

STRANGERS AT THE GATE:

ACADEMIC AUTONOMY, CIVIL RIGHTS, CIVIL LIBERTIES, AND UNFINISHED TASKS

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The National Association of College and University Attorneys (NACUA) was founded following a conference held between April 16 and April 19, 1960, some five generations after those days of April 12 and April 13, 1861, when the Battle of Fort Sumter opened the American Civil War. In both centuries, the sixth and seventh decades were times of tumult as the nation and its people struggled with the engrained political, economic, social, and moral accommodations that comprise the heritage of slavery.¹

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1. The line from slavery to segregation was short, and it was evident early on. In antebellum times, some states had adopted Slave Codes that “restricted the movements of Negroes; they forbade them to own firearms; they punished the exercise by them of the functions of a minister of the Gospel; they excluded them from other occupations; and they made it ‘a highly penal offense for any person, white or colored, to teach slaves. . . .’” Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 12 (1955) (quoting Senator Lyman Trumbull of Illinois, CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (addressing the Civil Rights Act of 1866). Senator Trumbull explained that “[s]ince the abolition of slavery, the Legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the States they have discriminated against them. They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the

The sixth and seventh decades of the twentieth century were also a time of other powerful, compelling movements. Totalitarian governments had recently usurped control of Eastern Europe and China, and politicians in Washington and across the nation, in the name of countering Communist subversion of the United States government, implemented a series of administrative and legislative actions designed to root out subversive organizations and to oust persons belonging to or associated with such organizations from public employment or positions of public influence.² Hard-pressed civil libertarians challenged statute after statute, action after action, to safeguard freedoms of speech and association and to establish rights of due process.³

existence of slavery, and before it was abolished.” *Id.* The legislation that replaced the Slave Codes came to be known as the Black Codes. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1968) (“Congress which approved the 1866 statute wished to eradicate the recently enacted Black Codes—laws which had saddled Negroes with ‘onerous disabilities and burdens, and curtailed their rights . . . to such an extent that their freedom was of little value’”) (quoting *The Slaughterhouse Cases*, 83 U.S. 36, 70 (1873)).

The Black Codes were precursors to de jure segregation, the Jim Crow laws that were very much in force when the National Association of College and University Attorneys was founded. *See* JERROLD M. PACKARD, *AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW* 84 (2003). Black Codes and Jim Crow segregation laws “had the same purpose and effect and social meaning: keeping blacks down and depriving them of equal status.” Akhil Reed Amar, *Becoming Lawyers in the Shadow of Brown*, 40 *WASHBURN L.J.* 1, 8 (2000) (“The 1860s Black Codes . . . were formally asymmetric: they imposed disabilities on blacks but not whites. Jim Crow was formally symmetric—blacks could not go to school X, but whites were likewise barred from attending school Y.”). If anything, the Jim Crow segregation codes were more rigid and pervasive than had been the Black Codes. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 7–8 (Oxford 2001).

2. The Communist takeover of Eastern Europe after World War II, together with the Chinese Communist push against the Nationalist Government, and the discovery of a spy ring in Canada, prompted an increase in “anti-subversive activity in the Legislative and Executive departments of the U.S. Government.” *Internal Security – Earlier Moves to Control Subversion*, 33 *CONG. DIG.* 132 (1954). By 1956, forty-two states, Alaska and Hawaii had enacted statutes penalizing “the advocacy of violent overthrow of the federal or state governments.” *Pennsylvania v. Nelson*, 350 U.S. 497, 514 n.4 (1956) (Reed, J., dissenting) (citing *DIGEST OF THE PUBLIC RECORD OF COMMUNISM IN THE UNITED STATES* 266–306 (Fund for the Republic 1955)).

3. *Wieman v. Updegraff*, 344 U.S. 183, 190–91 (1952) (challenging an Oklahoma statute that required each state officer and employee, as a condition of his employment, to take a “loyalty oath,” stating, *inter alia*, that he is not, and has not been for the preceding five years, a member of any organization listed by the Attorney General of the United States as “communist front” or “subversive”); *Id.* at 195, 198 (Frankfurter, J., concurring) (The Fourteenth Amendment limits “the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association”). Frankfurter quotes the testimony of Robert M. Hutchins, Associate Director of the Ford Foundation before the House Select Committee to Investigate Tax-Exempt Foundations and Comparable Organizations:

Now, the limits on this freedom [of scholars the freedom to think and to express themselves] cannot be merely prejudice, because although our

This was a time of monumental causes. The twentieth century civil rights struggles aimed to engage the conscience of the nation and to move government finally to redress the persistent indignities of de jure segregation and socially accepted racial discrimination.⁴ The civil

prejudices might be perfectly satisfactory, the prejudices of our successors or of those who are in a position to bring pressure to bear on the institution, might be subversive in the real sense, subverting the American doctrine of free thought and free speech.

Id. at 198. *See also* *Shelton v. Tucker*, 364 U.S. 479, 485–86 (1960) (“to compel a teacher to disclose his every associational tie is to impair that teacher’s right of free association”); *Greene v. McElroy*, 360 U.S. 474, 508 (1959) (due process violated where administrative agency had no statutory authority to terminate a contractor without providing an opportunity for hearing or confrontation of adverse witnesses).

Opponents of the civil rights movement did not hesitate to use the fear of subversives as an instrument of obstruction. They embroiled the NAACP in investigations premised, nominally, on allegations that it was a subversive organization. *See Shelton*, 364 U.S. at 480, 484 n.2 (noting that while the district court upheld an Arkansas statute that required each teacher or professor in the state “to file annually an affidavit listing without limitation every organization to which he has belonged or regularly contributed within the preceding five years,” the court also “held constitutionally invalid an Arkansas statute making it unlawful for any member of the National Association for the Advancement of Colored People to be employed by the State of Arkansas or any of its subdivisions”); DAVID ANDREW HARMON, *BENEATH THE IMAGE OF THE CIVIL RIGHTS MOVEMENT AND RACE RELATIONS: ATLANTA, GEORGIA, 1946-1981* at 84 (1996) (Georgia Attorney General Eugene Cook charged that the NAACP was a subversive organization whose membership was predominantly “South-hating white people with long records of affinity for, affiliation with, and participation in Communist, Communist-front, fellow-traveling and subversive organizations, activities and causes.”); Walter F. Murphy, *The South Counterattacks: The Anti-NAACP Laws*, 12 WEST. POL. Q. 371, 379 (1959) (Mississippi state officials declared that NAACP was a subversive organization). Additionally, the NAACP was attacked, somewhat more subtly, on the suspicion that communists might have infiltrated it. *See, e.g., Gibson v. Fla. Legislative Comm.*, 372 U.S. 539 (1963); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961). Such allegations carried some weight during the Cold War, for as late as 1965, large majorities of white Americans, of all ages, sections, religions, educational levels, occupations, incomes, geographic location, and political affiliations, believed that Communists had at least some influence on civil rights demonstrations. Hazel Erskine, *The Polls: Demonstrations and Race Riots*, 31 PUB. OP. Q. 655, 664 (1967).

4. The open manifestation of racial prejudice was still commonplace when NACUA was founded:

Across the South, some half a century ago, men and women, mostly young and black, challenged Jim Crow and the laws and administrators who enforced it, filling the jails and enduring extraordinary violence, intimidation, and harassment. Children made their way through gauntlets of cursing, spitting, screaming white parents. Activists, seeking to change the way things were, found themselves beaten in the train and bus stations, in the streets and parks, in the jails and prisons; churches, homes, schools, and buses were bombed and burned to the ground; in the rural South, “nigger hunts,” murder, terrorism, racial cleansing, and economic coercion and exploitation took their toll in black lives.

Leon F. Litwack, *“Fight the Power!” The Legacy of the Civil Rights Movement*, 75 J. S. HIST. 3 (2009). Professor Jesse H. Choper illustrated the “pervasiveness of the

libertarians sought to safeguard freedoms of thought and advocacy that lay at the very foundations of American popular government.⁵ The efforts of

American system of apartheid” at mid-century thusly:

In May of 1951, the state of Texas did not allow interracial boxing matches.

Florida did not permit white and black students to use the same editions of some textbooks.

In Arkansas, white and black voters could not enter a polling place in the company of one another.

In Alabama, a white woman was forbidden to nurse a black man in a hospital. North Carolina required racially separate washrooms in its factories. South Carolina required them in its cotton mills. Four states required them in their mines.

In six states, white and black prisoners could not be chained together.

In seven states, tuberculosis patients were separated by race.

In eight states, parks, playgrounds, bathing and fishing and boating facilities, amusement parks, racetracks, pool halls, circuses, theaters, and public halls were all segregated.

Ten states required separate waiting rooms for bus and train travelers.

Eleven states required Negro passengers to ride in the backs of buses and streetcars. Eleven states operated separate schools for the blind.

Fourteen states segregated railroad passengers on trips within their borders.

Fourteen states segregated mental patients.

And in May of 1951 seventeen states required the segregation of public schools, four other states permitted the practice if local communities wished it, and in the District of Columbia the custom had prevailed for nearly ninety years.

Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 25–26 (1984). Consider also, the remarks of President John F. Kennedy on June 11, 1963, the day that federalized Alabama National Guard troopers ordered Governor George Wallace to step aside and to allow two black students to register at the University of Alabama:

My fellow Americans, this is a problem which faces us all—in every city of the North as well as the South. Today there are Negroes unemployed, two or three times as many compared to whites, inadequate in education, moving into the large cities, unable to find work, young people particularly out of work without hope, denied equal rights, denied the opportunity to eat at a restaurant or lunch counter or go to a movie theater, denied the right to a decent education, denied almost today the right to attend a State university even though qualified. It seems to me that these are matters which concern us all, not merely Presidents or Congressmen or Governors, but every citizen of the United States.

This is one country. It has become one country because all of us and all the people who came here had an equal chance to develop their talents.

We cannot say to 10 percent of the population that you can't have that right; that your children cannot have the chance to develop whatever talents they have; that the only way that they are going to get their rights is to go into the streets and demonstrate. I think we owe them and we owe ourselves a better country than that.

John F. Kennedy, Radio and Television Report to the American People on Civil Rights, (June 11, 1963), transcript *available at* <http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/003POF03CivilRights06111963.htm>.

5. Justice Hugo Black put it thusly:

civil rights activists and civil libertarians changed the law, and the culture changed as well.

Changes intended to free a people and to protect a free people diminished the autonomy of the university, made it more accountable to government officials for academic decisions than ever before, and subjected elements of its mission to the vagaries of jurisprudential fashion. The convergent efforts of civil rights activists and civil libertarians gave rise to a series of decisions, regulatory changes, and legislation that can fairly be said to have had the most profound effect on the practice of college and university law of any developments during the first fifty years of NACUA's existence. A brief article can never do justice to topics rooted as deeply in the history of the United States as the Constitution itself, the Bill of Rights, or the Alien and Sedition Acts. This article seeks instead to review how changes forced by civil rights and civil liberties

History indicates that individual liberty is intermittently subjected to extraordinary perils. Even countries dedicated to government by the people are not free from such cyclical dangers. The first years of our Republic marked such a period. Enforcement of the Alien and Sedition Laws by zealous patriots who feared ideas made it highly dangerous for people to think, speak, or write critically about government, its agents, or its policies, either foreign or domestic. Our constitutional liberties survived the ordeal of this regrettable period because there were influential men and powerful organized groups bold enough to champion the undiluted right of individuals to publish and argue for their beliefs however unorthodox or loathsome. Today however, few individuals and organizations of power and influence argue that unpopular advocacy has this same wholly unqualified immunity from governmental interference. For this and other reasons the present period of fear seems more ominously dangerous to speech and press than was that of the Alien and Sedition Laws. Suppressive laws and practices are the fashion. The Oklahoma oath statute is but one manifestation of a national network of laws aimed at coercing and controlling the minds of men. Test oaths are notorious tools of tyranny. When used to shackle the mind they are, or at least they should be, unspeakably odious to a free people. Test oaths are made still more dangerous when combined with bills of attainder which like this Oklahoma statute impose pains and penalties for past lawful associations and utterances.

Wieman, 344 U.S. at 192–93 (Black, J., concurring); *See also* Justice Harlan writing for the majority:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the “liberty” assured by the Due process clause of the Fourteenth amendment, which embraces freedom of speech Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

NAACP v. Alabama, 357 U.S. 449, 460–61 (1958) (citations omitted).

activists drew attorneys from the remote periphery of college and university affairs—called upon occasionally to assist with routine business matters—inward to become essential participants in college and university governance and administration. Furthermore, it seeks to suggest why the controversies of the NACUA's first fifty years are likely to persist well into its second fifty years.

The article comprises four sections. Section I focuses upon three lines of cases as they stood when NACUA was formed, and suggests how civil rights, civil liberties and academic freedom fell into conflict. Section II outlines the ways in which civil rights and civil libertarian activism gave rise to pervasive regulation of internal college and university affairs. Section III reviews the circumstances that have politicized adjudication and increased the likelihood of continuing litigation challenging college and university activities. Section IV examines the race-related disparities that still bedevil disfavored minority communities and hamper efforts at self-improvement, and it predicts that the restrictive equal protection jurisprudence of the Burger, Rehnquist and Roberts Courts will be put aside because they constrain the ability of the nation to meet the demands presented by demographic changes that are already well advanced and that cannot be ignored.

I. CONSTITUTIONAL LITIGATION BRINGS GOVERNMENT REGULATION ONTO CAMPUS.

Constitutional litigation initiated by advocates of civil rights, civil liberties and academic freedom brought government regulation onto campus. The eventual sweep of the incipient changes in constitutional law was scarcely obvious when the attorneys who founded NACUA met in April, 1960, but the portents of change for higher education were already hard upon them. Three then-recent lines of cases had begun to converge: one proscribed racial discrimination in public university admissions;⁶ another established student due process rights in disciplinary matters;⁷ the third recognized that political investigations into what was studied and what taught interfered with “freedom in the community of American universities” and threatened to straightjacket the freedom of inquiry and teaching needed to deepen understanding of society, to inform social change and to protect the wellbeing of the nation.⁸

6. *Infra*, note 10.

7. *Infra*, note 13.

8. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities

When the NACUA founders first gathered, the longstanding effort by the National Association for the Advancement of Colored People (NAACP) and the NAACP Legal Defense Fund had achieved significant jurisprudential progress towards disassembling through litigation the equal protection doctrines that undergirded segregation.⁹ *Brown v. Board of Education* had overruled *Plessy v. Ferguson* insofar as concerned public education.¹⁰ *Brown* had already been applied to secure court orders

would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Id.

9. Vance Knapp and Bonnie Kae Grover, *The Corporate Law Firm—Can It Achieve Diversity?*, 13 NAT'L BLACK L.J. 298, 300 (1994). “[A]t the request of the NAACP Legal Defense Fund, Charles Houston, Vice-Chancellor of Howard [University], had devised a legal strategy centering around carefully chosen test cases. The strategy would challenge the ‘Separate but Equal’ system in two stages. The first stage would establish the disparity between a fully funded graduate program and a Jim Crow program. The second stage would build upon those precedents, along with empirical data, to persuade the United States Supreme Court to declare desegregation illegal.” *Id.* For cases that marked the success of the first stage, *see, e.g.*, *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents*, 339 U.S. 637, 641–42 (1950); *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948); *Mo. ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). For cases that marked the success of the second stage, *see Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (*Brown I*) and *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294 (1955) (*Brown II*). *See also* Murphy, *supra* note 3, at 373.

[T]he shrewd tactics of Marshall and his staff yielded phenomenal success.

Some of the more sophisticated voting and jury restrictions together with racially restrictive real estate covenants were struck down, and the second half of the ‘separate but equal’ formula was enforced to a far greater extent than ever before. Finally, legally sanctioned segregation itself fell before this attack, first in the public schools, later in public recreational facilities, and then in public transportation.

Id.

10. *Plessy v. Ferguson*, 163 U.S. 537 (1896), arose as a challenge to a Louisiana statute which provided that:

[A]ll railway companies carrying passengers in their coaches in this state, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: provided, that this section shall not be construed to apply to street railroads. No person or persons shall be permitted to occupy seats in coaches, other than the ones assigned to them, on account of the race they belong to.

Id. at 540 (citing 1890 La. Acts No. 111, p. 152, § 1). The plaintiff, Homer Plessy, had purchased a first class ticket and seated himself in a coach designated for whites, but was forcibly ejected from the carriage and arrested. *Id.* at 541–42. The Court addressed the Fourteenth Amendment question thusly:

directing public authorities to stand aside and to unblock college and university doors that had previously been barred by prejudice arrayed in the trappings of academic judgment.¹¹ All the same, real progress in dismantling segregation and undoing socially accepted discrimination remained meager.¹²

[T]he case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

Id. at 550–51. In opening his dissent, the first Justice John Marshall Harlan characterized the statute as requiring “separate but equal accommodations for white and colored persons,” and the phrase “separate but equal” was born. *Id.* at 552 (Harlan, J., dissenting); *cf. Brown I*, 347 U.S. at 495 (overruling, insofar as concerns public education, the *Plessy* doctrine that equal protection requirements may be met by segregated facilities so long as the facilities provided to each race are equal) (holding that “[s]eparate educational facilities are inherently unequal”).

11. *See, e.g., Lucy v. Adams*, 134 F. Supp. 235, 239 (N.D. Ala. 1955) (enjoining the University of Alabama dean of admissions from “denying the plaintiffs and others similarly situated the right to enroll in the University of Alabama and pursue courses of study thereat, solely on account of their race and color”); *Tureaud v. Bd. of Sup’rs of La. State Univ. and Agric. and Mech. Coll.*, 116 F. Supp. 248, 251 (E.D. La. 1953) (enjoining the Board “from refusing on account of race or color to admit the plaintiff, and any other Negro citizen of the state similarly qualified and situated, to the Junior Division of Louisiana State University for the purpose of pursuing the combined arts and sciences and law course offered by the University”).

12. Less than one percent of black school children attended integrated schools. “The decision was widely and openly flouted Political and social forces (both local and national) did not support desegregation, providing no pressure for compliance. The Supreme Court, acting alone, lacked the power to implement *Brown*.” Gerald N. Rosenberg, *Tilting at Windmills: Brown II and the Hopeless Quest to Resolve Deep-Seated Social Conflict Through Litigation*, 24 LAW & INEQ. 31, 35 (2006). The record was little better in higher education. In the Fall 1965 term, black enrollments nationwide amounted to 4.6% of the total, while “other nonwhite,” comprising ethnic Asians, Latinos, and Indians, amounted to 1.1%. JAMES S. COLEMAN ET AL., U.S. DEP’T OF HEALTH, EDUCATION AND WELFARE: EQUALITY OF EDUCATIONAL OPPORTUNITY 370, tbl. 5.1.1, (1966), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/33/42/82.pdf. Tellingly, except in the South, where black enrollments comprised 11.5% of total enrollment, and in the Southwest where combined minority enrollments reached 6%, more than 95% of the enrollment nationwide was white. *Id.* at 370, tbl. 5.1.2. The South educated 49% of all black students who pursued postsecondary education. *Id.* In New England, enrollment was 99% white; in the Rocky Mountain states, whites comprised 98% of the enrollment, and on the plains, 97%. *Id.* Enrollments for “other nonwhite minorities” exceeded 1% of the total in four regions: the Great Lakes (1.25%); the Southwest

Not long before the April 1960 meeting, twenty-nine black students enrolled at the Alabama State College for Negroes gathered, “according to a prearranged plan, entered as a group a publicly owned lunch grill located in the basement of the county courthouse in Montgomery, Alabama, and asked to be served.”¹³ Over the next few days, ignoring directives against such actions, the students repeatedly engaged in public demonstrations, and some six weeks before the NACUA founders gathered, the leaders of the students were expelled.¹⁴ The ensuing litigation confirmed that students enrolled at public colleges and universities enjoyed constitutional rights to procedural due process when threatened with expulsion.¹⁵

The example of student activism in furtherance of civil rights inspired thousands of other young people across the nation to advance their causes, however varied they might be, by banding together to confront authority, including university authorities.¹⁶ The efforts of the civil rights activists melded with those of civil libertarians as student activists pressed claims for rights to procedural due process and free expression.¹⁷

(1.52%); the Rocky Mountains (1.10%); and the Far West (2.78%). *Id.*

13. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 152 n.3 (5th Cir. 1961) *cert. denied*, 368 U.S. 930 (1961).

On the same date, John Patterson, as Governor of the State of Alabama and as chairman of the State Board of Education, conferred with Dr. Trenholm, a Negro educator and president of the Alabama State College, concerning this activity on the part of some of the students. Dr. Trenholm was advised by the Governor that the incident should be investigated, and that if he were in the president’s position he would consider expulsion and/or other appropriate disciplinary action.

Id.

14. *Id.* at 151–52 n.2.

15. *Id.* at 157–58; *See also Goss v. Lopez*, 419 U.S. 565, 576 n.8 (1975) (“Since the landmark decision of the Court of Appeals for the Fifth Circuit in [*Dixon*], the lower federal courts have uniformly held the Due Process Clause applicable to decisions made by tax-supported educational institutions to remove a student from the institution long enough for the removal to be classified as an expulsion.”).

