice and calling it, quite directly, what it is.

The report presents a false choice between race and class. We agree that many universities must do more to expand opportunity for low-income students. But even if we succeed in building better pathways to socio-economic mobility, we will not fully achieve the benefits of diversity if racial isolation persists. Although we have made significant progress, the Court recognized in *Bartlett v. Strickland* (2009) that “[m]uch remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions.” As Justice Kennedy recognized in his pivotal concurrence in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), our national tradition is “to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain” in order to ensure “that opportunity is not denied on account of race.”

The best admissions policies consider both class and race. This is exactly what UT does: 60%-80% of UT's students are automatically admitted because they rank in the top 10% of their high school class. Many are from racially isolated and impoverished regions and low-resource school districts. The remaining candidates are reviewed holistically, taking into consideration *both* race *and* socio-economic status, among many other factors. Contrary to the report's claims, UT's policy is consistent with the Supreme Court's settled precedents, including *Grutter v. Bollinger* (2003).

We support race-neutral alternatives that work, but rigorous research demonstrates that such programs, by themselves, are not uniformly successful in ensuring racial diversity. For instance, research findings, highlighted in the [amicus brief](#) filed by 444 social scientists supporting UT in *Fisher*, demonstrate that if percentage plans, like UT's, replaced race-conscious admissions nationwide, many colleges would enroll far fewer African-American and

Latino students than they currently do. Moreover, universities that cannot consider race in admissions typically have a more hostile racial climate.

Race-neutral policies are clearly insufficient at top-flight institutions. Even the report concedes that flagship universities in Michigan and California have not recovered from severe declines in minority enrollment after their states outlawed race-conscious admissions. Despite embracing race-neutral alternatives, UCLA and Berkeley, for example, have 50% fewer African-American students than before California banned race-conscious admissions. As the report also acknowledges, our nation's leadership ranks are overwhelmingly filled by graduates of selective schools. It would be deeply detrimental to our nation's future competitiveness in the global economy if these pathways to leadership were not visibly open to students of all races.

UT implemented a wide range of race-neutral alternatives but found them lacking. Between 1997 and 2004, UT was prohibited from using race-conscious admissions as a result of an appellate court ruling in *Hopwood v. Texas* (1996), later overruled in effect by *Grutter*. During that period, UT took full advantage of race-neutral measures, but African Americans never comprised more than 4.5% of the first-year class — despite making up 12-13% of high school graduates in Texas. This significant discrepancy limited UT's ability to realize the educational benefits of diversity and was not conducive to training the leaders of tomorrow. The Constitution does not, as the report contends, require a state university to blind itself to obvious evidence that certain groups are systematically fairing poorly in admissions.

Minority enrollment levels prior to affirmative action bans should not function as *de facto* ceilings on diversity. The report suggests that schools should be satisfied if race-neutral alternatives produce the same level of underrepresented minority enrollment that existed prior to bans on race-conscious admissions. We disagree. At UT and elsewhere, prior minority enrollment levels were insufficient to generate meaningful opportunities for cross-racial interaction and to alleviate tokenism and racial isolation. We should not celebrate a return to those enrollment figures as “success,” especially in California, Texas, and other states where any such rebounds have failed to keep pace with increasing diversity among high school graduates.

African-American and Latino kids should not have to sue to obtain a fair shot at educational opportunity. The report claims that race-conscious affirmative action is unnecessary so long as we have the legal tools to punish civil rights violations. This unfairly puts the burden on African-American and Latino students and their parents to secure access to higher education by first litigating in the courts. Moreover, some of the most enduring problems in racial inequality are structural in nature, requiring multi-faceted, comprehensive solutions. High-achieving African-American and Latino children should not have to wait until all our country's social problems are solved before they can access higher education.

The report falsely implies that the primary goal of race-conscious admissions at UT is to admit upper-income minority students. This is inaccurate. UT makes serious efforts to recruit and admit low-income students of all races. For instance, UT has created numerous scholarship programs — like the Longhorn Opportunity Scholarship Program and First Generation Scholarship Program — specifically aimed at high schools in underserved communities. That said, UT seeks a class that is broadly diverse with students of *all* backgrounds and perspectives. Admitting minority students from higher-income backgrounds can also help to dispel stereotypes (for instance, that all students of color are poor). It is also important to

understand that having a higher income does not inoculate African Americans or Latinos from racial discrimination. Race can matter in profound ways for students from all backgrounds.

Individualized review of every factor *except* race demeans students whose race is an integral part of their experiences and identity. If the report's arguments are accepted by the Supreme Court, UT would be able consider virtually any aspect of a student's background as part of its holistic admissions process — *except* race. But pretending that race plays no role in students' identities does not make it so. Our Constitution was amended to fight racial inequality and should not now be interpreted to countenance it.

Opinion polls should not, as the report suggests, impede racial justice. Our Constitution contains key safeguards to protect the rights of minorities. As our history demonstrates, providing equal opportunity to individuals of all races — and, indeed, all income levels — has not always been popular. Polls are not a constitutional rule of decision, nor should they be.