16. Mario Savio, leading speaker of the University of California, Berkeley Free Speech Movement, put it thusly:

Probably the most meaningful opportunity for political involvement for students with any political awareness is in the civil rights movement. Indeed, there appears to be little else in American life today which can claim the allegiance of men. Therefore, the action of the administration, which seemed to the students to be directed at the civil rights movement, was felt as a form of emasculation, or attempted emasculation. The only part of the world which people could taste, that wasn’t as flat and stale as the middleclass wasteland from which most of the University people have come, that part of the world was being cleanly eliminated by one relatively hygienic administrative act. The student response to this “routine directive” was outraged protest.

MARIO SAVIO, EUGENE WALKER & RAYA DUNAYEVSKAYA, *THE FREE SPEECH MOVEMENT AND THE NEGRO REVOLUTION* 15 (1965).

17. *See, e.g., Grossner v. Trustees of Columbia*, 287 F. Supp. 535 (S.D.N.Y.

Not quite three years prior to the meeting of the attorneys who created NACUA, the Supreme Court confronted another in a series of state statutes seeking to bar from public employment persons belonging to “subversive organizations.” *Sweezy v. New Hampshire* held substantial interest for college and university attorneys because it involved interrogation, by the New Hampshire Attorney General under New Hampshire’s Subversive Activities Act, of a faculty member about the content of a lecture delivered to a university class.¹⁸

Concerned that such an investigation “inevitably tends to check the ardor and fearlessness” with which scholars pursue their inquiries, Justice Felix Frankfurter elaborated a rationale to exclude “governmental intervention in the intellectual life of a university.”¹⁹ To illustrate what was at stake in the litigation, Justice Frankfurter borrowed liberally from a statement crafted by South African university leaders opposed to government-imposed racial segregation of their institutions.²⁰ He focused on the observation that

1968) (students motivated, *inter alia*, by opposition to university plans to demolish low income housing in a predominantly black neighborhood in order to construct a new gymnasium, which, though open to neighborhood residents, would provide separate entrances for residents and students); *Jones v. State Bd. of Educ. of Tenn.*, 279 F. Supp. 190 (M.D. Tenn. 1968) (students placing worms in food to protest food service, disrupting meetings, confronting in public university president and calling him names); *Goldberg v. Regents of the Univ. of Cal.*, 57 Cal. Rptr. 463 (Cal. Ct. App. 1967) (suit challenging suspension brought by students participating in University of California, Berkeley Free Speech Movement which was said to be fueled, in part, by student reactions to administrative limitations on demonstrations); *Cox v. Louisiana*, 379 U.S. 536, 545–46 (1965) (prosecution for disturbing the peace based upon leadership of “a group of young college students who wished ‘to protest segregation’ and discrimination against Negroes and the arrest of 23 fellow students. They assembled peaceably at the State Capitol building and marched to the courthouse where they sang, prayed and listened to a speech” urging participants to go to segregated restaurants, to order a meal and to remain seated for one hour if refused service); *Knight v. State Bd. of Educ.*, 200 F. Supp. 174 (M.D. Tenn. 1961) (students suspended from Tennessee A & I University (now Texas A & M University at Kingsville) based upon allegations of their arrests in Mississippi while participating in the freedom rides in Mississippi to protest the segregation laws and practices of that state at interstate bus terminals and facilities entitled to due process hearing).

18. *Sweezy* 354 U.S. at 243–44 (1957). *See also* *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589 (1967) (interrogation of university professor and staff); *Shelton v. Tucker*, 364 U.S. 479 (1960) (university professor co-plaintiff in consolidated case); *Wieman v. Updegraff*, 344 U.S. 183 (1952) (university professor and staff).

19. *Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring).

20. CONFERENCE OF REPRESENTATIVES OF THE UNIVERSITY OF CAPE TOWN AND THE UNIVERSITY OF WITWATERSRAND, JOHANNESBURG, THE OPEN UNIVERSITIES IN SOUTH AFRICA (1957). The Conference of Representatives of the University of Cape Town and the University of the Witwatersrand resolved that:

- (i) It is opposed in principle to academic segregation on racial grounds;
- (ii) It believes that separate academic facilities for non-Europeans and Europeans could not be equal to those provided in an open university;
- (iii) It is convinced that the policy of academic non-segregation, which as far

colleges and universities should not be used to propound the views preferred by the state or nonacademic institutions or particular social classes, but should enjoy “the right to examine, question, modify or reject traditional ideas and beliefs,” and he quoted with approval the premise that colleges and universities must be free to determine for themselves “on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”²¹

The phrasing that Justice Frankfurter borrowed from the South Africans has often served to suggest a range of academic decisions that are entitled to degrees of judicial deference and that are to be accommodated, to the extent possible, when applying the First and Fourteenth Amendments to controversies between colleges and universities and their students or employees.²²

as possible the University of Cape Town has always followed, accords with the highest university ideals and has contributed to inter-racial understanding and harmony in South Africa.

Id. at 4 (quoting a December 12, 1956 Council of the University of Cape Town Resolution). See also Richard H. Hiers, *Institutional Academic Freedom—A Constitutional Misconception: Did Grutter v. Bollinger Perpetuate the Confusion?*, 30 J.C. & U.L. 531, 533–35 (2004) (discussing the context of the South African statement).

21. *Sweezy*, 354 U.S. at 262–63 (Frankfurter, J., concurring) (“It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”) (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA, at 10–12).

22. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (holding that a state university has a compelling interest in diversity for purposes of Fourteenth Amendment equal protection analysis) “The freedom of a university to make its own judgments as to education includes the selection of its student body.” *Id.* (citing *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 312 (1978)). See also *Grutter*, 539 U.S. at 362–64 (Thomas, J., concurring in part and dissenting in part) (tying the idea of the judicial “idea of ‘educational autonomy’ grounded in the First Amendment” to Justice Frankfurter’s concurrence in *Sweezy*); *Bd. of Regents of the Univ. of Wis. v. Southworth*, 529 U.S. 217, 238–39 (2000) (Souter, J., concurring in judgment) (noting that Justice Frankfurter’s views in *Sweezy* were neither adopted nor rejected by the majority of the Court in that case) (“While we have spoken in terms of a wide protection for the academic freedom and autonomy that bars legislatures (and courts) from imposing conditions on the spectrum of subjects taught and viewpoints expressed in college teaching . . . we have never held that universities lie entirely beyond the reach of students’ First Amendment rights.”); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (assuming, *arguendo*, a Fourteenth Amendment substantive due process right) (citing, *inter alia*, the majority and concurring opinions in *Sweezy* for the principle that “academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also, and somewhat inconsistently, on autonomous decision-making by the academy itself”); *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (stipulating that the Court did not question “the right of the University to make academic judgments as to how best to allocate scarce resources or ‘to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study’”); *but see* *Univ. of*

The three lines of authority that were newly emergent when the NACUA founders gathered in April of 1960 revealed a profound, ineluctable, and ironic conflict. The ideal of autonomy of colleges and universities from government action asserted by South African academics to oppose segregation had to be modified in order to end segregation at colleges and universities in the United States. In order to extirpate invidious discrimination from the American college and university, and in order to curtail personnel or student discipline decisions motivated by considerations of political convenience rather than academic judgment,²³ civil rights activists and civil libertarians had to break down in degrees the very autonomy that the courts were erecting to protect the American college and university from the chilling effects of Cold War anti-subversive legislation.²⁴

Penn. v. EEOC, 493 U.S. 182, 198 (1990) (characterizing *Sweezy* as involving content-based government regulations and noting that the subpoena of tenure files at issue in that litigation did not involve “governmental attempts to influence the content of academic speech through the selection of faculty or by other means” and that the release of the files to EEOC investigators was neither “intended to” nor would “in fact direct the content of university discourse toward or away from particular subjects or points of view.”).

23. The court records for *Dixon* establish political interference with academic decision-making with respect to the discipline of student civil rights activists. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 152 n.3 (5th Cir. 1961). By the mid-fifties, faculty members believed that political considerations were affecting administrative action. A report published in 1956 provides a measure of insight into the expectations of faculty members. *Notes on Research and Teaching: The Climate of Opinion and the State of Academic Freedom*, 21 AM. SOC. REV. 353 (1956). Most of the 125 participants in the poll of sociologists served at major private metropolitan universities. Although few had direct knowledge of incidences in which faculty member contracts were ended or not renewed because of their associations or activism, and although few believed that their own institutions would do such things, substantial majorities believed that faculty members contracts were not renewed because the individuals had refused to testify before investigating committees, had been identified as Communists or former communists or were identified as either too liberal or conservative by their administrations. *Id.* at 355. Nearly 29% of the respondents claimed to have direct knowledge that colleagues had been “spoken to” regarding their views or involvement in controversial issues, and 28% claimed direct knowledge that their institution discouraged invitation of liberal speakers. *Id.* at 356, tbl.5. Whether or not the participants in the poll had good information, the fact that the poll was undertaken and its results published in a leading academic journal reveals the concerns of the authors, as well as the editors’ judgment that the piece would hold the attention of their readership.

24. The Court’s concerns with anti-subversive legislation were not limited to the suppression of First Amendment freedoms for educators or for its application to universities or schools. *See, e.g.*, *Greene v. McElroy*, 360 U.S. 474, 508 (1959); *Kent v. Dulles*, 357 U.S. 116 (1958) (denial of passport based upon alleged Communist beliefs and associations not authorized under statute and implicated constitutional liberty interest in freedom to travel); *Speiser v. Randall*, 357 U.S. 513 (1958) (denial of state property tax exemption for failure to subscribe loyalty oaths); *Konigsberg v. State Bar*, 353 U.S. 252, 273–74 (1957) (remanding for reconsideration complaint that California State Bar arbitrarily denied admission for want of character) (“[T]he mere

As the Courts became more willing to set aside governmental actions that enforced or sustained segregation or that infringed fundamental constitutional rights, and as public opinion became more supportive,²⁵ the way became clear for litigation, statutes and regulations in pursuit of the most laudable objectives that tended, nevertheless, to delimit the bases and the procedures for college and university decision making.

II. ADVOCACY GIVES RISE TO PERVASIVE REGULATION

Advocacy gave rise to the pervasive regulation of college and university relations with personnel and students, and sometimes, even of academic matters. Civil rights activists and civil libertarians turned initially to the federal judiciary to declare and to implement constitutional rights in order to secure relief from state laws and practices that discriminated against blacks or other minorities or that infringed rights to free speech, free association, due process, or equal protection. As the political climate changed, they sought to move the federal executive and legislative branches into action to curtail private discrimination.

Their endeavors have been stunningly successful. They expanded the protections from prejudiced or arbitrary action to numerous groups and set the modern example for concerted action to change government policy and social attitudes.²⁶ They created an environment in which college and

fact of Konigsberg's past membership in the Communist Party, if true, without anything more, is not an adequate basis for concluding that he is disloyal or a person of bad character. A lifetime of good citizenship is worth very little if it is so frail that it cannot withstand the suspicions which apparently were the basis for the Committee's action.").

25. By the mid-sixties, public opinion polling suggested a broadening antipathy towards segregationist reaction to black civil rights activists, albeit with reservations about public protest and distaste for rioting. Erskine, *supra* note 3, at 657–62. By the late-sixties, the public had become more tolerant of peaceful dissent. Hazel Erskine, *The Polls: Freedom of Speech*, 34 PUB. OP. Q. 483, 491, 494 (1970).

26. The protean example set by the NAACP and the NAACP Legal Defense Fund in coordinating selective litigation, organization, fundraising and political activism in order to force social change has been emulated often by other movements in the United States and other nations. See Helen Hershkoff, *Public Law Litigation: Lessons and Questions*, 10 HUM. RIGHTS REV. 157, 162 (2009) (noting that advocacy groups often model themselves on the NAACP). "[P]ublic law litigation in the USA through its professional and grassroots organization has constituted a political practice that generates resources, allies, and public sympathy." *Id.* See also Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2028 (2008) ("The success of these organizations is apparent on multiple levels. They have grown substantially in size, scale, and diversity. Their influence has been critical in protecting fundamental rights, establishing legal principles, developing social policy, and raising public awareness.").

Nor is the use of litigation to effect social change solely a liberal practice. See Hershkoff, *supra*, at 163; Anthony Paik et al., *Lawyers of the Right: Networks and Organization*, 32 LAW & SOC. INQUIRY 883, 884 (2007) ("Conservative lawyers have created scores of organizations devoted to their causes, but relatively little scholarly

university dealings with students and staff implicated legally enforceable rights at many turns, some arising from the Constitution, others from statute or regulation, and sometimes in matters that bore directly upon the exercise of academic judgment.

Decisions arising from the civil rights movement or from the efforts of civil libertarians established the principle that the power of government should not be used to enforce private discrimination,²⁷ transformed equal

attention has focused on the entrepreneurs who built these organizations or on the particular contributions of lawyers.”); John C. Calmore, “*Chasing the Wind*”: Pursuing Social Justice, Overcoming Legal Miseducation, and Engaging in Professional Re-Socialization, 37 *Loy. L.A. L. Rev.* 1167, 1169 (2004) (“[C]onservative and reactionary advocates have effectively rearticulated and redeployed the term ‘public interest.’ These advocates now oppose many of the causes that the earlier public interest lawyers sought to advance.”) (citation omitted); John P. Heinz et al., *Lawyers for Conservative Causes: Clients, Ideology, and Social Distance*, 37 *LAW & SOC’Y REV.* 5, 6 (2003) (“Scholars have produced extensive research on lawyers who serve causes associated with America’s political left, but much less empirical work has focused on the characteristics of lawyers who serve conservative causes . . .”).

Public interest litigation provides an effective means to force consideration “whether or how a government policy or program shall be carried out.” Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 *HARV. L. REV.* 1281, 1295 (1976). In particular, recourse to the courts empowers persons who cannot otherwise influence institutions to force them to reform practices that activist organizations find objectionable. Charles F. Sabel & William Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 *HARV. L. REV.* 1015, 1056 (2004); Andrew P. Morriss, *Litigating To Regulate: Massachusetts v. Environmental Protection Agency*, 2007 *CATO SUP. CT. REV.* 193, 193–94 (2007) (noting “a broader trend toward regulation through litigation. A wide range of interest groups, including state politicians, private interest groups, and federal regulators, is increasingly using the courts as a vehicle to impose regulatory measures the interest groups cannot obtain from legislatures and agencies.”). It should be noted that this form of activism has a history as long as the nation’s history. De Tocqueville observed over one hundred and seventy years ago that:

Armed with the power of declaring the laws to be unconstitutional, the American magistrate perpetually interferes in political affairs. He cannot force the people to make laws, but at least he can oblige them not to disobey their own enactments and not to be inconsistent with themselves Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate; hence all parties are obliged to borrow the ideas, and even the language, usual in judicial proceedings in their daily controversies.

ALEXIS DE TOCQUEVILLE, 1 *DEMOCRACY IN AMERICA*, bk. xvi, pt. 1, 233–34 (H.C. Mansfield ed., Barnes & Noble 2003) (1862).

27. See e.g., *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 151–52 (1970) (“Few principles of law are more firmly stitched into our constitutional fabric than the proposition that a State must not discriminate against a person because of his race or the race of his companions, or in any way act to compel or encourage racial segregation.”); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724–26 (1961) (municipal authority violated the Equal Protection Clause by financing with municipal support and operating as a public facility a parking structure one of whose tenants operated a segregated restaurant and held under a lease that required compliance with state and local law but that did not require equal access to the restaurant).

protection jurisprudence,²⁸ enjoined discriminatory denial of college and university admission,²⁹ applied equal protection analysis to the missions of single sex colleges and universities,³⁰ expanded the reach of the due

By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so “purely private” as to fall without the scope of the Fourteenth amendment.

Id. at 725; *Barrows v. Jackson*, 346 U.S. 249, 258 (1953) (holding that any attempt to enforce a restrictive covenant against a signer who declined to incorporate the covenant in a subsequent instrument of transfer would involve the state action violating the Equal Protection Clause); *Shelley v. Kraemer*, 334 U.S. 1, 13, 20 (1948) (holding that while voluntary compliance with a racial restrictive covenant presents no action by the state that might violate the Fourteenth Amendment, any attempt to enforce the covenant against willing buyers and sellers through the courts constitutes state action and violates the Amendment).

28. *Brown v. Bd. of Educ.* 347 U.S. 483, 495 (1954) (*Brown I*) (holding that, insofar as concerns public education, the *Plessy* doctrine that equal protection requirements may be met by segregated facilities so long as the facilities provided to each race are equal violated the Fourteenth Amendment).

29. *See, e.g., Meredith v. Fair*, 306 F.2d 374 (5th Cir. 1962), *cert. denied*, 371 U.S. 828 (1962), *enforced*, 313 F.2d 532 (5th Cir. 1962) (vacating two state court decrees barring the University of Mississippi from admitting a black student and enjoining his admission by the university); *Kirstein v. Rector & Visitors of Univ. of Va.*, 309 F. Supp. 184 (E.D. Va. 1970) (the Commonwealth of Virginia may not now deny to women, on the basis of sex, educational opportunities at the Charlottesville campus that are not afforded in other institutions operated by the state) The Equal Protection Clause “prohibit[s] prejudicial disparities before the law. This means prejudicial disparities for all citizens—including women.” *Id.* (quoting *White v. Crook*, 251 F. Supp. 401, 408 (M.D. Ala. 1966) (holding that women may not be denied the right to jury service)); *Holmes v. Danner*, 191 F. Supp. 394, 410 (M.D. Ga. 1961) (enjoining the University of Georgia from, *inter alia* “subjecting Negro applicants to requirements, prerequisites, interviews, delays and tests not required of white applicants for admission; and from making the attendance of Negroes at said University subject to terms and conditions not applicable to white persons; and from failing and refusing to advise Negro applicants promptly and fully regarding their applications, admission requirements and status as is done by the defendant and his associates in the case of white applicants; and from continuing to pursue the policy, practice, custom and usage of limiting admissions to said University to white persons”); *Lucy v. Adams*, 134 F. Supp. 235, 239 (N.D. Ala. 1955) (enjoining the University of Alabama dean of admissions from “denying the plaintiffs and others similarly situated the right to enroll in the University of Alabama and pursue courses of study thereat, solely on account of their race and color”); *Tureaud*, 116 F. Supp. 248 at 251 (issuing a temporary injunction enjoining the Board from refusing on account of “race and color” to admit the plaintiff, and any other Negro citizen of the state similarly qualified and situated, “to the Junior Division of Louisiana State University for the purpose of pursuing the combined arts and sciences and law course offered by the University”).

30. *United States v. Virginia*, 518 U.S. 515, 542–46 (1996) (holding that where the state failed to prove that admitting women to the Virginia Military Academy would compromise the institutional mission or its use of adversative pedagogical approaches); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 727–31 (1982) (holding that state may

process clause to protect students³¹ and government employees,³² affirmed the use of § 1983 to pursue damage remedies against public officials whose actions in office or in the course of employment infringed constitutionally protected rights,³³ confirmed the use of § 1981 to challenge private

not justify maintenance of a single-sex program as compensation for prior discrimination against the disfavored sex or where there is no showing that exclusion of the opposite sex is essential for program effectiveness).

31. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158–59 (5th Cir. 1961) (holding that the students disciplined for participation in a lunch counter sit-in and civil rights demonstrations at state and municipal government buildings entitled to notice of specific charges, witnesses and their evidence, together with an opportunity to present their own statements, witnesses and evidence); *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535, 547, 552–53 (S.D.N.Y. 1968) (holding that although receipt of public money does not convert private university discipline into government action, the challenged regulations, which provided, *inter alia*, that “[p]icketing or demonstrations may not be conducted within any University building,” and the challenged disciplinary action would have met constitutional standards; the regulations were neither vague nor unreasonable nor was the process of applying the rules fundamentally unfair); *Knight v. State Bd. of Educ.*, 200 F. Supp. 174, 182 (M.D. Tenn. 1961) (holding that students suspended from Tennessee A & I University after an *ex parte* hearing, without notice to the plaintiffs based upon allegations of their arrest in Mississippi while participating in the freedom rides in Mississippi to protest the segregation laws and practices of that state at interstate bus terminals and facilities entitled to due process hearing); *Goldberg v. Regents of the Univ. of Cal.*, 57 Cal.Rptr. 463, 473–74 (Cal. Ct. App. 1967) (holding that the students participating in University of California, Berkeley Free Speech Movement protests were entitled to due process hearing).

32. The constitutional employment cases from the civil rights era have an attenuated relation to the civil rights movement. *But see Shelton v. Tucker*, 364 U.S. 479, 484 n.2 (1960) (noting that while the district court upheld an Arkansas statute that required each teacher or professor in the state “to file annually an affidavit listing without limitation every organization to which he has belonged or regularly contributed within the preceding five years,” district court also “held constitutionally invalid an Arkansas statute making it unlawful for any member of the National Association for the Advancement of Colored People to be employed by the State of Arkansas or any of its subdivisions.”). In the course of deciding cases involving McCarthy era requirements that public employees accept loyalty oaths and disclose membership, the Court found it “sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.” *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952). *See also Cafeteria Workers v. McElroy*, 367 U.S. 886, 897–98 (1961) (although, absent statute or regulation, government employment is at-will, an employee may not be dismissed on arbitrary or discriminatory grounds). Although the facts at bar in *Bd. of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972), did not involve civil rights activists, these cases established the principle that termination of public employment might implicate due process requirements, not only where the action violated substantive due process guarantees against arbitrary and capricious state action or where it infringed upon protected speech or associational rights, but also where it deprived a public employee of liberty interests or state-created property interests.

33. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (“The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law, ‘whether that action be executive, legislative, or judicial.’”) (quoting

discrimination in admission or employment policies,³⁴ confirmed protections under the due process clause for advocates of social or political change,³⁵ reinforced protections under the free speech clause for advocates of social or political change,³⁶ and extended protections under the freedom

Ex parte Va., 100 U.S. 339, 346 (1879)); *Adickes*, 398 U.S. 144, 149–52 (1970) (reversing a grant of summary judgment).

Although this is a lawsuit against a private party, not the State or one of its officials, our cases make clear that petitioner will have made out a violation of her Fourteenth Amendment rights and will be entitled to relief under § 1983 if she can prove that a Kress employee, in the course of employment, and a Hattiesburg policeman somehow reached an understanding to deny Miss Adickes service in The Kress store, or to cause her subsequent arrest because she was a white person in the company of Negroes.

Id. at 152. *See also* *Monroe v. Pape*, 365 U.S. 167, 184 (1961) (§ 1983 provides recourse against government actors for infringement of constitutional rights arising under color of state law) (“Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken ‘under color of’ state law”).

34. *Runyon v. McCrary*, 427 U.S. 160, 172 (1976) (admissions); *Johnson v. R.R. Express Agency*, 421 U.S. 454, 459–60 (1975) (employment); *Alfred H. Mayer Co.*, 392 U.S. at 441–42 (employment) (overruling *Hodges v. United States*, 203 U.S. 1 (1906)).

35. *Garner v. Louisiana*, 368 U.S. 157, 160, 163 (1961) (holding that the convictions were “so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment.”) In this case, Southern University students who sought to be served at lunch counters reserved for white patrons, although they “did and said nothing except that one of them stated that she would like a glass of iced tea,” were arrested [and convicted] for disturbing the peace “by sitting there.” *Id.*

36. *Healy v. James*, 408 U.S. 169, 181, 185 (1972) (holding that a college or university’s denial of official recognition, without justification, to college organizations burdens or abridges student associational rights) (a university could not ban its students from forming a chapter of Students for a Democratic Society based upon its disagreement with views espoused by parent organization); *Cox*, 379 U.S. 536, 545–46 (1965); *Edwards v. South Carolina*, 372 U.S. 229, 229–33, 236 (1963) (holding that “The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views.”) (One hundred and eighty-seven black high school and college students walked in small groups to the state capitol grounds, and there still in the same small groups, walked single file or two-by-two in an orderly way through the grounds, each group carrying placards bearing such messages as “I am proud to be a Negro” and “Down with segregation,” without obstructing traffic, although drawing a group of onlookers; when told to disperse, the students listened to a “religious harangue” by one of their leaders, and loudly sang “The Star Spangled Banner” and other patriotic and religious songs, while stomping their feet and clapping their hands; they were then arrested); *Dickey v. Ala. State Bd. of Educ.*, 273 F. Supp. 613, 616–18 (M.D. Ala. 1967) (state school officials cannot infringe on their students’ right of free and unrestricted expression as guaranteed by the Constitution of the United States where the exercise of such right does not materially and substantially interfere with requirements of appropriate discipline in the operation of the school). In *Dickey*, the institution established a rule to the effect that the student paper could not publish editorials that were critical of the state governor or legislature, and it expelled the editor of the student paper who circumvented the rule by publishing a blank space where the editorial would have been and secured publication of the editorial in a local newspaper

of association clause to organizations dedicated to advocacy of social or political change.³⁷

The successes achieved through such litigation opened the way for constitutional challenges to a wide range of college and university practices. Individuals and interest groups litigated to establish student rights to use campus facilities for religious activities,³⁸ to engage in commercial activities on campus,³⁹ to carry firearms on campus,⁴⁰ to employ disparaging speech,⁴¹ to receive student fee support for religious

of general circulation—the editorial defended a student publication that contained, *inter alia*, excerpts from the speeches of Bettina Aptheker, a Communist who gained notoriety at the University of California, and Stokely Carmichael, president of the Student Non-Violent Coordinating Committee, and an advocate of violent revolution and black power.

37. *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 466 (1958) (a state may not require advocacy organization to disclose the identities of its members or contributors); *La. ex rel. Gremillion*, 366 U.S. 293, 296 (1961) (disclosure of organizational membership lists infringes associational rights where there is a likelihood that disclosure will result in reprisals against and hostility to the members); *NAACP v. Button*, 371 U.S. 415, 438 (1963) (a state may not, in the guise of regulating the legal profession, interfere with “the right of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights”).

38. *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (“Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulations of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards.”).

39. *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 472, 475 (1989) (upholding a prohibition of student sponsored parties at which an outside merchant sought to sell china, crystal and silverware to university students in view of the substantial government interests in the university setting in “promoting an educational rather than commercial atmosphere on [campus], promoting safety and security, preventing commercial exploitation of students, and preserving residential tranquility.”).

40. *Swait v. Univ. of Neb. at Omaha*, No. 8:08CV404, 2008 WL 5083245, at *2–*3 (D. Neb. Nov. 25, 2008) (holding that because states may prohibit carrying a concealed weapon, the bald claim that a student was wrongly disciplined, in part, because he carried a concealed weapon does not, without more, establish a Second Amendment violation) (citing *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816–17 (2008) (prohibition of carrying of firearms in sensitive places such as schools exemplify presumptively valid regulatory measures)).

41. *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983) (holding that the university violated students’ First Amendment rights to free expression where it cut student newspaper’s funding because it disapproved of the “Humor Issue” of the *Minnesota Daily*, styled in the format of sensationalist newspapers, containing articles, advertisements, and cartoons satirizing Christ, the Roman Catholic Church, evangelical religion, public figures, numerous social, political, ethnic groups, social customs, popular trends, and liberal ideas, using frequent scatological language and explicit and implicit references to sexual acts, and eliciting numerous letters deploring the content of the “Humor Issue” from church leaders, members of churches, interested citizens, students, and legislators, who in many cases were responding to the complaints of constituents); *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993

speech,⁴² to be relieved of the obligation to pay fees that benefitted organizations whose activities some students found to be objectionable,⁴³ to be free from faculty oversight of adherence to established academic standards,⁴⁴ to obtain state-funded scholarship support for enrollment at religious institutions,⁴⁵ and to set aside state constitutional restrictions on state funding for scholarships at religious institutions.⁴⁶ Faculty members sought to protect themselves from institutional oversight of classroom speech that students found harassing,⁴⁷ from college and university control over grading,⁴⁸ and from state control over use of computer technology.⁴⁹

F.2d 386, 392–93 (4th Cir. 1993) (holding that, given the First Amendment limitations on regulation of expressive content and requirements of viewpoint neutrality, university’s interest in maintaining an educational environment free of discrimination and racism, and in providing gender-neutral education did not justify imposition of discipline based upon its hostility towards the content of a fraternity fundraiser denominated as an “ugly woman contest” with “racist and sexist” overtones).

42. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995) (holding that a university practice of withholding eligibility for student fee funding from a student newspaper because of the paper’s religious content violated the First Amendment requirement that the program be administered in a viewpoint neutral fashion).

43. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 231–34 (2000) (holding that a university may require objecting students to pay general activity fees, provided that it employs viewpoint neutral mechanisms in the allocation of funding support).

44. *Hosty v. Carter*, 412 F.3d 731, 737–38 (7th Cir. 2005), *cert. denied*, 546 U.S. 1169 (2005) (if a student board acts as publisher of student paper operated by the university as a non-public forum underwritten at public expense, a university may not censor it); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1286 (10th Cir. 2004) (university may require acting student to speak lines in a play even though she regarded the expression as conflicting with tenets of her religious faith); *Brown v. Li*, 308 F.3d 939, 952 (9th Cir. 2002) (a university may require a student to complete an assignment according to reasonable standards governing “how to research within an academic specialty and how to present his results to other scholars in his field”).

45. *Witters v. Wash. Dept. of Servs. for Blind*, 474 U.S. 481, 487–88 (1986) (aid to student enrolled in a sectarian college provided through a state program extending vocational assistance to the visually handicapped was not “state action sponsoring or subsidizing religion.”) (emphasis in original).

46. *Locke v. Davey*, 540 U.S. 712, 721 n.3 (2004) (state funded scholarship program is not a forum).

47. *Hardy v. Jefferson Comm. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001) (sexist and racially vulgar speech in class on social deconstructivism and language, which explored the social and political impact of certain words, germane and protected); *Silva v. Univ. of N.H.*, 888 F. Supp. 293, 313–17 (D. N.H. 1994) (writing instructor’s classroom use of sexual metaphors to explain principles of writing was protected expression; instructor was wrongfully disciplined under subjective standards employed in university’s sexual harassment policy).

48. *Keen v. Penson*, 970 F.2d 252, 253, 258 (7th Cir. 1992) (faculty member properly disciplined for withholding grade from student until the student apologized for remarks she made about course testing, then failing the student and sending her demeaning and insulting letters — even assuming a professorial right of expression, such a right must be balanced “against the University’s interest in ensuring that its

College and university staff members sought to require that spousal benefits be provided to same sex domestic partners.⁵⁰ Such precedents represent only a sampling of the causes that have been brought to secure government assistance through the courts to reverse college and university actions or policy.

The executive power was brought to bear on racial discrimination in federal employment and by federal contractors. Executive orders fixed policies that federal employment should be nondiscriminatory;⁵¹ that federal agencies should undertake affirmative action to increase minority access to federal openings;⁵² and that federal contractors and subcontractors should accept obligations in their own employment practices both to eschew discrimination and to undertake affirmative action.⁵³ In due course, executive orders provided for the systematic

students receive a fair grade and are not subject to demeaning, insulting, and inappropriate comments”); *Parate v. Isibor*, 868 F.2d 821, 828–30 (6th Cir. 1989) (a university professor has a First Amendment right to assign grades and evaluate students as determined by his or her independent professional judgment) (“the individual professor may not be compelled, by university officials, to change a grade that the professor previously assigned to her student.”).

49. *Urofsky v. Gilmore*, 216 F.3d 401, 404–05 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001) (challenging Virginia statute that limited use of state computer equipment to view sexually explicit materials unless the use was duly authorized for bona fide research projects or other undertakings).

50. *See, e.g., Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 451–52 (concluding that the fact that a university benefits policy allowed “unmarried opposite-sex couples” to sign an affidavit that they were “married” for purposes of receiving benefits defeated the university’s claim that benefits were based on marital status because “marital status” depends on compliance with legal rules, not an affidavit).

51. Exec. Order No. 10590, 20 Fed. Reg. 409 (Jan. 18, 1955) (“[excluding and prohibiting] discrimination against any employee or applicant for employment in the Federal Government because of race, color, religion, or national origin”); Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 6, 1961) (reaffirming the substance of Executive Order 10590) (compliance overseen by a presidential Committee on Equal Employment Opportunity); Exec. Order No. 11246, 30 Fed. Reg. 12319, § 101 (Sept. 24, 1965) (“It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, creed, color, or national origin. . .”).

52. Exec. Order No. 10925, 26 Fed. Reg. 1977, § 201 (Mar. 6, 1961) (initiating a review “to consider and recommend additional affirmative steps which should be taken by executive departments and agencies to realize more fully the national policy of nondiscrimination within the executive branch of the Government”); Exec. Order No. 11246, 30 Fed. Reg. 12319, § 101 (Sept. 24, 1965) (“It is the policy of the Government of the United States . . . to promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency. The policy of equal opportunity applies to every aspect of Federal employment policy and practice.”).

53. Exec. Order No. 10925, 26 Fed. Reg. 1977, § 310 (Mar. 6, 1961) (obligating federal contractors and subcontractors to agree to “not discriminate against any employee or applicant for employment because of race, creed, color, or national origin” and to take “affirmative action to ensure that applicants are employed, and that

administration of such nondiscrimination and affirmative action policies through well-established federal agencies.⁵⁴

The federal legislative power was the last to be brought into play. In the years between Reconstruction⁵⁵ and 1960, states, exercising police powers, took the lead in banning employment discrimination based on race, creed, and color.⁵⁶ Later the national government, employing variously its power to enforce the Fourteenth Amendment, its power under the Commerce Clause, and its Spending Power, adopted statutory requirements that extended to state and local government and to private business prohibitions against discrimination in employment⁵⁷ and program access⁵⁸ on the basis

employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.”); Exec. Order No. 11114, 28 Fed. Reg. 6485 (June 25, 1963) (extending 10925 to “all construction contracts paid for in whole or in part with funds obtained from the Federal Government or borrowed on the Credit of the Federal Government pursuant to such grant, contract, loan, insurance or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance or guarantee”); Exec. Order No. 11246, 30 Fed. Reg. 12319, § 202 (Sept. 24, 1965) (continuing contractor and subcontractor nondiscrimination and affirmative action obligations).

54. Exec. Order No. 11246, 30 Fed. Reg. 12319, §§ 103–105, 201 (Sept. 24, 1965) (making the Civil Service Commission responsible for nondiscrimination and equal employment opportunity in federal employment, and charging the Department of Labor with oversight of contractor compliance with nondiscrimination and affirmative action requirements).

55. The Civil Rights Acts of 1866 and 1871 gave rise to 42 U.S.C. §§ 1981, 1982, 1983 and 1985, although these statutes were little used after *Plessy* until civil rights activists and civil libertarians invoked them for their purposes. See Comment, *Legal Sanctions to Enforce Desegregation in the Public Schools: The Contempt Power and the Civil Rights Acts*, 65 YALE L. J. 630 (1956) (“The contempt power of the federal courts and the Federal Civil Rights Acts appear to afford sanctions which can be used to help eliminate resistance to legally valid attempts to establish and maintain a nondiscriminatory school system.”).

56. The first such statute was New York’s Ives-Quinn Act, which was signed into law in 1945. It banned employment discrimination based on race, creed and color. HASIA R. DINER, *THE JEWS OF THE UNITED STATES, 1654 TO 2000* at 206 (2006). By 1960, California, Colorado, Connecticut, Delaware, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Ohio, Oregon, Rhode Island, Pennsylvania, Washington and Wisconsin had adopted some form of antidiscrimination legislation. HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960–1972* at 21 (1990).

57. Title VII of the Civil Rights Act of 1964, grounded on the Interstate Commerce Clause and on § 5 of the Fourteenth Amendment. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 458 (1976) (Brennan, J., concurring) (“Congressional authority to enact the provisions of Title VII at issue in this case is found in the Commerce Clause, Art. I, § 8, cl. 3, and in § 5 of the Fourteenth Amendment, two of the enumerated powers granted Congress in the Constitution.”); *Id.* at 453 n.9 (extension of Title VII of Civil

of race, creed or color, national origin, sex, religion,⁵⁹ age,⁶⁰ disability,⁶¹ against employment discrimination based upon immigration status⁶² or, for federal contractors, Vietnam Era Veteran⁶³ status. To enforce these new rights, Congress provided for an assemblage of administrative and judicial remedies and, by authorizing recovery of attorney fees, created substantial incentives for private enforcement through the courts.⁶⁴

Practices intended to assure compliance with civil rights law and civil liberties law became ubiquitous features of college and university life, affecting both public and private institutions. The ever-present threat of constitutional litigation challenging governance decisions or administrative practices obligated public colleges and universities to secure advice about complex, nuanced constitutional problems that rarely arise in private sector legal practice. Private institutions often came within the ambit of

Rights Act of 1964 to States was pursuant to Congress' § 5 power).

58. Title VI of the Civil Rights Act of 1964, grounded on the Spending Clause. *See* *Guardians Assn. v. Civil Serv. Comm'n of New York City*, 463 U.S. 582, 598–99 (1983). Title IX of the Education Amendments of 1972 was also grounded on the Spending Clause. *See* *Franklin v. Gwinnett County Public Sch.*, 503 U.S. 60, 64 (1992).

59. Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2 (2006) (grounded on § 5 of the Fourteenth Amendment when state action is involved). In the absence of state action, the Commerce Clause serves to provide that basis for action against private parties. *See* *Katzenbach v. McClung*, 379 U.S. 294 (1964) (providing a broad definition of the commerce power to regulate businesses having any relation to interstate commerce).

60. Age Discrimination in Employment Act (ADEA) 29 U.S.C. § 623 (2006) (grounded on the Commerce Clause). *See* *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983) (finding the ADEA to be a valid exercise of the Commerce Clause). *See also* *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (holding that the ADEA is not a valid exercise of § 5 of the Fourteenth Amendment and is not sufficient to abrogate state immunity under the Eleventh Amendment).

61. Title I of the Americans with Disabilities Act, 42 U.S.C. § 12112 (2006) (grounded in the Commerce Clause). *See* *Bd. of Trustees for the Univ. of Ala. v. Garret*, 531 U.S. 356 (2001) (holding that Title I of the ADA does not appropriately abrogate state immunity through the Fourteenth Amendment).

62. Immigrations Reform and Control Act, 8 U.S.C. § 1101 (2006). *See* *Hoffman Plastics Compound v. NLRB*, 357 U.S. 93 (2002) (applying IRCA through its own interpretation of the Commerce Clause and rejecting the NLRB's interpretation).

63. Vietnam Era Veterans Readjustment Assistance Act, 38 U.S.C. § 4212 (2006) (grounded in the Commerce Clause).

64. Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (2006). *See* Sean Farhang, *The Political Development of Job Discrimination Litigation, 1963-1976*, UC BERKELEY: CENTER FOR THE STUDY OF LAW AND SOCIETY JURISPRUDENCE AND SOCIAL POLICY PROGRAM 11 (2008), available at <http://escholarship.org/uc/item/3pk6v8sk> ("Civil rights advocates insisted upon fee shifting (among other provisions) with the specific aim and hope of actually mobilizing private enforcers in significant numbers. That the volume and efficacy of Title VII litigation far exceeded anyone's expectations is a story of *underintended* consequences: the effects occurred in precisely the realm intended, but their magnitude was far greater than expected.") (emphasis in original).

legislation, such as Title VII of the Civil Rights Act of 1964, that was enacted under the Commerce Clause, but typically their dependency on federal aid brought them within the reach of statutes, such as Title VI of the Civil Rights Act of 1964 or § 504 of the Rehabilitation Act of 1973, that were enacted under the Spending Power.⁶⁵ Thus, in one way or another, the management of statutory civil rights compliance requirements became critical to virtually all colleges and universities, and, since Title VI has been held to incorporate constitutional equal protection standards,⁶⁶ all institutions, public or private, became conversant with some areas of federal constitutional law.

Compliance with civil rights statutes necessitated substantial, sustained investment of staff and financial resources in order to document observance of detailed regulatory requirements in matters as varied as the contents and posting of required notices or as the provision of player access to athletic trainers.⁶⁷ Compliance administration required attention to matters both of procedure and of substance. Colleges and universities needed to review periodically decision making processes to assure their consistency with procedures specified by regulations⁶⁸ and they needed to document that

65. Over the period between 1997–98 to 2005–06, the federal contribution to the total annual revenue of private not-for-profit degree-granting institutions ranged from a low of 10.11% in 1999–2000 to a high 17.54% in 2001–02. NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS 2008, tbl. 353, http://nces.ed.gov/programs/digest/d08/tables/dt08_353.asp. Participating in federal student financial aid programs triggers the obligation to comply with legislation enacted under Spending Power. *Grove City Coll. v. Bell*, 465 U.S. 555, 565 (1984) (institutions participating in federal financial aid programs are subject to Title IX). Private universities, as well as public universities, may come within the sweep of Executive Order 11246 when they contract to furnish supplies or services to a federal agency or to allow the use of personal property, including leases. *See Partridge v. Reich*, 141 F.3d 920, 924–25 (9th Cir. 1998) (“The Grant Act instructs executive agencies to use procurement contracts whenever ‘the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government.’” 31 U.S.C. § 6303. Conversely, the Act requires executive agencies to use grants or cooperative agreements when ‘the principal purpose of the relationship is to transfer a thing of value . . . to carry out a public purpose . . . instead of acquiring . . . property or services for the direct benefit or use of the United States Government.’ 31 U.S.C. §§ 6304–6305.”).

66. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 284–87 (1978).

67. *See, e.g.*, 41 C.F.R. §§ 60-1.41, 60-1.42 (2009) (specifying contents for posters required by OFCCP); U.S. Equal Employment Opportunity Commission, EEOC Poster Request Form, <http://www1.eeoc.gov/employers/poster.cfm>; 34 C.F.R. § 106.41(c)(8) (2009) (“A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors . . . Provision of medical and training facilities and services”); VALERIE M. BONNETTE & LAMAR DANIEL, TITLE IX ATHLETICS INVESTIGATOR’S MANUAL 72 (1990).

68. Procedural regulations include those arising under FERPA, § 504 or the ADA. FERPA establishes detailed procedural notice requirements that are pre-requisites to

substantive decisions avoided proscribed standards and otherwise remained within the bounds of acceptable practice in order to secure the deference accorded to university decisions, even in academic matters.⁶⁹

disclosure of directory information. 34 C.F.R. § 99.37 (2009). OCR proscribes pre-admission inquiries into student disabilities, but allows post-admission “confidential inquiries of students about disabilities that may require accommodation,” although students are not required to answer. Letter from Stephanie Monroe, Assistant Secretary for Civil Rights, Office of Civil Rights, to Colleague, at 2–3 (Mar. 16, 2007), *available at* <http://www.ed.gov/about/offices/list/ocr/letters/colleague-20070316.pdf>. Regulations implementing the ADA also proscribe substantive eligibility standards for program eligibility that “screen out or tend to screen out an individual with a disability or any class of individuals with disabilities.” 28 C.F.R. §§ 35.131(b)(8) (public universities) or 36.301(a) (private universities).

69. Even quintessentially academic decisions relating to degree requirements may be subject to scrutiny under § 504 of the ADA, and alterations in degree requirements may be required unless doing so would constitute a fundamental alteration of the program. 34 C.F.R. § 104.44(a) (2009) (§ 504) (mandating such modifications to “academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap,” except where the “[a]cademic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section”); 28 C.F.R. § 35.130(b)(7) (2009) (ADA Title II) (mandating “reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity”); and 28 C.F.R. § 36.302(a) (2009) (ADA Title III) (mandating “reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford . . . services . . . to individuals with disabilities, unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of the . . . services”). Courts have melded procedural and substantive considerations when trying to assess whether a university reasonably determined not to waive a program requirement, seeking evidence that the decision was reached through a deliberative process involving responsible parties that examined the challenged program requirement and considered possible alternatives. *See Wynne v. Tufts Univ. Sch. of Medicine*, 932 F.2d 19, 27–28 (1st Cir. 1991) (en banc) (the institution had an obligation to demonstrate “that its determination . . . was a reasoned, professional academic judgment, not a mere *ipse dixit*”) (such a demonstration requires “consideration of possible alternative . . . discussion of the unique qualities of” challenged requirements, a record indicating when the discussion took place and who participated in it); *Guckenberger v. Boston Univ.*, 8 F. Supp. 2d 82, 87–88 (D. Mass. 1998) (holding that where there was no dispute that a university considered whether foreign language degree requirements were fundamental to a liberal arts curriculum, the test is satisfied even if other experts might disagree with the university’s conclusion). Concerns to protect bona fide academic decision-making also arise in connection with constitutional claims. *See Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225, (1985) (assuming that students have a substantive due process right to be free from arbitrary action, but declining to question a university academic decision “unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment”); *Bd. of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 89–91 (1978) (declining to extend procedural due process requirements from disciplinary settings to govern academic decision-making, since academic decisions “requires an expert evaluation of

The increasing need for staff and resources to manage civil rights and civil liberties alone might justify the claim that the efforts of civil rights activists and civil libertarians have had the most profound effect on the practice of college and university law of any set of developments during the first fifty years of NACUA's existence. Still, a focus on such administrative matters would miss the true significance of these developments.

The changes in the college and university legal environment initiated by the early activists drew lawyers to the very core of the institution. They made indispensable the assistance of attorneys both to safeguard individual rights recognized by the courts or established under statute or rule and to protect a college or university's ability to make and to implement autonomous, sound academic decisions. The lawyer's work was not to intrude upon institution autonomy, but to help its decision-makers exercise their autonomy in ways that would withstand scrutiny by outside judges or regulators. The lawyer became an essential participant in college and university governance to assure that the decision-making would not run afoul of external constraints imposed by one or another of the organs or branches of government.

III. POLITICAL REACTION

The political reaction to the successes of civil rights advocates and civil libertarians contributed to the purposeful politicization of the federal judiciary. Although civil rights and civil liberties litigants wielded claims of constitutional rights to force change upon an unwilling or timorous academy, the true focus of their efforts was elsewhere. Changes that affected the university represented only portions of broader political agendas that sought fundamental changes in American society. Ending segregation and protecting free expression were but two thrusts; other efforts that created equal or greater controversy included vindication of voting rights,⁷⁰ expansion of procedural protections against police or prosecutorial misconduct⁷¹ and protection against the establishment of religion.⁷²

cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.”).

70. *Reynolds v. Sims*, 377 U.S. 533 (1964) (legislative districts must be based on population, not geography); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (racial gerrymandering).

71. *Miranda v. Arizona*, 384 U.S. 436 (1966) (right to remain silent and to obtain counsel); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to court-appointed counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusion of evidence obtained by unreasonable search); *Rogers v. Richmond*, 365 U.S. 534 (1961) (exclusion of coerced confession).

72. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (prayer in school);

As should be expected from such a sweeping agenda, the political initiatives that employed adjudication to advance change also gave rise to political counter-initiatives that drew the judiciary, and adjudication, deep into partisan politics.⁷³ The result has been a politically charged legal environment that places additional uncertainties and costs on efforts to address aspects of college and university missions that intersect with partisan politics. On the fiftieth anniversary of NACUA's founding, the end of these struggles does not appear to be in sight.

Already in 1964, Barry Goldwater made the Supreme Court a central issue in his presidential campaign.⁷⁴ Although Goldwater had argued against desegregation of the schools, his principal complaints were that the Court's decisions eroded the authority of state officials to address local problems and that the Court construed the Constitution to obtain social ends.⁷⁵ Criticizing strongly decisions that banned prayer in school, redefined protections for persons accused of criminal conduct, and ordered reapportionment of state and congressional legislative districts, Goldwater promised to do what he could to reverse decisions he found objectionable.⁷⁶

Goldwater's presidential gambit did not succeed, but his challenge to the Court resonated. Ever since, the role of the federal judiciary in controlling the reach and bounds of state and federal legislation has been a central feature of American presidential and congressional politics.

In his 1968 campaign, Richard M. Nixon took up Goldwater's tactic. He combined an attack on crime and with an attack on the Court, and the

Engle v. Vitale, 370 U.S. 421 (1962) (also discusses prayer in school).

73. *Brown* and *Sweezy* were decided during the tenure of Chief Justice Earl Warren. The Warren Court effected broad, pervasive changes in many areas of law and touched upon many ideological, religious and political sensibilities, and many proprietary and pecuniary interests. These included fundamental changes in criminal procedure (expanded use of exclusionary rules, right to counsel, right to trial by jury, line-ups, self-incrimination, cruel and unusual punishment, commitment of mentally ill, rights of juveniles, limitation on military courts), First Amendment jurisprudence involving freedoms of expression (defamation, obscenity) and association (legal services), the establishment of religion, voting rights (one person one vote, poll taxes, reapportionment, ballot access, residency restrictions), privacy rights (miscegenation, restrictions on contraceptives), and debtors' rights and expatriate's rights. *See, e.g., generally*, Choper, *supra* note 4, at 25. This was scarcely the first time in the twentieth century that the Supreme Court found itself squarely in the center of partisan politics. Robert A. Schapiro, *Must Joe Robinson Die?: Reflections on the 'Success' of Court Packing*, 16 CONST. COMMENT. 561(1999).

74. Walter F. Murphy and Joseph Tanenhaus, *Public Opinion and Supreme Court: The Goldwater Campaign*, 32 PUB. OP. Q. 31, 32 (1968).

75. *Id.* at 33 (noting his emphasis on law and order and his position that the Constitution neither requires states to maintain racially mixed schools nor permits federal involvement in education) (citing BARRY GOLDWATER, *THE CONSCIENCE OF A CONSERVATIVE* 35 (1960) as authority for Goldwater's views on the Court's desegregation decisions).

76. *Id.*

gambit seemed to contribute to his victory.⁷⁷ Once in office, President Nixon concluded that there was something that the president could do to affect the course of judicial decision-making. He sought to use judicial selection as a policy-making device by seeking out judicial candidates who shared his views and who would be likely to propound them long after his term in office ended.⁷⁸ The insight appears to have been that:

[T]he role the judiciary will play in different historical eras depends as much on the type of men who become judges as it does on the constitutional rules which appear to set at least the outer limits of judicial action.⁷⁹

77. Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153, 215 (2002).

78. Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 *U. RICH. L. REV.* 871, 879 (2005). Goldman excerpts recommendations from a White House aide that President Nixon reviewed and forwarded to his attorney general:

Through his judicial appointments, a President has the opportunity to influence the course of national affairs for a quarter of a century after he leaves office In approaching the bench, it is necessary to remember that the decision as to who will make the decisions affects what decisions will be made [T]he President [should] establish precise guidelines as to the type of man he wishes to appoint—his professional competence, his political disposition, his understanding of the judicial function—and establish a White House review procedure to assure that each prospective nominee recommended by the Attorney General meets the guidelines.

Id. at n.44 (quoting Memorandum from Tom Charles Huston, White House Aide, to Richard M. Nixon, President, United States 2 (Mar. 25, 1969) (on file with the Nixon Presidential Materials Project of the National Archives & Records Administration, College Park, Maryland)); *See also* Jonathan Remy Nash, *Prejudging Judges*, 106 *COLUM. L. REV.* 2168, 2183 n.44 (2006) (noting that although consideration of a prospective judge's ideology has a long history in the federal judicial appointment process, open consideration of ideology is a relatively recent origin); Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 *COLUM. L. REV.* 215 (1999)

The same-party appointment rate for U.S. presidents from 1869–1992 is 93.5% for the federal district courts and 92.2% for the federal circuit courts. Even President Carter, who set up an independent process for judicial nominations, had a same-party appointment rate of 85.4%. Such systematic behavior has at times resulted in large swings in the partisan make-up of the federal judiciary. Franklin Roosevelt's long tenure in office, for example, resulted in a dramatic change in the partisan make-up of federal courts. Only 22% of the district and circuit court judgeships were held by Democratic appointees when he came to office; when he left, nearly 70% of these seats were held by Democratic appointees. Moreover, the political effects of judicial selection survive even the repudiation of a party at the polls. There is a considerable lag before a new Administration can appoint a significant number of new judges. It took Eisenhower a full eight years to erase the majority margin of Democrats appointed by Roosevelt and Truman.

Id. at 218 (citations omitted).

79. Sheldon Goldman, *Unpicking Pickering in 2002: Some Thoughts on the Politics of Lower Federal Court Selection and Confirmation*, 36 *U.C. DAVIS L. REV.*

What President Nixon attempted, Ronald Reagan implemented, creating a centralized judicial nomination process with an expressly ideological objective.⁸⁰ Presidential efforts to perfect the use the judicial selection process as an instrument to shape public policy have recurred since that time.⁸¹

The inevitable result of this purposeful politicization of judicial appointments has been mounting concern that politicization may compromise the integrity of federal adjudication.⁸² In many settings,

695, 698 n.11 (2003) (quoting Memorandum, *supra* note 78).

80. David S. Law, *Appointing Federal Judges: The President, The Senate, And The Prisoner's Dilemma*, 26 CARDOZO L. REV. 479, 485–86 (2005) (noting that President Reagan established a high-level, centralized process to review the ideology of candidates); Goldman, *supra* note 79, at 700–01 (noting that Reagan White House Counsel Fred F. Fielding faulted a Circuit Court candidate for being “relatively moderate on civil rights issues” and overturning a statute requiring parental notification before an unmarried, minor child could obtain an abortion) (citing Judicial Selection Materials, Aug. 1984 [1 of 3] CF 514, Fielding Files, Ronald Reagan Library, Simi Valley, California)).

It has been argued that, the Huston memorandum notwithstanding, the Carter administration first interjected political consideration into the judicial selection process by expressly seeking to increase the number of women and minority judges on the federal bench. Elliot E. Slotnick, *Symposium: Federal Judicial Selection in the New Millennium*, 36 U.C. DAVIS L. REV. 587, 590–91 (2003) (instead of relying upon congressional recommendations, President Carter created special commission to nominate federal judges and charged each body reviewing candidates “to make special efforts to seek out and identify well qualified women and members of minority groups as potential nominees” and to assure that candidates “possess[] and [have] demonstrated a commitment to equal justice under the law”).

81. Goldman, *supra* note 79, at 697–703. In 2004, both the Democratic and Republican parties made judicial selection standards express parts of their campaign platforms. *Id.* at 872–73.

Partisan concerns among senators who must vote to confirm nominees also factor largely in the politicization of the federal judiciary. “The Senate confirms 90 percent of Supreme Court nominees when it is controlled by the president’s party, but only 59 percent when the president’s party is in the minority.” Law, *supra* note 80, at 499. Moreover, senators use their role in judicial appointment processes for political and electoral purposes. Adam Burton, *Pay No Attention to the Men Behind the Curtain: The Supreme Court, Popular Culture, and the Countermajoritarian Problem*, 73 UMKCL. REV. 53, 81 (2005).

82. Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 HARV. J.L. & PUB. POL’Y 875, 884 (2008) (“One of the chief flaws of Justice Brennan-style non-originalism is that it takes hotly contested issues like abortion out of the democratic process in the fifty states, where compromise is possible, and puts them under the power of the Supreme Court, which cannot produce compromise solutions. The constitutionalization and nationalization of the abortion dispute in *Roe v. Wade* has embittered the confirmation process for all federal judges and has roiled our politics for more than three decades.”); Morriss, *supra* note 26, at 193 (complaining that a politicized majority of the Court assumed the roles of super-legislature and super-administrative agency quite at odds with the intent of the framers for a more limited judicial role); Nash, *supra* note 78, at 2206 (cautioning that the perception of judicial politicization may be a problem; that it may erode public confidence in the impartiality of the judiciary or that it may reflect an accurate perception of a social reality); Robert

federal judges tend to reflect the ideological preferences of the party that appointed them to office⁸³ or their own ideological proclivities.⁸⁴ As the

J. Pushaw, Jr., *Partial-Birth Abortion And The Perils Of Constitutional Common Law*, 31 HARV. J.L. & PUB. POL'Y 519, 529 (2008) ("if the Justices continue to apply their impressionistic and politicized constitutional common law, they cannot legitimately complain about the growing public perception of the Court as just another political organ").

Some critics worry about evidence that a politicized Supreme Court has contorted the growth of the law by favoring certain types of litigation and certain types of parties. Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1458–59 (2009) (noting that the Supreme Court has accepted 18 antitrust cases since 1992 and has decided them all in the defendant's favor and that "[a]lthough the Court on average grants certiorari to less than two percent of petitions, the U.S. Chamber of Commerce's backed-petitions between 2004 and 2007 were granted at a disproportionate rate of twenty-six percent"); Michael L. Rustad, *The Uncertainty of the Court's Unmaking of Punitive Damages*, 2 CHARLESTON L. REV. 459, 474–76 (2008) (noting that since 1994, the Court has given corporate defendants challenging state punitive damage awards an unbroken string of victories, while trenching on state tort reform and displacing litigation involving other critical matters involving criminal law, civil rights, and consumer law).

Concerns have also been voiced about the politicization of state courts. *See, e.g.*, Emily Chow, *Health Courts: An Extreme Makeover of Medical Malpractice with Potentially Fatal Complications*, 7 YALE J. HEALTH POL'Y L. & ETHICS 387, 410 (2007) ("The ABA's Commission on the Twenty-First Century Judiciary found that recent state judicial election campaigns have been politicized due to the participation of 'interest groups that formed to promote a specific political issue.'") (citing AM. BAR ASS'N, COMM'N ON THE 21ST CENTURY JUDICIARY, JUSTICE IN JEOPARDY 22 (2003)); Stucke, *supra*, at 1457 ("Business lobbyists, once focusing on legislation, are now more active in the selection of state supreme court judge.").

Other voices question whether the politicization of the federal appointment process may distort the outcome of the selection process by limiting the class of viable judicial candidates to persons who share a limited range of views. Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L.J. 1423, 1474 (2008) (concluding that this tendency towards a more intellectually homogeneous bench works to the disadvantage of minority groups). *But see* Judge William H. Pryor Jr., *Not-So-Serious Threats to Judicial Independence*, 93 VA. L. REV. 1759, 1781 (2007) (arguing that the Framers considered the process for appointing judges a matter of accountability to the people and "those who are willing to endure the hardships of a controversial appointment may be more independent than others," as illustrated by the services of Justice Hugo Black, whose membership in the Ku Klux Klan and legal defense of a Klansman accused of killing a Catholic priest contributed to the controversy over his nomination).

83. Thomas J. Miles & Cass R. Sunstein, *The Real World Of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 767 (2008) (finding that based upon a review of published decisions reviewing administrative actions by the Environmental Protection and the National Labor Relations Board, judges appointed by Democrats are significantly more likely to uphold "liberal" administrative decisions and judges appointed by Republicans are significantly more likely to uphold "conservative" administrative decisions, with roughly equal frequency and the likelihood of ideological voting is greater still when judges sit on panels composed entirely of appointees from their own party). After studying 400 federal racial harassment cases between 1981 and 2003, researchers "found that the race of judges matters, as does their political affiliation. On the other hand, our findings also indicate that judges of all

history of constitutional adjudication during the twentieth century made clear, changes in the ideological dispositions that predominant on the Supreme Court may transform utterly the accepted understanding of the meaning of the Constitution and the reach of governmental power,⁸⁵ and

racers are attentive to the merits of the case.” Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1156 (2009). Although the judges’ political association factors significantly in how they decide racial harassment cases, Professors Chew and Kelley conclude that “the judges’ race remains a stronger influence than the judges’ political affiliation, as suggested by the 20% difference in plaintiffs’ win rate between White Democratic judges and African American Democratic judges. Logistic regression analyses also confirm that both the judges’ political affiliation and the judges’ race are independently significant to case outcomes, and that the judge’s race has more of an effect. For instance, the modeling indicates that while having a Republican judge decreases the plaintiff’s chance of winning by an average of 0.5, appearing before an African American judge increases the plaintiff’s chance of winning by about three times.” *Id.* at 1158.

84. Goldman, *supra* note 79, at 873 (liberal judges tend to favor plaintiff civil rights, political liberties, or due process rights; conservative judges tend to support government claims that regulation of rights and liberties is in the greater public interest, and moderate judges fall in between) (citing JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 329–31, 422–24 (2002)).

85. At the dawn of the century, in *Lochner v. New York*, 198 U.S. 45 (1905), the Court saw economic regulation as “a question of which of two powers or rights shall prevail—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract,” and imposed stringent requirements—comparable to strict scrutiny standards—on legislation deemed to interfere “with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.” *Id.* at 57–58. The *Lochner* strictures were abandoned during the Depression, shortly after Franklin D. Roosevelt called for legislation to increase the number of justices on the court. Schapiro, *supra* note 73; Pushaw, *supra* note 82, at 521–23 (“constitutional law has been marked by abrupt shifts, not incremental doctrinal tinkering. For instance, in 1937, the Court suddenly abandoned a century-and-a-half of case law imposing limits on Congress and instead interpreted Article I as conferring virtually untrammelled legislative power. This turnaround reflected five Justices’ perception of sound governmental and economic policy during the Depression. President Roosevelt solidified this jurisprudence by appointing Justices based primarily on their political commitment to the New Deal, not on judicial experience or legal acumen. A generation later, the Warren Court dismantled most precedent concerning individual rights and reinterpreted the Constitution to implement ideas about liberty and equality that incorporated progressive social and moral views. Even the supposedly conservative Burger and Rehnquist Courts occasionally unleashed unprecedented thunderbolts, such as *Roe v. Wade*.”) and at 524–25 (contrasting *stare decisis* in common law and in constitutional construction driven by the ideological views of the justices, yielding “an idiosyncratic common law in which *stare decisis* is either invoked selectively (to defend a previous revolutionary case implementing some preferred policy that had no constitutional roots) or flatly rejected, prior decisions are freely modified, and legislatures have no input.”). See also Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751, 761 (2009) (elaborating a thesis that the “strong rights we know today — the rights we associate with strict scrutiny and compelling state interests — first emerged in the period from 1937 to 1943, as a

consequently the rules of constitutional construction that bind lower courts.⁸⁶ The purposeful politicization of federal judicial selection processes and the decades of judicial activism, particularly by deeply divided courts, have created an environment in which neither officials nor activists can be certain whether constitutional doctrines adopted at one point in time will be accepted by subsequent panels of the Supreme Court. The resulting uncertainty itself is likely to produce increased litigation over ranges of politically sensitive issues,⁸⁷ and, as the twentieth century record has shown, colleges and universities, public and private, are often enmeshed in politically sensitive activities, either of their own making or at

response to Franklin Roosevelt's court-packing plan and the Court's attempt to rehabilitate itself and address the grave wrongs of fascism that were so evident in the period before World War II" by weakening its oversight of economic regulation, while strengthening its role in cases involving speech, religion, and race).

86. *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'") (quoting *Rodrigues de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 649 (2004) (asserting that lower federal courts "must respect the decisions of their judicial superiors as controlling authority").

87. Douglas O. Linder, *Trends in Constitution-Based Litigation in the Federal Courts*, 63 UMKC L. REV. 41, 69–70 (1994) (uncertainty in the law seems to encourage litigation; as uncertainty as to litigation outcomes increases, so will the number of trials and the number of appeals will increase as uncertainty as to the outcomes of appeals increases; appeal rates also increased in circuit courts of appeal that were ideologically balanced, and where the random assignment of panel judges was most likely to determine the outcome; decisions that substantially extend constitutional protections often appear to have the predictable effect of encouraging lawsuits that make similar claims); *Grutter v. Bollinger*, 539 U.S. 306, 348 (2003) (Scalia, J., concurring) ("Unlike a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anticonstitutional holding that racial preferences in state educational institutions are OK, today's *Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation."); Wendy Parker, *The Legal Cost of the "Split Double Header" of Gratz and Grutter*, 31 HASTINGS CONST. L.Q. 587, 587 n.4, 611 (2003) (citing authorities with like views) (Professor Parker disputes Justice Scalia's apprehensions, since she regards the University of Michigan Law School program upheld in *Grutter* as both confirming the legality of race sensitive admissions programs and providing a workable model for such programs); Daniel J. Schwartz, Note, *The Potential Effects of Nondeferential Review on Interest Group Incentives and Voter Turnout*, 77 N.Y.U. L. REV. 1845, 1869–73 (2002) (deferential treatment of legislation creates incentives for activists to pursue legislative or electoral agenda, while judicial activism creates incentives for interest group litigation); Abram Chayes, *Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 27 (1982) (reforms facilitating class actions "coincided almost exactly with the invention of 'public interest law' in the late 1960's and with the general surge of reformist zeal into the courts").

the instance of their students or faculties.⁸⁸ Thus, on the fiftieth anniversary of NACUA's founding, there is no reason to expect that the flow of litigation intended to shape college and university policies and practices will abate.⁸⁹

IV. UNFINISHED TASKS

In the next half century, the nation will have to put aside views of equal protection that strangle equal opportunity. A half century after the great push for racial justice, racial disparity remains a stubborn fact in America. The Court has conceded that racial disparities present real and persistent problems.⁹⁰ In his *Bakke* opinion, Justice Lewis Powell declared that, "No

88. See *supra* notes 8, 11, 13–19, 29–32, 34–37, 39–51 and accompanying text.

89. Activist groups from across the political spectrum, such as the People for the Ethical Treatment of Animals (PETA), the Foundation for Individual Rights in Education (FIRE), the Center for Individual Rights (CIR), the Student Press Law Center (SPLC) and Public Citizen actively promote their support of litigation and actively pursue cases involving universities. "PETA has built a powerful network of caring voices through public education, litigation, research and investigations, rescues, media campaigns, and grassroots activism." People for the Ethical Treatment of Animals, The PETA Guide to Compassionate Living, available at <http://www.peta2.com/COLLEGE/pdf/CompassionateLiving.pdf#xml=http://www.peta2.com/search/pdfhi.txt?query=litigation+division&pr=default&prox=page&roder=500&rprox=500&rdfreq=500&rwfreq=500&rlead=500&rdepth=0&sufs=0&order=dd&cq=&id=4b4abb5e11> (last visited Mar. 28, 2010). "FIRE supports precedent-setting litigation in defense of the First Amendment as an integral part of our effort to end the scourge of unconstitutional speech codes on public campuses and to ensure truth-in-advertising and informed consent on private campuses." Foundation for Individual Rights in Education, FIRE's Programs, <http://www.thefire.org/about/programs/> (last visited Mar. 28, 2010). "The Center for Individual Rights (CIR) is a nonprofit public interest law firm dedicated to the defense of individual liberties against the increasingly aggressive and unchecked authority of federal and state governments." The Center for Individual Rights, CIR's Mission: Fighting for Individual Rights, http://cir-usa.org/mission_new.html (last visited Mar. 28, 2010). "The Student Press Law Center is an advocate for student First Amendment rights, for freedom of online speech, and for open government on campus. The SPLC provides information, training and legal assistance at no charge to student journalists and the educators who work with them." Student Press Law Center, Student Press Law Center Vision and Missions Statements, <https://www.splc.org/mission.asp> (last visited Mar. 28, 2010). Public Citizen Litigation Group, founded in 1972, "specializes in cases involving regulation, consumer rights, access to the courts, open government, and the First Amendment, including internet free speech." Public Citizen, Litigation Group, <http://www.citizen.org/litigation> (last visited Mar. 28, 2010).

90. The phrase, "the Court," employed in this section of the article suggests a degree of consensus that does not truly exist on the Roberts Court as presently constituted. The views appear to be held in substantial degree by four justices and accepted as influential at least for purposes of framing analyses by a fifth. The fact that a plurality of justices, if not a majority, employ, albeit occasionally with caveats, the views ascribed to the Court, is the basis for treating it as the Court's analysis at the time that this article was submitted for publication.

The phrase is intended to capture views that are generally consistent with those embraced by the Chief Justice and Justices Scalia, Thomas and Alito in *Parents*

Involved in *Cnty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). See generally *id.* at 720 (insofar as these involve conflation of racial classification with racial discrimination and subject to strict scrutiny) and 731–32 (“The sweep of the mandate claimed by the district is contrary to our rulings that remedying past societal discrimination does not justify race-conscious government action.”); see also *id.* at 751 (Thomas, J., concurring) (“The Constitution does not permit race-based government decisionmaking simply because a school district claims a remedial purpose and proceeds in good faith with arguably pure motives.”); *id.* at 755 (“Establishing a strong basis in evidence requires proper findings regarding the extent of the government unit’s past racial discrimination. The findings should define the scope of any injury and the necessary remedy, and must be more than inherently unmeasurable claims of past wrongs. Assertions of general societal discrimination are plainly insufficient.”) (citations and internal punctuation omitted); *id.* at 760 (“General claims that past school segregation affected such varied societal trends are ‘too amorphous’ a basis for imposing a racially classified remedy, because ‘[i]t is sheer speculation’ how decades-past segregation in the school system might have affected these trends. Consequently, school boards seeking to remedy those societal problems with race-based measures in schools today would have no way to gauge the proper scope of the remedy. Indeed, remedial measures geared toward such broad and unrelated societal ills have ‘no logical stopping point,’ and threaten to become ‘ageless in their reach into the past, and timeless in their ability to affect the future.’”) (citations and internal punctuation omitted).

Justice Kennedy’s views are more nuanced, but he shares substantial analytical points of departure with the Chief Justice and Justices Scalia, Thomas and Alito. He agrees that plans that “classify individuals by race and allocate benefits and burdens on that basis . . . are to be subjected to strict scrutiny.” *Id.* at 783 (Kennedy, J., concurring in part and dissenting in part). At the same time, Justice Kennedy emphasizes that the purpose for “searching judicial inquiry into the justification for such race-based measures” is to determine “what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.” *Id.* (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)). Justice Kennedy also invokes the assertion that the Court “never has held that societal discrimination alone is sufficient to justify a racial classification,” and he turns anew to *Croson* for the explanation that to “accept [a] claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for ‘remedial relief’ for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.” *Id.* at 794–95 (quoting *Croson*, 488 U.S. at 505–06). Justice Kennedy adds that “[f]rom the standpoint of the victim, it is true, an injury stemming from racial prejudice can hurt as much when the demeaning treatment based on race identity stems from bias masked deep within the social order as when it is imposed by law. The distinction between government and private action, furthermore, can be amorphous both as a historical matter and as a matter of present-day finding of fact. Laws arise from a culture and vice versa. Neither can assign to the other all responsibility for persisting injustices.” *Id.* at 795.

Justices Stevens, Ginsburg and Breyer place the emphasis differently. Justice Stevens demurs from the view that all racial classifications must be analyzed under strict scrutiny and regards the contrary view as resting only on the “citation of a few recent opinions—none of which even approached unanimity.” *Id.* at 799–800 (Stevens, J., dissenting). Justice Stevens holds “the view that a decision to exclude a member of a minority because of his race is fundamentally different from a decision to include a member of a minority for that reason.” *Id.* at 800 n.3.

Justice Breyer rejects the view that the Court’s precedents entail that conclusion

one denies the regrettable fact that there has been societal discrimination in this country against various racial and ethnic groups.”⁹¹ In her *Grutter* concurrence, Justice Ruth Bader Ginsburg recognized that “[i]t is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals.”⁹² In her *Gratz* dissent, Justice Ginsburg stated more pointedly that:

In the wake of a system of racial caste only recently ended, large disparities endure. Unemployment, poverty, and access to health care vary disproportionately by race. Neighborhoods and schools remain racially divided. African-American and Hispanic children are all too often educated in poverty-stricken and underperforming institutions. Adult African-Americans and Hispanics generally earn less than whites with equivalent levels of education. Equally credentialed job applicants receive different receptions depending on their race. Irrational prejudice is still encountered in real estate markets and consumer transactions. Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country’s law and practice.⁹³

No Justice has disputed either the history of discrimination to which Justice Powell alluded or Justice Ginsburg’s summary of the ongoing disparities that rive deeply American society.

that “the test of ‘strict scrutiny’ means that all racial classifications — no matter whether they seek to include or exclude — must in practice be treated the same.” *Id.* at 832 (Breyer, J., dissenting), and maintains that “from local government the longstanding legal right to use race-conscious criteria for inclusive purposes in limited ways.” *Id.* at 834. Still, if only for purposes of argument, Justice Breyer does address questions involving the use of race to decide who will receive goods or services that are normally distributed on the basis of merit and which are in short supply, whether race-conscious limits stigmatize or exclude, whether they exacerbate racial tensions and whether they impose burdens unfairly upon members of one race alone but instead seek benefits for members of all races alike.” *Id.* at 834–35.

Justice Ginsburg did not write separately in *Parents Involved*, but she previously rejected the view that the same strict scrutiny standard of review controls judicial inspection of all official race classifications. *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting) (strict scrutiny “would be fitting were our Nation free of the vestiges of rank discrimination long reinforced by law. But we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools.”) (citations and internal punctuation omitted).

Justice Sotomayor’s views as a member of the Court remain to be seen.

91. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 297 n.36 (1978) (Powell, J.).

92. *Grutter v. Bollinger*, 539 U.S. 306, 345 (2003) (Ginsburg, J., concurring).

93. *Gratz v. Bollinger*, 539 U.S. 244, 299–301 (2003) (Ginsburg, J., dissenting) (citations and internal punctuation omitted).

Despite such acknowledgement of inconvenient reality, the Court now tilts toward applications of constitutional principles that render government nearly impotent to mitigate real, pernicious, and persistent problems that keep disfavored minorities at the margins of the social, economic, and political life of the nation. Except insofar as necessary to “remedying the effects of past intentional discrimination”⁹⁴ or as one of several elements considered to achieve diversity in higher education,⁹⁵ Justices Antonin Scalia and Clarence Thomas appear quite prepared to ban all government use of racial classification, and Chief Justice John Roberts and Justice Samuel Alito are not far removed from that opinion.⁹⁶ Under this position,

94. *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 504 (1989) (“While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.”); *Parents Involved*, 551 U.S. at 720; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (“[This] Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.”).

95. *Parents Involved*, 551 U.S. at 722 (“[W]hat was upheld in *Grutter* was consideration of ‘a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.’”) (citation omitted).

96. Justice Clarence Thomas took the most extreme position, as expressed in his *Parents Involved* concurrence:

The dissent accuses me of ‘feel[ing] confident that, to end invidious discrimination, one must end *all* governmental use of race-conscious criteria’ and chastises me for not deferring to democratically elected majorities. . . . Regardless of what Justice Breyer’s goals might be, this Court does not sit to ‘create a society that includes all Americans’ or to solve the problems of ‘troubled inner city schooling.’ . . . We are not social engineers. The United States Constitution dictates that local governments cannot make decisions on the basis of race. Consequently, regardless of the perceived negative effects of racial imbalance, I will not defer to legislative majorities where the Constitution forbids it.”

Parents Involved, 551 U.S. at 766 n.14 (Thomas, J., concurring). The position that the Fourteenth Amendment “dictates that local governments cannot make decisions on the basis of race” closes the door quite firmly on all but a few programs. *Id.*

Justice Antonin Scalia predictably assumed a proximate position:

But if the Federal Government is prohibited from discriminating on the basis of race . . . then surely it is also prohibited from enacting laws mandating that third parties—*e.g.*, employers, whether private, State, or municipal—discriminate on the basis of race As the facts of these cases illustrate, Title VII’s disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory.

Ricci v. DeStefano, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring) (citations omitted). Racial decision-making here appears to be very nearly per se discriminatory, whether the product of federal or state policy.

The Parthian shot with which Chief Justice John Roberts closes his *Parents Involved* majority opinion places him at a short remove from Justices Thomas and

equal protection requires that decisions affecting individual citizens be based on non-racial factors. In effect, government cannot address race-related societal conditions head-on through programs that take into account the race of beneficiaries or participants, but must instead thrash about for proxy factors in hopes that proxy programs may also ameliorate adverse, race-related societal conditions.⁹⁷

Scalia, who together with Justice Alito, joined the Chief Justice's opinion, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, 551 U.S. at 748 (Roberts, C.J.). The Chief Justice reasons that "[a]t stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable *on a nondiscriminatory basis*," and what was required was "determining admission to the public schools *on a nonracial basis*. . . . What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis?" *Id.* at 747 (paraphrasing and partially quoting *Brown II*, 349 U.S. at 300–01) (emphasis in *Parents Involved*). The Chief Justice here conflates the *Brown II* holding with respect to nondiscrimination with the remedy designed to break apart segregated schools. *Brown II* does not address the issue that was present in *Parents Involved*. While *Brown II* did hold, in essence, that the way to stop racial segregation of schools included requiring measures to assign students to schools on a nonracial basis, it scarcely held that the constitutional guarantees would be satisfied so long as a state, as pervasive regulator of education, merely ended de jure segregation, even if the plenipotent regulator of education accommodated socially produced segregation. The Chief Justice merely chopped the *Brown II* opinion to create from its parts positions never taken therein.

97. See, e.g., *Parents Involved* 551 U.S. at 747 (Roberts, C.J.) (declining to express any opinion, even in dicta, about other means to increase student diversity within K-12 systems, observing that decisions about "where to construct new schools, how to allocate resources among schools, and which academic offerings to provide to attract students to certain schools—implicate different considerations than the explicit racial classifications at issue" in *Parents Involved*); *Croson*, 488 U.S. at 526 (Scalia, J. concurring) ("A State can, of course, act 'to undo the effects of past discrimination' in many permissible ways that do not involve classification by race. In the particular field of state contracting, for example, it may adopt a preference for small businesses, or even for new businesses—which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race.").

The problem with proxies is that they often fail of their intended purpose. It has been held, for example, that wealth is not a proxy for race. *Hallmark Developers, Inc. v. Fulton County, Ga.*, 466 F.3d 1276, 1284 (11th Cir. 2006) (citing *James v. Valtierra*, 402 U.S. 137, 140–42 (1971) (California law requiring "referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority" does not violate Equal Protection Clause)). Hence, an admission preference for economically disadvantaged students would tend to benefit Blacks, Hispanics and members of Indian tribes, whose average per capita income between 2006 and 2008, inclusive, was 56.5%, 49.7% and 53.2% of the average for non-Hispanic whites. U.S. CENSUS BUREAU, MEAN INCOME IN THE PAST 12 MONTHS, available at http://factfinder.census.gov/servlet/STTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2008_3YR_G00_S1902&ds_name=ACS_2008_3YR_G00_&lang=en&-redoLog=false&-CONTEXT=st (last visited Mar. 28, 2010). As a practical matter, though, national demographics obviate the use of wealth-based measures to address racial disparities. Although the percentage of whites falling below the poverty level is small compared to other groups, the raw number of whites is nearly as large as the aggregate racial minority populations. Thirteen and two tenths percent (13.2%) of

Three positions developed since *Bakke* by bare majorities of the Burger, Rehnquist and Roberts Courts undergird the positions that circumscribe so tightly the power of the American people to mitigate the effects of race-related societal problems. First, the majorities systematically conflate racial classification and racial discrimination, as though these were semantic twins.⁹⁸ Second, since *Bakke*, majorities of the Court have adhered steadfastly to a rule that “remedying past societal discrimination does not justify race-conscious government action.”⁹⁹ Third, since *Bakke*,

whites were below poverty levels between 2006 and 2008, compared to 29.2% for Hispanics, 34.1% for blacks and 37% for Indians, but the populations affected were, 25,551,296, 12,983,831, 12,098,493 and 866,963, respectively. U.S. CENSUS BUREAU, SELECTED CHARACTERISTICS OF PEOPLE AT SPECIFIED LEVELS OF POVERTY IN THE PAST 12 MONTHS, available at http://factfinder.census.gov/servlet/STTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2008_3YR_G00_S1703&-ds_name=ACS_2008_3YR_G00_-&-redoLog=false&-CONTEXT=st (last visited Mar. 28, 2010). Policy-makers simply cannot rely upon wealth-based proxies to construct programs that address the distinctively race-related societal problems.

Finding an appropriate proxy is not always an easy task, for some proxies may themselves be deemed to be race-based and therefore constitutionally suspect. Compare *Grace v. City of Detroit*, 760 F. Supp. 646, 651 (E.D. Mich. 1991) (“Residence is not race; and although Defendant appears to argue that the residency requirements here are a means of excluding whites from consideration, assuming that this is a lawful means of accomplishing affirmative action, the rules actually discriminate against non-residents of all races.”) (holding that Detroit requirement that police candidates reside in the city for at least sixty days prior to the date of application for employment unconstitutionally burdened the right to travel) and *U.S. v. Caruthers*, 458 F.3d 459, 467 (6th Cir. 2006) (for purposes of establishing reasonable suspicion to justify an investigative detention under the Fourth Amendment, labeling an area “high-crime” raises special concerns of racial, ethnic, and socioeconomic profiling).

98. In *Bakke*, Justice Powell asserted that “[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake.” *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 307 (1978)) (citing *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (prohibiting interracial marriage), *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) (prohibiting interracial cohabitation) and *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (*Brown I*) (maintaining racially segregated school systems)); see also *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (“all ‘governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed.”) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

99. *Parents Involved*, 551 U.S. at 731; *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996) (“[A]n effort to alleviate the effects of societal discrimination is not a compelling interest”); *Croson*, 488 U.S. at 498–99 (“While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia.”) *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (“Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. . . . [A]s the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over-expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.”); *Bakke*, 438 U.S. at

majorities of the Court have held that any line drawn on the basis of race implicates the equal protection clause and must be subject to the most exacting judicial scrutiny.¹⁰⁰

Each of these positions suffers from serious historical and doctrinal defects, but trying to detail the internal weaknesses of the Court's analyses would require a far more extensive review than can be accommodated in the present article. There is yet another weakness in the Court's position that would assure its eventual demise even if it were doctrinally sound.¹⁰¹

307–09 (Powell, J., for the court) (“[R]emedying of the effects of ‘societal discrimination,’ an amorphous concept of injury that may be ageless in its reach into the past.”); *but see* *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564–65 (1990), *overruled by Adarand*, 515 U.S. at 227 (O’Connor, J.) (“We hold that benign race-conscious measures mandated by Congress—even if those measures are not ‘remedial’ in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.”).

100. “Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.” *Bakke*, 438 U.S. at 291. In *Parents Involved*, 551 U.S. at 741–43, Justice Roberts cites several cases as authority for this proposition, including *Johnson v. California*, 543 U.S. 499 (2005); *Grutter*, 539 U.S. 306; *Gratz*, 539 U.S. 244; *Adarand*, 515 U.S. 200; *Metro Broadcasting*, 497 U.S. 547, and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267.

101. In addition to other matters, the doctrine labors under the burden of being the product of a politicized judiciary. *See supra* notes 79 through 83, discussing the politicization of judicial appointments since the Nixon presidency. The Justices who developed the core doctrines and embraced them enthusiastically were appointed by presidents who sought deliberately to use judicial appointments as an instrument of political policy. The *Bakke* decision, 438 U.S. 265, was handed down by a panel of Justices that included four Nixon appointees: Chief Justice Warren Burger; Justice Harry A. Blackmun; Justice Powell and Justice William H. Rehnquist and one Ford appointee, Justice John Paul Stevens. Justices of the United States Supreme Court, available at <http://www.unitedstatesreports.org/justices/index.html> (last visited Apr. 9, 2010). The alignment of the Justices in that case was convoluted, for Nixon appointee Justice Powell’s seminal dissertation on the constitutionality of race-based classification was not joined by Nixon appointees Chief Justice Warren Burger, Justice Blackmun or Justice Rehnquist. The Chief Justice, Justice Rehnquist and Eisenhower appointee Justice Potter Stewart joined Ford appointee Justice Stevens’ writing that would have overturned the admissions policy on statutory grounds, forming thus the plurality that struck down the policy. Kennedy appointee Justice Byron White subscribed to the view that racial and ethnic distinctions of any sort are inherently suspect and call for the most exacting judicial examination. Nixon appointee Justice Blackmun agreed that strict scrutiny was critical, but did not regard affirmative action programs as inherently at odds with the Fourteenth Amendment.

The *Bakke* pattern has been largely consistent since that time. For example, *Wygant*, 476 U.S. 267, reflected the views of Reagan appointee Justice O’Connor, Nixon appointees Chief Justice Warren Burger, Justice Powell and Justice Rehnquist and Kennedy appointee Justice White. The *Croson*, 488 U.S. 469, outcome was controlled by Reagan appointees Justice O’Connor, Justice Scalia and Justice Kennedy, Nixon appointee Chief Justice Rehnquist, and Kennedy appointee Justice White. The *Adarand*, 497 U.S. 547, majority included George H.W. Bush appointee Justice Thomas and Reagan appointees Justice O’Connor, Justice Scalia and Justice Kennedy

and Nixon appointee Chief Justice Rehnquist. *Parents Involved*, 551 U.S. 701, reflected the views of George W. Bush appointees Chief Justice Roberts and Justice Alito, George H.W. Bush appointee Justice Thomas and Reagan appointees Justice Scalia and Justice Kennedy.

The version of equal protection elaborated by the Burger, Rehnquist Roberts Courts also suffers because the substance of the doctrine appears to constitutionalize policy preferences advanced for strategic partisan purposes. When Ronald Reagan ran as the Republican candidate, he used race to split the traditional Democratic labor and lower middle class base. THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS AND TAXES ON AMERICAN POLITICS 164 (1992). While his “story of a ‘Chicago welfare queen’ . . . who supposedly drove a Cadillac, bought thick steaks with food stamps and vacated in resorts on taxpayer funds[,]” is perhaps the most memorable use of racially charged rhetoric, Holloway Sparks, *Queens, Teens, and Model Mothers: Race, Gender, and the Discourse of Welfare Reform*, in RACE AND THE POLITICS OF WELFARE REFORM 194 n.10 (Sanford F. Schram et al. eds., 2003), Reagan also made opposition to affirmative action an express element in his campaign:

We must not allow this noble concept . . . of equal opportunity to be distorted into federal guidelines or quotas which require race, ethnicity or sex – rather than ability and qualifications – to be the principal factor in hiring and education. Instead we should make a bold commitment to economic growth, to increase jobs and education for all Americans.

KEVIN L. LYLES, THE GATEKEEPERS FEDERAL DISTRICT COURTS IN THE POLITICAL PROCESS 133 (1997) (quoting a Reagan Campaign press release).

Such race-charged rhetoric was particularly effective with the working class and lower middle class Democrats who saw civil rights policies as “benefiting minorities at the expense of the working and middle class” and believed that federal regulatory policy “had shifted away from provision of such essential goods as job safety and the policing of monopolies to the imposition of forced busing and racial preferences.” Edsall & Edsall, *supra*, at 174 (1992). See also Charlotte Steeh & Maria Krysan, *The Polls—Trends Affirmative Action And The Public, 1970-1995*, 60 Pub. Op. Q. 128, 135–36 (1996) (finding that white support for race-based preferences or economic aid remained below 20% between 1970 and 1995, while black support for such measures dropped from 80% in 1970 to 40% in 1995).

While it may well be the case that Reagan was trying to take advantage of discussion generated by *Bakke*, 438 U.S. 265, the close alignment between his rhetoric and the substantive equal protection doctrines shaped by Justices that he appointed creates the appearance that the Court’s doctrines embody political preferences, not jurisprudential ones. That appearance augurs poorly for the sustainability of the doctrines. Just as the political character of *Dred Scott v. Stanford*, 60 U.S. (19 How.) 393 (1857), compromised its authority, so too does the political instrumentality of jurisprudential choices forced by partisan judges undercut the authority of the Court’s holdings. See Harry V. Jaffa, *Dred Scott Revisited*, 31 Harv. J. of Law & Pub. Pol. 197, 208-11 (2008) (arguing that *Dred Scott* should be understood as “part of a Slave Power conspiracy involving two Presidents [Franklin Pierce and James Buchanan], a Chief Justice [Roger Taney], and a United States Senator [Stephen A. Douglas], and providing the foil for Abraham Lincoln’s campaign”); Lucas E. Morel, *The Dred Scott Dissents: McLean, Curtis, Lincoln, and the Public Mind*, 32 J. of Sup. Ct. Hist. 133, 134 (2007) (pressure from influential Southerners led to the reassignment of the opinion to Chief Justice Taney).

While the politicized character of the equal protection doctrines propounded by the Burger, Rehnquist and Roberts Courts would not necessitate their abandonment, if they were sound and suited to the needs of the nation, the partisan appearance of the doctrines, coupled by their maintenance by a set of Justices selected for partisan

Where the Court's doctrinal experiments diminish the power of the nation's people to mitigate long-standing, unremittingly serious, disruptive societal disparities, the compounding pressure of the public need will force change.

Sound statecraft can neither ignore nor deny social, economic, or political problems that divide and weaken the nation. As *Worcester v. Georgia*,¹⁰² *Dred Scott*,¹⁰³ *Plessy*,¹⁰⁴ *Lochner*¹⁰⁵ and *Brown I*¹⁰⁶ made plain, the judicial power cannot reach the social circumstances that manifest themselves through the demand for or opposition to political action; nor can the judicial power sustain constructions of the constitution that deny the people the use of the resources of their government to eliminate or to mitigate perceived obstacles to the public weal.¹⁰⁷

Through its *Bakke* line of equal protection decisions, the Court has prevented the American people from using race-related criteria to channel

purposes, taints the doctrines with partisanship, compromises their authority, as well as that of the Court, and provides ongoing partisan incentives to overturn the decisions.

102. 31 U.S. (6 Pet.) 515 (1832).

103. 60 U.S. (19 How.) 393 (1856).

104. 163 U.S. 537 (1896).

105. 198 U.S. 45 (1905).

106. 347 U.S. 483 (1954).

107. *Dred Scott* held that slavery was a form of property affirmatively acknowledged in the constitution and that Congress did not have the power to forbid slavery in the territories and that territorial laws purporting to forbid slavery were nugatory. *Dred Scott*, 60 U.S. at 450–52. The decision did nothing, of course, to temper the roiling discord over slaveholding and slave economies. See *supra* note 11 for a discussion of *Plessy v. Ferguson*, 163 U.S. 537 (1896); *supra* note 13 for a discussion of the meager short-term effects of *Brown I* and *Brown II*; *supra* note 86 for a discussion of *Lochner*. *Worcester* illustrates how even a decision that is well grounded in the Constitution and sound moral judgment can run afoul of strong political currents. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). The case arose from the prosecution under Georgia law of a missionary residing with the Cherokee people and resisting efforts to arrange for their expulsion from their lands in Georgia. The Court held that,

The Cherokee nation . . . is a distinct community occupying its own territory, with boundaries accurately described, the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

Id., at 561. The Court ordered Georgia to release the missionary. *Id.*, at 562–63. President Andrew Jackson famously observed that, “the decision of the [S]upreme [C]ourt has fell still born, and they find that they cannot coerce Georgia to yield to its mandate.” FRANCIS P. PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 212 (1984). The decision limiting state encroachment on Indian treaty lands did nothing to relieve pressure to open the lands for white settlement, and federal authorities secured the Treaty of New Echota in 1835, opening the way for eventual removal the Cherokee. Treaty of New Echota § 16, Dec. 29, 1835, 7 Stat. 478, reprinted in 2 *INDIAN AFFAIRS: LAWS AND TREATIES, TREATIES* 446 (Charles J. Kappler ed., 1904) <http://digital.library.okstate.edu/kappler/Vol2/treaties/che0439.htm#mn2>.

assistance to individuals who have suffered the consequences of race-related disparities. By creating a constitutional disability to mitigate the effects of racial discrimination, the Court sets the nation at odds with its very history.

Throughout the nation's existence, racial discrimination has been a societal cancer whose morbid effects imperiled the stability of the republic, and for this reason the people have ever returned to the task of applying the power of government to rid the nation of the lingering corruption. Slavery was the bane of the early republic, jeopardizing approval of the Constitution¹⁰⁸ and leading inexorably to secession and war.¹⁰⁹ The nineteenth century fight to establish the power of the national government to effectuate the union victory in the Civil War and to protect the rights of freed slaves through appropriate legislation was sharp and successful,¹¹⁰ though the intended benefits of the Reconstruction Amendments were

108. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), revolved around the interpretation of Article IV, § 2, Cl 3, of the constitution. This Constitution provision states: "No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up, on claim of the party to whom such service or labor may be due." U.S. CONST. ART. IV, § 2, CL. 3.

Historically, it is well known, that the object of this clause was to secure to the citizens of the slave-holding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape from the state where they were held in servitude. The full recognition of this right and title was indispensable to the security of this species of property in all the slave-holding states; and, indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted, that it constituted a fundamental article, without the adoption of which the Union could not have been formed. Its true design was, to guard against the doctrines and principles prevalent in the non-slave-holding states, by preventing them from intermeddling with, or obstructing, or abolishing the rights of the owners of slaves.

Prigg, 41 U.S. at 611.

109. Jaffa, *supra* note 101, at 197–98 ("The Civil War clearly was a test, as Lincoln said at Gettysburg, of whether any nation 'conceived in Liberty, and dedicated to the proposition that all men are created equal' could long endure. The test came when eleven states "seceded" following the election of Abraham Lincoln in 1860. The Republican platform in that year contained a pledge to end any further extension of slavery into the new territories from which new states might be formed. The seceding states found it intolerable that all new states would be free states, so that eventually three-fourths of the states might be able to abolish slavery by constitutional amendment, without the consent of the slave states.")

110. See *The Slaughterhouse Cases* at 83. Thirteenth, Fourteenth and Fifteenth Amendments, respectively, to confirm the outcome of the Civil War, to empower Congress to outlaw the Black Codes and to empower blacks to protect their interests through the political process); Bickel, *supra*, note 1, at 63 (noting that the framers of the fourteenth amendments viewed it as providing only limited correction to state legislation motivated by racial hostility and that they expected that achieving the objectives of the amendment would await "further legislation, in enabling acts or other provisions.").

substantially diminished by the decisions of the Court that culminated in *Plessy*.¹¹¹ The twentieth century effort to persuade government to prohibit segregation and overtly discriminatory practices was long and difficult.¹¹² The trammels that the Court, following *Bakke*, has sought to impose upon the political will of the American people are no more likely to endure than were the obstacles raised by the Court in *Dred Scott* or *Plessy*. The inexorable need to eliminate race-related divisions that set communities against one another cannot long be stayed, and the nation must have the latitude to provide assistance to individuals who have borne the burdens of race-related disadvantage if it is to break the cycles of disadvantage that plague generation after generation of disfavored minority communities.

The remainder of this article comprises three parts. Part A attempts to document the circumstances that make it unlikely that the informal working social networks will provide minority communities with opportunity, and it suggests that circumstances will oblige government to develop programs to improve opportunities for the nation's minority populations. Part B examines the deep national tradition of investing in the American people to expand the people's prospects and to enhance the people's capacity for self-government, and it emphasizes the longstanding public investment in education and in higher education. Part C concludes that, as it did in *Bakke*,¹¹³ *Grutter*,¹¹⁴ and *Gratz*,¹¹⁵ the college or university will again play a role in seeking to assure that the promise of equal protection does not strangle the prospects for equal opportunity.

A. Separate lives

People belonging to racial minorities tend to encounter very different challenges in their lives from those that confront people who are white. For example, minority populations remain at the margins of American prosperity and are most likely to be excluded from the benefits and safety enjoyed by the white majority. There is a serious personal toll caused by

111. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 342 (1949) ("The purposes of the framers [of the Fourteenth Amendment] received short shrift at the hands of the Supreme Court. The revolution in the federal system, which was the Amendment's principal goal, fell victim to the Court's doctrine that only state action was reached. The privileges and immunities clause was officially killed in the *Slauhterhouse* cases. The due process clause, though also hampered by the state-action doctrine, became the cornerstone of the judicial defense of property and the system of natural liberty. While the equal protection clause, its natural-rights sweep and state-inaction coverage completely ignored, was relegated to a secondary position.").

112. See *supra* notes 3-4, 9, 12-18, 27-37, 51-59, 64-66, 71, 75-77 and accompanying text.

113. 438 U.S. 264 (1978).

114. 539 U.S. 306 (2003).

116. 539 U.S. 244 (2003).

racial discrimination, which affects the well-being and family life of individuals belonging to disfavored minority groups. Moreover, children born into minority groups still face disproportionately separate and unequal educational opportunities. Minority populations remain underrepresented among the professions and management and business ownership. The ordinary workings of informal social networks reinforce and perpetuate race-related disparities in economic circumstances, well-being, education, and work. The nation cannot ignore the fact that the lives of people belonging to disfavored racial minority groups follow separate and unequal paths from those of the white majority.

1. Minority populations at the margins

On average, persons in racial minority groups earn little more than half of what white Americans earn.¹¹⁶ Earnings for minority communities are more sensitive to economic downturn than those of white Americans.¹¹⁷ Although the nation made significant progress in reducing poverty, members of minority communities are still more likely to live in poverty than white Americans.¹¹⁸

116. The average per capita income between 2006 and 2008, inclusive, for Blacks, Hispanics and members of Indian tribes was 56.5%, 49.7% and 53.2% of the average for non-Hispanic whites. Average earnings for Asians were 94.4% those of the average for non-Hispanic whites. U.S. CENSUS BUREAU, MEAN INCOME IN THE PAST 12 MONTHS (IN 2008 INFLATION-ADJUSTED DOLLARS), 2006-2008 AMERICAN COMMUNITY SURVEY 3-YEAR ESTIMATES, *available at* http://factfinder.census.gov/servlet/STTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2008_3YR_G00_S1902&-ds_name=ACS_2008_3YR_G00_-lang=en&-redoLog=false&-CONTEXT=st.

117. CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR, & JESSICA C. SMITH, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2008, 5 (2009), *available at* <http://www.census.gov/prod/2009pubs/p60-236.pdf> (“Real median income for households of each race category and those of Hispanic origin declined between 2007 and 2008 The income of non-Hispanic White households declined 2.6 percent (to \$55,530); for Blacks, income declined 2.8 percent (to \$34,218); for Asians, income declined 4.4 percent (to \$65,637); and for Hispanics, income declined 5.6 percent (to \$37,913). In comparison to the respective income peaks before the 2001 recession, 2008 household income was 4.3 percent lower for all races combined (from \$52,587 in 1999), 2.7 percent lower for non-Hispanic Whites (from \$57,059 in 1999), 7.8 percent lower for Blacks (from \$37,093 in 2000), 5.8 percent lower for Asians (from \$69,713 in 2000), and 8.6 percent lower for Hispanics (from \$41,470 in 2000).”).

118. Data on poverty rates from 1959 only permit comparison of whites and blacks, but the figures provide a stark measure of the gains that were made in reducing poverty. In 1959, poverty rates for whites and blacks stood at 18.1% and 55.1%, respectively. *Id.* at 45, 47. Despite the relative progress, whites are still nearly one third as likely as blacks to fall below poverty levels. “In 2008, the poverty rate increased for non-Hispanic Whites (8.6 percent in 2008—up from 8.2 percent in 2007), Asians (11.8 percent in 2008—up from 10.2 percent in 2007), and Hispanics (23.2 percent in 2008—up from 21.5 percent in 2007). The poverty rate in 2008 was statistically unchanged for Blacks (24.7 percent).” *Id.* at 13.

Members of a minority group are more likely to be unemployed.¹¹⁹ Not surprisingly given higher unemployment rates, they are also more likely than whites to lack health insurance.¹²⁰ Members of a minority group are more likely than whites to report that cost was a barrier to healthcare¹²¹ and to report fair or poor health status, obesity, diabetes, and no leisure-time physical activity.¹²²

Racial or ethnic minorities are more likely to be the targets of hate crimes¹²³ and less likely to be the perpetrators of hate crimes.¹²⁴ Minorities

119. In the 2006–2008 reporting period, unemployment rates for non-Hispanic Whites stood at 5.2%; Blacks at 12%; Hispanics at 7.4%; Asians at 5%, and American Indians at 12%. U.S. CENSUS BUREAU, 2006-2008 AMERICAN COMMUNITY SURVEY, EMPLOYMENT STATUS: 3 YEAR ESTIMATES http://factfinder.census.gov/servlet/STTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2008_3YR_G00_S2301&-ds_name=ACS_2008_3YR_G00. For January 2010, the seasonally adjusted unemployment figures stood at 8.7% for Whites, 16.5% for Blacks, 12.6% for Hispanics; seasonally adjusted figures were not available for Asians, but the unadjusted number was 8.4%. BUREAU OF LABOR STATISTICS, THE EMPLOYMENT SITUATION—JANUARY 2010, tbls. A-2, A-3. <http://www.bls.gov/news.release/pdf/empst.pdf>.

120. In 2008, the uninsured rate for non-Hispanic Whites was 10.8%; for Blacks it was 19.1%; for Hispanics 30.7%; and for Asians it was 17.1%. CARMEN DENAVAS-WALT, *supra* note 116, at 23.

121. Julie C. Bolen et al., State-Specific Prevalence of Selected Health Behaviors, by Race and Ethnicity—Behavioral Risk Factor Surveillance System, 1997 (2000), <http://www.cdc.gov/mmwr/PDF/ss/ss4902.pdf> (“Whites were the least likely racial or ethnic group to report that cost was a barrier to obtaining health care. The median percentage was 9.4% for whites (range: 5.4%-24.3%), 13.2% for blacks (range: 6.6%-27.7%), 16.2% for Hispanics (range: 7.9%-30.1%), 12.6% for American Indians or Alaska Natives (range: 9.2%-26.7%), and 11.6% for Asians or Pacific Islanders (range: 4.7%-16.3%).”). Cf. DEP’T OF HEALTH AND HUMAN SERVS., MENTAL HEALTH: CULTURE, RACE, ETHNICITY SUPPLEMENT TO MENTAL HEALTH: REPORT OF THE SURGEON GENERAL 38 (2001) available at <http://download.ncadi.samhsa.gov/ken/pdf/SMA-01-3613/sma-01-3613A.pdf>. (“Racism and discrimination . . . have been documented in the administration of medical care. They are manifest, for example, in fewer diagnostic and treatment procedures for African Americans versus whites.”).

122. Bolen, *supra* note 121, at 14, 25.

123. Federal Bureau of Investigation statistics document that 51% of all hate crimes were based on race, and 12/7% were based on ethnicity or national origin. FED. BUREAU OF INVESTIGATION, 2008 HATE CRIME STATISTICS, available at <http://www.fbi.gov/ucr/hc2008/victims.html>. Of the 4,934 victims of these racial bias crimes, 72.9 % were victims of an offender’s anti-black bias, 16.8% were victims because of an anti-white bias, 3.4% were targeted because of an anti-Asian/Pacific Islander bias, 1.3% were victims because of an anti-American Indian/Alaskan Native bias. 5.6% were victims because of a bias against a group of individuals in which more than one race was represented (anti-multiple races, group). *Id.* Hate crimes motivated by the offender’s bias toward a particular ethnicity/national origin affected 1,226 victims, 64.6% of whom were victims of an anti-Hispanic bias and 35.4% were targeted because of a bias against other ethnicities/national origins. *Id.*

124. Race data reported in 2008 for the 6,927 known hate crime offenders revealed that, 61.1% were white, 20.2% black, 5.9% were groups made up of individuals of various races (multiple races, group), 1.1 % Asian/Pacific Islander, 0.7 % were

are more likely than whites to be victims of violent crimes.¹²⁵ Minorities are more numerous in prison populations than would be predicted on the basis of their percent in the general population,¹²⁶ and they less likely to be on probation.¹²⁷

Even without taking into consideration the mechanics of racial discrimination, life in general is poorer, less healthy, and more dangerous for disfavored racial minorities.

2. The personal toll of racial discrimination

Minorities are more likely than whites to live with high levels of stress and are subject to higher levels of stress-related disorders, such as hypertension and transitory illness.¹²⁸ Reaction to racial discrimination

American Indian/Alaskan Native, and 11.0 % were unknown. *Id.* These data do not break down the race of the hate crime defenders by nature of the hate crime, i.e., it cannot be determined from this report which percent of hate crime offenders of particular racial or ethnic groups were engaged in race or ethnic hate crimes. *Id.*

125. For the period 2002-2006, the victim rates by race per 1000 population per year for violent crimes were: white 22.6, black 29.1, Hispanic 24.1, Asian/Pacific Islander 10.6 and American Indian/Alaska Native 56.4. ERIKA HARRELL, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: ASIAN, NATIVE HAWAIIAN, AND PACIFIC ISLANDER VICTIMS OF CRIME 3 tbl. 2 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/anhpivc.pdf>. In 2005, 49% of all homicide victims were black – 52% of all male victims were black and 35% of all female victims were black. ERIKA HARRELL, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: BLACK VICTIMS OF VIOLENT CRIME 3 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/bvvc.pdf>.

126. In 2007, 2.1 million were men and 208,300 women were incarcerated. WILLIAM J. SABOL & HEATHER COUTURE, BUREAU OF JUSTICE STATISTICS, BULLETIN, PRISON INMATES AT MIDYEAR 2007 at 7 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim07.pdf>. “Black males represented the largest percentage (35.4%) of inmates held in custody, followed by white males (32.9%) and Hispanic males (17.9%).” *Id.* White women comprised 46.4% of the female prison population, black women, 32.5%, and Hispanic women, 15.4%. *Id.* at 7 tbl. 9. By contrast, in 2007, the nation’s male population was 80.4% white, 12.4% black and 15.8% Hispanic; its female population was 79.5% white, 13.2% black and 14.4% Hispanic. U.S. CENSUS BUREAU, POPULATION ESTIMATES, ANNUAL ESTIMATES OF THE POPULATION BY SEX, RACE, AND HISPANIC ORIGIN FOR THE UNITED STATES: APR. 1, 2000 TO JULY 1, 2007, (2007) available at <http://www.census.gov/popest/national/asrh/NC-EST2007/NC-EST2007-03.xls>.

127. In 2008, whites comprised 56% of the adults on probation, blacks 29%, Hispanic’s 13%, Asians 1%. LAUREN E. GLAZE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, BULLETIN PROBATION AND PAROLE IN THE UNITED STATES 2008 at 24 app. tbl.5 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ppus08.pdf>.

128. DEP’T OF HEALTH AND HUMAN SERVICES, *supra* note 121, at 38.

In a national probability sample of minority groups and whites, African Americans and Hispanic Americans reported experiencing higher overall levels of global stress than did whites. The differences were greatest for two specific types: financial stress and stress from racial bias. Asian Americans also reported higher overall levels of stress and higher levels of stress from racial bias, but sampling

appears to be a significant factor in the levels of stress reported.¹²⁹ The physiologic effects of chronic stress may even explain consistent patterns of prematurity and low birth weights for black mothers and for second generation Hispanic mothers.¹³⁰ The higher rate of premature, low birth weight infants has further consequences for family life, since such infants “are far more likely than other infants to suffer major developmental

methods did not permit statistical comparisons with other groups. American Indians and Alaska Natives were not studied.

Id.

129. The Department of Health and Human Services Report observed:

Recent studies link the experience of racism to poorer mental and physical health. For example, racial inequalities may be the primary cause of differences in reported quality of life between African Americans and whites. Experiences of racism have been linked with hypertension among African Americans. A study of African Americans found perceived discrimination [used in the report to refer to ‘self-reports of individuals about being the target of discrimination or racism. The term is not meant to imply that racism did not take place’] to be associated with psychological distress, lower well-being, self-reported ill health, and number of days confined to bed Perceived discrimination was linked to symptoms of depression in a large sample of 5,000 children of Asian, Latin American, and Caribbean immigrants. Two recent studies found that perceived discrimination was highly related to depressive symptoms among adults of Mexican origin and among Asians.

Id.

130. “[B]lack infants are two to three times as likely as their white counterparts to be born prematurely and/or with low birth weight.” Paula Braveman, *Racial Disparities at Birth: The Puzzle Persists*, ISSUES IN SCI. AND TECH. (2008), available at http://www.issues.org/24.2/p_braveman.html; see also S Iyasu et al., *Infant Mortality and Low Birth Weight Among Black and White Infants — United States, 1980–2000*, 51 MORBIDITY AND MORTALITY WKLY. REP. 589, 589–92 (July 12, 2002), available at <http://www.cdc.gov/mmwr/PDF/wk/mm5127.pdf>.

Chronic stress could lead to adverse birth outcomes through neuroendocrine pathways. Neuroendocrine and sympathetic nervous system changes caused by stress could result in vascular and/or immune and inflammatory effects that could lead to premature delivery as well as inadequate fetal nutrition.

Braveman, *supra*.

Hispanic women (despite poverty) and poor birth outcomes of their U.S.-born daughters (whose income and education levels are generally higher around the time of childbirth than those of their immigrant mothers), black immigrants also have better birth outcomes than U.S.-born black women. In contrast to the unfavorable (compared to whites) birth outcomes of black women born and raised in the United States, birth outcomes among black immigrants from Africa and the Caribbean are relatively favorable, especially after considering their income and education. As with the comparison of racial disparities in different socioeconomic groups noted above, it is very difficult to explain this disparity by maternal birthplace with genetic differences. If the basis for the differences in birth outcomes by maternal birthplace were genetic, one would expect the immigrants (presumably with a heavier “dose” of the adverse genes) to have worse outcomes, not better.

Id.

problems, including cognitive, behavioral, and physical deficits during childhood.”¹³¹

Parents who belong to minority groups cannot responsibly ignore racial discrimination. They must raise their children to live with racial hostility. Parents in minority communities are wise to coach their children about the hostility that awaits them once the children leave the home and enter school.¹³² Minority children are more likely to be victims of racial disparagement at school, and children who perceive themselves as having been subject to racial disparagement are more likely than their classmates to exhibit behavioral problems that interfere with their education, such as depression, attention deficit hyperactivity disorder, oppositional defiant disorder, and conduct disorder.¹³³ Depression was the most predictable consequence of racial discrimination for minority children.¹³⁴ Even though there was no significant association for white children between believing themselves to have been targets of racial discrimination and depression, among minorities, children who perceived themselves as having been subject to racial disparagement were 2.6 to 3.9 times more likely than whites to develop symptoms of depression.¹³⁵

Because of racial discrimination, individuals who belong to disfavored minority groups face pervasive challenges that differ from those confronting majority groups and that lead disproportionately to physical and psychological adversity.

3. Educational challenges for children born to minority groups

On average, school districts with heavy minority populations are substantially less well-funded than those with low minority enrollment, receiving 11.4 percent less funding per pupil than school districts with low minority enrollment.¹³⁶ Not only are such schools underfunded, but also

131. *Id.* Premature, low birth weight infants also “have poorer prospects for employment and wages as adults. Prematurity and low birth weight . . . also predict poor adult health, including diabetes, high blood pressure, and heart disease, all of which raise risks of disability and premature mortality.” *Id.*

132. Robert M. Seller et al., *Racial Identity Matters: The Relationship between Racial Discrimination and Psychological Functioning in African American Adolescents*, 16 J. RES. ON ADOLESCENCE 187, 209 (2006) (“[T]eaching African American adolescents that other groups may hold negative attitudes toward African Americans should lead to better outcomes for African American adolescents when they encounter racial hassles.”).

133. Tumaini R. Coker et al., *Perceived Racial/Ethnic Discrimination Among Fifth-Grade Students and Its Association With Mental Health*, 99 AM. J. OF PUB. HEALTH 878, 881–83 (2009).

134. *Id.*

135. *Id.*

136. School districts with heavy minority populations receive on average 11.4% less funding per pupil than school districts with low minority enrollment. As would be expected, school districts in high poverty areas are also less well funded per pupil than

academic quality is marginal. The larger the minority enrollments in a school, the less likely it is to meet annual yearly progress goals established under No Child Left Behind standards.¹³⁷ Underfunded schools with dubious quality enroll disproportionately large numbers of minority students. Schools that were targeted as needing improvement under NCLB standards enrolled thirty-two percent of all black children enrolled in K-12 schools during 2003–2004, twenty-eight percent of Hispanic students, twenty-one percent of all American Indian students, seventeen percent of all Asian students and only nine percent of white students.¹³⁸

School performance is affected, not only by resources, but also by family and community expectations. Parental education levels showed a greater influence on student achievement than race, and students whose parents had more education outperformed their classmates whose parents had less formal schooling; a fact that may well reflect the fact that more highly educated parents tend to have greater economic resources to invest in their children's education and greater expectations that the investments in education will translate into greater future economic opportunity.¹³⁹

districts with low poverty levels with an 8.1% disparity between funds per pupil. Kati Haycock, Mary Lynch, and Jennifer Engle, *Opportunity Adrift: Our Flagship Universities are Straying from their Public Mission* 4 (2010), available at <http://www.edtrust.org/sites/edtrust.org/files/publications/files/Opportunity%20Adrift%28%29.pdf>.

137. Only 55% of the schools with minority enrollments of 75% or greater met the annual yearly progress goal. Kerstin Carlson Le Flock et al. 3 STATE AND LOCAL IMPLEMENTATION OF THE NO CHILD LEFT BEHIND ACT — ACCOUNTABILITY UNDER NCLB: INTERIM REPORT xxii (2007), available at <http://www2.ed.gov/rschstat/eval/disadv/nclb-accountability/nclb-accountability.pdf>. Seventy percent of schools with minority enrollments of 25% to 75% met AYP goals, as did 86% of schools enrolling less than 25% minorities. *Id.*

138. *Id.*, at 151.

139. D. SNYDER ET AL., DIGEST OF EDUCATION STATISTICS 2008 at 86 (2009), <http://nces.ed.gov/programs/digest/d08>. As noted, *supra* notes 117 through 119 and accompanying text, persons belonging to minority groups are more likely to live in poverty, and poverty forces families to choose between allocating scarce resources to contribute to their children's education or other pressing needs and it forces individuals to choose whether it is in their best interests to forego work for further education. See also Carlotta Berti Ceroni, *Poverty Traps and Human Capital Accumulation*, 68 ECONOMICA 203, 204 (2001) ("Education involves variable opportunity costs in terms of forgone income rather than fixed direct costs in most countries"); Tanya Araújo & Miguel St. Aubyn, *Education, Neighborhood Effects And Growth: An Agent-Based Model Approach*, 11 ADVANCES IN COMPLEX SYSTEMS 99, 103 (2008) (devising an economic model to predict the interplay between neighborhood effects and individual economic decision-making, "[s]tudying implies a period of time without earnings, so the agent compares the present value of its income as a skilled worker with the present value of an unskilled workers' income."); Maria Emma Santos, *Human Capital and the Quality of Education in a Poverty Trap Model* 16 (Oxford Poverty & Human Dev. Initiative, Working Paper No. 30 2009), available at http://www.ophi.org.uk/pubs/OPHI_WP_30.pdf ("One possible explanation for the observed differences may be that many public schools in Argentina form private cooperatives to which parents contribute voluntarily to complement funds received

Here, again, some minorities are at a disadvantage. In 2008, 91.5 percent of whites over 18 years of age completed high school and 32.6 percent completed college or university; the corresponding percentages for blacks were 83.3 percent, and 19.7 percent, and for Hispanics, they were 62.3 percent and 13.3 percent—at these completion rates it could take generations for the gradual increases in minority education achievement to reach parity with whites.¹⁴⁰ The effects of neighborhood educational levels on educational achievement are approximately the same as those of parent education.¹⁴¹ Not surprisingly, given the toxic mix of low funding, low performing schools, and lower education completion rates, dropout rates for blacks and Hispanics remain higher than for whites.¹⁴²

Postsecondary education participation rates have come more nearly into alignment with overall population distributions. In 2007, whites comprised 64 percent of total postsecondary enrollment and 74.3 percent of the overall population; the corresponding figures for blacks comprised thirteen percent and 12.3 percent, and for Hispanics the percentages were at eleven percent and fifteen percent.¹⁴³

from the government. Although this fund usually represents a small percentage of the school budget, schools with children from the more advantaged social sectors will be in a better position to buy additional educational material or improve the infrastructure. Moreover, schools with students coming from the very disadvantaged social sectors cannot count on such extra funds (or they are very meagre). These schools also need to use a large fraction of public funding for purposes other than strictly educational, i.e., satisfying the students' most urgent basic needs such as providing them with daily meals.”).

140. D. SNYDER ET AL., *supra* note 139, at 25. Race was also related to student performance on subject-matter achievement tests; Asian and white students achieved comparable testing scores, while black, Hispanic and American Indian children consistently lagged on these measures. *See id.* (citing statistics). These results are likely collinear to some extent with differences in parental education.

Assuming that higher parental education correlates to higher income and greater incentives and ability to invest in children's education, even if minority children were to complete college at the rate of 35%, it could take eight generations for minority populations to achieve completion rates that would be at parity to wealthy white populations. Carlotta Berti Ceroni, *supra* note 139, at 212, 214 (estimating the number of generations it would required for the descendants of persons whose incomes are in the bottom quartile and whose education is high school or less to reach levels of income and education at which the wealth and education of original populations would not predict the economic or educational achievement of the descendants).

141. Yannis M. Ioannides & Linda Datcher Loury, *Job Information Networks, Neighborhood Effects, and Inequality*, 42 J. OF ECON. LITERATURE 1056, 1081–82, 1084 (2004) (reviewing literature).

142. In 2007, dropout rates for blacks and Hispanics (8.4 and 21.4 percent, respectively) remained higher than the rate for Whites (5.3 percent). D. SNYDER ET AL., *supra* note 139, at 3. When dropout rates were first differentiated by race — albeit reported only white and black, in 1967, the rate for whites was 15.4% and for blacks 28.6%. *Id.* at 169. In 1972, when rates for Hispanics were added, the statistics were 12.3%, 21.2% and 34.3%, respectively for whites, blacks and Hispanics. *Id.*

143. In 2007, 64% of students enrolled in postsecondary institutions were white,

Despite such superficial comparability, noteworthy disparities remain. Minority populations are more somewhat less likely to enroll in programs at the baccalaureate level. Public four year institutions are sixty-seven percent white, and private-not-for profit institutions are seventy percent white.¹⁴⁴ In contrast, white enrollments at two year institutions are sixty percent and sixty-one percent, respectively.¹⁴⁵

The overall percentages of enrollment only show part of the trend towards racial separation in postsecondary education. Many students, particularly whites, attend institutions that enroll seventy-five percent or more of members of their own race. Some fifty-two percent of white students attended institutions where more than seventy-five percent of the enrollment was white; the comparable figures for other minorities were thirteen percent for black students eleven percent of the black enrollment was in historically black colleges or universities); six percent for Hispanic students; and eight percent for American Indian students (usually tribal colleges located on reservations).¹⁴⁶

Minority students are much less likely to study at the most well-funded public institutions in their states. While combined black, Hispanic, and American Indian enrollments comprised thirty percent of the 2007 freshmen class for all colleges and universities, they comprised only thirteen percent of the entering classes at flagship institutions.¹⁴⁷ The flagship colleges and universities not only enjoy the greatest breadth and depth of learning resources and the greatest prestige, but that also afford the greatest opportunity to establish the social connections with students and alumni that afford preferential access to jobs, further study and other forms of advancement.

Generations after *Brown I*,¹⁴⁸ the nation's elementary and secondary schools continue to fail persons belonging to disfavored minority groups; and generations after *Bakke*,¹⁴⁹ the most prestigious institutions still accommodate few persons belonging to the most disadvantaged minority

13% were black, 11% were Hispanic, 7% were Asian/Pacific Islander, 1% were American Indian/Alaska Native, and 3% were nonresident aliens. M. PLANTY ET AL., THE CONDITION OF EDUCATION 2009 at 94 (2009), available at http://nces.ed.gov/programs/coe/2009/pdf/38_2009.pdf. This shows significant progress, compared to the 1965 data, see James S. Coleman et al., *supra* note 12. Census bureau population statistics for the period 2006-2008, report 74.3% of the population as white, 12.3% as black, .8% as American Indian or Alaska Native, 4.4% as Asian, 0.1% as Native Hawaiian, 8% as other or two or more races and 15% as Hispanic, whatever their race. U.S. CENSUS BUREAU, *supra* note 116.

144. M. PLANTY ET AL, *supra* note 143, at 230–31. Private for-profit institutions, in contrast, are only 53% white. *Id.* at 231.

145. *Id.*

146. *Id.* at 232.

147. Haycock, *supra* note 136, at 7, 19.

148. 347 U.S. 483 (1954).

149. 438 U.S. 265 (1978).

groups.

4. Underrepresentation among the professions, management, and business ownership

Minorities are underrepresented across the professions. Only ten percent of American lawyers are minorities, “about four percent of lawyers are African American, 3.3 percent are Hispanic, 2.3 percent are Asian American, and 0.2 percent are Native American.”¹⁵⁰ Judges reflect similar percentages. Overall one out of ten judges belongs to a minority group, six percent of judges are black, three percent are Hispanic, one percent are Asian, and 0.1 percent are American Indian.¹⁵¹ Healthcare fields reflect similar trends. Blacks, Hispanics and American Indians comprise only nine percent of the nation’s nurses, six percent of its physicians, and five percent of dentists.¹⁵² The pattern is similar in the sciences and engineering. Whites hold 72.4 percent of the positions in the sciences, blacks 4.3 percent, Hispanics 4.2 percent, Asians 16.9 percent, and American Indians 0.5 percent.¹⁵³ For engineering employment, the respective figures are 74.8 percent, 3.2 percent, 5.4 percent, 14.5 percent and 0.2 percent.¹⁵⁴

Minorities continue to be underrepresented in management positions, 83.6 percent of such positions are held by whites, 8.3 percent by blacks, 7.1 percent by Hispanics, and 6.3 percent by Asians.¹⁵⁵ Among chief executive officers, 90.8 percent are white, 3.9 percent are black, 4.8 percent are Hispanic, and 4 percent are Asian.¹⁵⁶ Minority corporate leaders are more likely to encounter career difficulties than their white counterparts. Minorities are more likely to suffer from lack of mentoring, to be excluded from social and informational networks, and to receive low-status assignments.¹⁵⁷ Women and racial or ethnic corporate leaders are more likely to be promoted to corporate leadership during times of financial stress when corporate performance results in erosion of stock prices.¹⁵⁸

150. Chew, *supra* note 83, at 1127.

151. *Id.* at 1125.

152. SULLIVAN COMMISSION ON DIVERSITY IN THE HEALTHCARE WORKFORCE, MISSING PERSONS: MINORITIES IN THE HEALTH PROFESSIONS 2 (2004), available at <http://www.aacn.nche.edu/Media/pdf/SullivanReport.pdf>.

153. NATIONAL SCIENCE FOUNDATION, WOMEN, MINORITIES, AND PERSONS WITH DISABILITIES IN SCIENCE AND ENGINEERING: 2009 at 219 (2009).

154. *Id.*

155. U.S. BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2008 at 14 (2009)

156. *Id.*

157. Alison Cook & Christy Glass, *But Can S/he Lead? Market Assessments of Black Leadership in Corporate America*, 13 J. WORKPLACE RIGHTS 337, 338–39 (2008) (reviewing literature).

158. *Id.* at 345, 347.

Consequently:

[The] financial state of the firm combined with negative share price fluctuations will likely result in a greater struggle for Black leaders to effectively lead the firm[, and] they are more likely to be singled out as unfit leaders rather than as capable individuals appointed to struggling firms.¹⁵⁹

Minority businesses ownership rates remain well below the 30 percent minority share of the nation's population, and minority owned businesses tend to be small businesses employing small percentages of the national workforce and earning a small percent of national business revenues. In 2002, businesses owned by blacks, Hispanics, Asians, and American Indians comprised 17.7 percent of all businesses, but they only employed 4.3 percent of the nation's workforce, and their revenues only amounted to 2.9 percent of business receipts.¹⁶⁰

In 2006, minorities comprised 32.2 percent of the overall federal government workforce, but minority employment was greatest at the lowest pay grades, 43.3 percent, and lowest at the senior pay level, 14.8 percent.¹⁶¹ The demographics of the highest ranks of federal employment were comparable to those of corporate management, 85.2 percent of those at senior pay levels were white, 6.4 percent black, 3.7 percent Hispanic, 3.8 percent Asian and 0.8 percent American Indian.¹⁶²

Fifty years after the civil rights movement occupied the center of

159. *Id.* at 347.

160. U.S. CENSUS BUREAU, 2002 SURVEY OF BUSINESS OWNERS (2002), available at <http://www.census.gov/econ/sbo/historic.html#aian>. Black-owned firms accounted for 5.2% of all nonfarm businesses in the U.S., 0.7% of their employment, and 0.4% of their receipts. U.S. CENSUS BUREAU, SURVEY OF BUSINESS OWNERS - BLACK-OWNED FIRMS: 2002, <http://www.census.gov/econ/sbo/02/blacksof.html>. Hispanic-owned firms accounted for 6.8% of all nonfarm businesses in the United States, 1.4% of their employment and 1.0% of their receipts. U.S. CENSUS BUREAU, SURVEY OF BUSINESS OWNERS - HISPANIC-OWNED FIRMS: 2002 (2002), available at <http://www.census.gov/econ/sbo/02/hispanicsof.html>. Asian-owned firms accounted for 4.8% of all nonfarm businesses in the U.S., 2.0% of their employment and 1.4% of their receipts. U.S. CENSUS BUREAU, SURVEY OF BUSINESS OWNERS - ASIAN-OWNED FIRMS: 2002, http://www.census.gov/econ/sbo/02/asiansof_all.html. American Indian- and Alaska Native-owned firms accounted for 0.9% of all nonfarm businesses in the United States, almost 0.2% of their employment, and more than 0.1% of their receipts. U.S. CENSUS BUREAU, SURVEY OF BUSINESS OWNERS - AMERICAN INDIAN- AND ALASKA NATIVE-OWNED FIRMS: 2002 (2002), available at <http://www.census.gov/econ/sbo/02/aiansof.html>.

161. OFFICE OF PERSONNEL MANAGEMENT, TRENDS BY GENERAL SCHEDULE AND RELATED (GSR) GRADE GROUPINGS (ALL EMPLOYEES), tbl. 1-5, *Demographic Profile of the Federal Workforce* (2006), available at <http://main.opm.gov/feodata/demograp/table1-5.pdf>.

162. *Id.* General Schedule ranks 14–15 were quite similar: 79.2% white; 9.7% black; 4.1% Hispanic; 6% Asian and 0.9% American Indian. *See supra* notes 155, 156 and accompanying text for corporate figures.

American culture and politics, disproportionately few men and women who are members of minority groups have been able to reach the centers of power that shape the professions, drive the nation's economy and influence public policy.

5. Informal social networks reinforce and perpetuate race-related disparities

Informal social networks play crucial roles in disseminating information about opportunities for employment. Numerous studies have documented the role that social networks play in labor markets. In some instances as many as fifty to sixty percent of jobs result from social contacts, and these results hold for “a variety of occupations, skill levels, and socioeconomic backgrounds.”¹⁶³ Minorities, in particular, are more likely to have found their jobs through informal networking.¹⁶⁴ Although social networks provide significant assistance in locating jobs, there “is little evidence that using contacts to find work results in higher wages or increased occupational prestige.”¹⁶⁵ “[D]ifferential network contacts and differential resources accruing from these contacts may explain part of the continuing inequality between whites and blacks, and between men and women;” and, of course, since education often figures among the circumstances that factor into the creation of social network ties, the abiding educational disadvantages of many minority neighborhoods and schools obstructs minority access to advantageous networks.¹⁶⁶ White men are more likely

163. Antoni Calvó-Armengol & Matthew O. Jackson, *The Effects of Social Networks on Employment and Inequality* 94 AM. ECON. REV. 426, 426 (2004) (citing Mark Granovetter, *The Strength of Weak Ties*, 78 AM. J. OF SOCIOLOGY 1360 (1973) and Albert Rees, *Information Networks in Labor Markets*, 56 AM. ECON. REV. 559 (1966)); Ted Mouw, *Social Capital and Finding A Job: Do Contacts Matter?*, 68 AM. SOC. REV. 868, 868 (2003) (same, reviewing literature); Ioannides & Loury, *supra* note 141, at 1058, 1065–66 (reviewing literature) (citing findings that about half of all workers heard about their current job through a friend or relative and a meta-study that estimated that 30 to 60 percent of jobs were found through friends or relatives). In the context of high tech industry hiring, the effects of race on applicant success disappear once personal and professional contacts are included in the analyses for once “personal and professional contacts account for 60.4 percent of applicants and 80.8 of those receiving offers.” *Id.*

164. Roberto M. Fernandez & Isabel Fernandez-Mateo, *Networks, Race, and Hiring*, 71 AM. SOC. REV. 42, 42 (2006). There is limited evidence that people tend to refer information about job opportunities to members of their own race more frequently than to members of other races, although not exclusively, and that whites may be less likely to refer opportunities at all, less likely to refer them to other races and more likely to receive information about opportunities from other races. *Id.* at 56–57, 66. This study was based on a single factory and it did not find that referral translated into hiring or that race played an easily predictable role in hiring. *Id.* at 66.

165. Mouw, *supra* note 1633, at 869–70, 878; Fernandez, *supra* note 164, at 42.

166. Alexandra Kalev, Frank Dobbin, & Erin Kelly, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 594 (2006) (citations omitted); *but see* Mouw *supra*,

than others to find good jobs through network ties because their networks are composed of other white men who dominate management positions.

Given the important roles played by social networks, the high unemployment rates among members of disfavored minority groups and limited access to high status positions may have compounding effects that prolong the social, economic, and political disadvantages of minority communities and their members. Just as social networks can enhance individual access to critical information and opportunity, they may also obstruct opportunity: “Agents in the network with worse initial starting conditions have a lower expected discounted stream of future income from remaining in the network than agents in the network with better initial starting conditions.”¹⁶⁷ The paucity of opportunities available through a person’s social network might encourage individuals to drop out of the job market, and dropping out may itself disrupt further the flow of information through the whole social network.¹⁶⁸ Each person who drops out of the job market no longer serves as a source of job information for his social contacts, making it harder for them to identify opportunity:

As a larger drop-out rate in a network leads to worse employment status for those agents who remain in the network, . . . slight differences in initial conditions can lead to large differences in drop-out rates and sustained differences in employment rates.”¹⁶⁹ In the end, “network relationships can change as workers are unemployed and lose contact with former connections. Long unemployment spells can generate a desocialization process leading to a progressive removal from labor market opportunities and to the formation of unemployment traps.”¹⁷⁰

The social network analysis information flow explanation for race-related

note 163, at 888, 891 (finding that among higher status workers, “social capital measures, such as average education, employment levels, or the occupational status of social network members, do not have a causal effect on labor market outcomes—or, if they do, it is not via the information and influence of contact networks,” in part because the existence of potential social advantages among higher status workers does not predict their attempt to use contacts to obtain referrals for jobs). With respect to the interplay between education and social network formation, see Ioannides & Loury, *supra* note 141, at 1064–66 (education affects access to advantageous social network contacts and job offers); Mouw, *supra* note 163, at 886 (education level and education level of friends correlates to wages); Calvó-Armengol, *supra* note 163, at 426 n.3 (The gap between wages for white and blacks is roughly on the order of 25 percent to 40 percent, and can be partly explained by differences in skill levels and quality of education. See *supra* notes 136–149 and accompanying text (documenting disparity in educational resources and outcomes).

167. Calvó-Armengol, *supra* note 163, at 427.

168. *Id.* at 426 (citing studies that suggest blacks are 2.5 to 3 times more likely than whites to drop out of labor markets).

169. *Id.* at 427.

170. *Id.* at 443.

higher employment drop-out rates and sustained inequality in wages and employment rates does not depend upon postulates about psychological disposition to favor people from the same social groups.¹⁷¹ But, by the same token, social network analysis does not explain the factors that may influence employer hiring decisions.¹⁷² Here, the tendency to favor social ties with similar people may play a substantial role in hiring. The role of race, gender, social class, and religion, as well as behaviors and values in influencing such choices is well documented.¹⁷³ Minorities are not only more likely to have poor access to information about job opportunities, but they are also more likely to encounter difficulties exploiting the information available to them, and, in addition to everything else, they are more likely to encounter discrimination and bias in the selection process.¹⁷⁴

Informal social networking mechanisms that facilitate access to information about opportunities and informal preferences for persons with similar backgrounds and interests tend, on the whole, to be of greater help to whites trying to improve themselves in the mainstream economy,¹⁷⁵ but their utility depends upon starting points and backgrounds. Persons from disfavored minority groups are less likely than whites to enjoy socially, economically and educationally advantageous starting points and their backgrounds are less likely than whites to approximate those of the majority of existing professionals or managers. Hence, there is little basis

171. *Id.* at 427, 439.

172. *See* Mouw, *supra* note 163, at 886 (in contexts where educational credentials are material, it is difficult to differentiate between selection based upon referral by persons whose social and educational standing is similar to the person referred or selection based upon the similarity between the social and educational standing of the person selecting employees and the person referred); Fernandez, *supra* note 164, at 46–47 (noting that some employers avoid hiring through referrals); *Id.* at 65–66 (finding some indication that, although Asian males working in the factory being analyzed were the most active in referring Asian applicants, hiring officials tended to limit the number of persons hired through Asian referrals).

173. Mouw, *supra* note 163, at 872, 886, 888; Ioannides & Loury, *supra* note 141, at 1064.

174. Alison Cook, *supra* note 157, at 339–40 (citing literature).

175. It goes without saying that social network analysis has also proven useful to explain how individuals enter into and operate within criminal enterprises. *See, e.g.*, Christopher R. Browning, *Illuminating the Downside of Social Capital: Negotiated Coexistence, Property Crime, and Disorder in Urban Neighborhoods*, 52 AM. BEHAVIORAL SCI. 1556 (2009) (hypothesizing “that as network interaction and reciprocated exchange among neighborhood residents increase, offenders and conventional residents become increasingly interdependent” and the residents belief in their collective ability to regulate criminal activity reduced in neighborhoods characterized by high levels of network interaction and reciprocated exchange); Garry Robins, *Understanding individual behaviors within covert networks: the interplay of individual qualities, psychological predispositions, and network effects*, 12 TRENDS ORGAN. CRIM. 166 (2009) (noting that criminal networks tend to operate as covert networks and discussing the significance of psychological factors in the analysis of covert networks).

for believing that the ordinary operation of social networks will ultimately provide members of disfavored minority communities with opportunities to extricate themselves from the serial disadvantages that confront them from birth.

6. Disfavored racial minority groups follow separate and unequal paths from those of the white majority

Nearly three score years have passed since *Brown I*¹⁷⁶ opened the way to repudiating *Plessy*.¹⁷⁷ For all that has been attempted and achieved in the intervening years, the stubborn facts remain that persons who are black, Hispanic or American Indian, and even in many respects, Asian, continue to confront social, economic and material circumstances that are different and far more difficult than those that confront their fellow citizens who are white. From birth through childhood, in school and in the workforce, persons who belong to disfavored minority groups must contend with active discrimination, lack of economic resources, inadequate education, poor health and poor healthcare, and few informal sources for information and assistance in finding opportunities to better their prospects.

Particularly given the pervasive government involvement in regulating and operating the nation's school systems, and given the importance that a solid education plays in providing access to advantageous social networks, the Court's rigid equal protection regime seems singularly disingenuous. A nation whose schools fail its minority communities is scarcely a neutral bystander; its failings actively contribute to perpetuating conditions that impede the ability of minority communities to heal themselves. The equal protection that the Court has propounded since *Bakke*¹⁷⁸ operates to perpetuate the very race-related disparities that have strained the national fabric throughout the nation's history.

Irrespective of divergent opinions on questions jurisprudence, partisan preference, or even morality, the nation cannot ignore the cumulative, pervasive, and generational disadvantages that confront persons born into racial minorities. In 2005, 44.4 percent of the children born in the United States belonged to a racial or ethnic minority.¹⁷⁹ For at least the fifteen years between 1990 and 2005, pregnancy rates for minority women have

176. 347 U.S. 483 (1954).

177. 163 U.S. 537 (1896).

178. 438 U.S. 537 (1896).

179. Non-Hispanic white women gave birth to 55.6% of all live infants in 2005. Black and Hispanic women accounted for 14.0% and 23.8% of the total respectively. STEPHANIE J. VENTURA, JOYCE C. ABMA, WILLIAM D. MOSHER, & STANLEY K. HENSHAW, NATIONAL CENTER FOR HEALTH STATISTICS, ESTIMATED PREGNANCY RATES FOR THE UNITED STATES, 1990–2005: AN UPDATE 58 NATIONAL VITAL STATISTICS REPORTS 1, 11 tbl. 3, *Number and Percent Distribution of Pregnancies, by Outcome of Pregnancy, by Age, and by Race and Hispanic Origin of Women: United States, 2005* (2009), available at http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_04.pdf.

exceeded those of non-Hispanic white women.¹⁸⁰ There is every reason to expect increases in the number of persons born in America to a lifetime of race-related adversity.

The combination of perverse and pervasive race-related disadvantages, a burgeoning population subject to such disadvantages and a paucity of informal social means to relieve such disadvantages creates the practical necessity, even the urgency, of empowering government to intervene and to extirpate the vestigial remains of the nation's heritage of slavery. The need is pressing; soon half the nation will have been born to race-related adversity. Jurisprudential doctrines that impede the ability of the people to use their government to bring equal opportunity into reach for persons of all races will be challenged, and, in the end, *Bakke*¹⁸¹ and *Parents Involved*¹⁸² will be bent or put aside to allow the people of the United States to use their government to help them to help themselves.

B. Higher Education as an Extra-Constitutional Mechanism to Remedy Disparities

Higher education provides the nation an extra-constitutional mechanism to strengthen and to preserve the republic; and, in that service, it will continue to play a role in the nation's efforts to help individuals overcome the disadvantages that befall members of disfavored minority communities. Institutions of higher education have long played a distinctive role in western society. They facilitate both individual growth and societal development.¹⁸³ These twin objectives led to the founding of American

180. *Id.* at 12 tbl.4, *Estimated total pregnancy, total fertility, and total induced abortion rates, by race and Hispanic origin: United States, 1990, 1996, 2000, 2003, 2004, and 2005*, http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_04.pdf.

181. 438 U.S. 265 (1978).

182. 551 U.S. 701 (2007).

183. Already in the middle ages, "the social role of the medieval university consisted primarily of training for more rational forms of the exercise of authority in church, government, and society." Walter Rüegg, *Themes*, in 1 A HISTORY OF THE UNIVERSITY IN EUROPE, UNIVERSITIES IN THE MIDDLE AGES 21 (Hilde de Ridder-Symoens ed., 1991). The university was the catalyst that permitted the growth of nation states and international businesses; it provided the corps of leaders, trained in the skills of complex analysis, writing and mathematics and possessing the capacity to create the complex bureaucracies required to support the work of nations and international finance and enterprise; and it afforded a means to channel talented individuals from middle and upper classes into constructive endeavors. Peter Moraw, *Careers of Graduates*, in 1 A HISTORY OF THE UNIVERSITY IN EUROPE, UNIVERSITIES IN THE MIDDLE AGES 246 (Hilde de Ridder-Symoens ed., 1991) (explaining that founding or expanding medieval universities was motivated by "the 'prestige' and the practical, economic, and administrative benefits accruing to communities and rulers") social changes that resulted from the activities of the learned classes were unintended consequences); *id.* at 247 (citing the Northern Italian city states to illustrate how emerging cities and states needed specialists for domestic administration and legal systems in order to secure their autonomy and to gain competitive advantages over

universities.¹⁸⁴ College and university programs designed to meet these objectives not only provide individual students with skills that open the way to employment in business, government or the professions within the larger society, but also help individual students to gain access to social networks, and the advantages that they provide, that might otherwise not be open to them.¹⁸⁵ Nor is the utility of these programs in facilitating mobility across social networks a coincidental feature of the university mission, it is a core feature of the mission, and one that contributes significantly to protecting the nation.

The historic role of public colleges and universities in educating those who were not born to privilege or opportunity, coupled with the stubborn demographic facts that disproportionately burden persons in disfavored minority groups, pulled public universities into the conflicts that came before the Court in *Bakke*,¹⁸⁶ *Grutter*¹⁸⁷ and *Gratz*.¹⁸⁸ Higher education's historic mission, and the nation's persistent race-related disparities,¹⁸⁹ assure that the colleges and universities will be involved as the nation struggles to overcome the lingering effects of racial discrimination and to undo the Court's ill considered precedents.

1. American colleges and universities serve as extra-constitutional social mechanisms to secure representative government

Leading members of the founding generation understood the nation's security required more than a formal constitution whose division of power,

their neighbors); *id.* at 255 (a university degree provided a "qualification which was largely or to some extent independent of birth and property was important everywhere, but supremely important in the modernization of less advanced societies.").

184. Benjamin Franklin expressed similar view during colonial times when he first advanced proposals for the creation of the University of Pennsylvania. BENJAMIN FRANKLIN, PROPOSALS RELATING TO THE EDUCATION OF YOUTH IN PENSILVANIA (1748), available at <http://www.archives.upenn.edu/primdocs/1749proposals.html> ("The good Education of Youth has been esteemed by wise Men in all Ages, as the surest Foundation of the Happiness both of private Families and of Common-wealths. Almost all Governments have therefore made it a principal Object of their Attention, to establish and endow with proper Revenues, such Seminaries of Learning, as might supply the succeeding Age with Men qualified to serve the Publick with Honour to themselves, and to their Country.").

185. See, e.g., Ioannides & Loury, *supra* note 141, at 1064–66 (education affects access to advantageous social network contacts and job offers); Mouw, *supra* note 163, at 886 (education level and education level of friends correlates to wages); Calvó-Armengol, *supra* note 163, at 426 n.3 (The gap between wages for white and blacks is roughly on the order of 25 percent to 40 percent, and can be partly explained by differences in skill levels and quality of education).

186. 438 U.S. 265 (1978).

187. 539 U.S. 306 (2003).

188. 539 U.S. 244 (2003).

189. See *supra* notes 116–180 and accompanying text.

checks, and balances raised hedges against the concentration of power that enabled despotism. The eminently practical early American leaders saw that security was inextricably linked to expanding access to social and economic opportunities. The founders knew that the hope that drew people to the new nation was less the desire for political freedom than the opportunity to be free from the restraints on personal prospects that were inherent in the class system that divided eighteenth century European society.

The tyranny of that class system chafed the European masses and constrained their social and economic prospects. Even in England, where social mobility was easier than in continental Europe, the vast majority of wealth and opportunity was controlled by aristocrats, landed gentry, merchants and entrepreneurs, and the mass of people “could never be sure of full employment.”¹⁹⁰ Europe’s class-related barriers to individual advancement, not its monarchical political systems, caused the restiveness that spurred massive immigration to the new world.¹⁹¹ In the new world, the very lack of hereditary aristocracy facilitated the ascent from poverty to the highest ranks of national leadership, not only of Alexander Hamilton and Benjamin Franklin, and of the whole colonial leadership.¹⁹² This chance for self-improvement drew the poor of Europe to America, and their pursuit of opportunity expanded the American settlements and enlarged the economic prospects for all.¹⁹³

Members of the founding generation understood well the social dynamic that led to American political independence, and they saw necessity for government investment in programmatic measures that improved the lives and livelihood of the American people, that drew them together socially and economically and that thereby reinforced their political bonds.¹⁹⁴

190. T. S. ASHTON, *AN ECONOMIC HISTORY OF ENGLAND: THE EIGHTEENTH CENTURY 20–23* (1972).

191. Gottfried Achenwall, *Some Observations on North America from Oral Information by Dr. Franklin*, 14 HANNOVERISCHES MAGAZIN, 17tes, 18tes, 19tes, 31tes, 32tes Stücke (Feb. 27, Mar. 2, 6, Apr. 17, 20, 1767), cols. 257-96, 482-508 <http://franklinpapers.org/franklin/framedVolumes.jsp> (Translated from “Einige Anmerkungen über Nordamerika, und über dasige Grosbritannische Colonien. (Aus mündlichen Nachrichten des Hrn. Dr. Franklins.)” “Frequently poor Scots, Irish, Germans go to America, to seek there the fortune they do not believe they can find in the Old World.” *Id.*

192. JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 13 (2000).

193. See Achenwall, *supra* note 191 (recounting how the prospects of profiting from sales to internal migrants spurred the growth of settlements in the wilderness and how laborers save to set themselves up as independent farmers).

194. John Adams, for example, captured all these themes in 1779, when he proposed amendments to the Massachusetts Constitution that committed the legislature to support education throughout the commonwealth, including support for a university at Cambridge. JOHN ADAMS, *THE REVOLUTIONARY WRITINGS OF JOHN ADAMS* (C. Bradley Thompson ed., 2000), available at <http://oll.libertyfund.org/title/592/76884>

There can be no surprise that members of the founding generation favored investment in education as a public good.

Washington and Jefferson early emphasized the essential role of education in creating the opportunity that strengthens representative government. They regarded public colleges and universities as an extra-constitutional mechanism to preserve the republic by broadening the diffusion of learning across social classes and enlarging the population of persons possessing the skills required for democratic governance and useful in diversifying the economy. They believed that higher education would play a critical role in preparing leaders who understood thoroughly the distinctive American form of government and an educated citizenry able to hold its leaders to account.¹⁹⁵ They expected colleges and universities to

("Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties, and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislators and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings, sincerity, good humor, and all social affections and generous sentiments among the people.")

195. Letter from George Washington, President of the United States, to Governor Robert Brooke, Governor of Va. (Mar. 16, 1795), *available at* <http://bit.ly/cx11A0> ("It is with indescribable regret, that I have seen the youth of the United States migrating to foreign countries, in order to acquire the higher branches of erudition, and to obtain a knowledge of the Sciences. Altho' it would be injustice to many to pronounce the certainty of their imbibing maxims, not congenial with republicanism; it must nevertheless be admitted, that a serious danger is encountered, by sending abroad among other political systems those, who have not well learned the value of their own.").

The Commissioners of the University of Virginia saw the distinctive role of the university as embracing the preparation of the nation's leaders, and to such ends established curricula:

To form the statesmen, legislators and judges, on whom public prosperity and individual happiness are so much to depend; To expound the principles and structure of government, the laws which regulate the intercourse of nations, those formed municipally for our own government, and a sound spirit of legislation, which, banishing all arbitrary and unnecessary restraint on individual action, shall leave us free to do whatever does not violate the equal rights of another; To harmonize and promote the interests of agriculture, manufactures and commerce, and by well informed views of political economy to give a free scope to the public industry; To enlighten them with mathematical and physical sciences, which advance the arts, and administer to the health, the subsistence, and comforts of human life; . . .

THOMAS JEFFERSON, REPORT OF THE COMMISSIONERS FOR THE UNIVERSITY OF VIRGINIA (1818), *available at* http://mailer.fsu.edu/~njumonvi/jefferson_uva.htm. The

play a seminal role in improving the nation's society and economy by bringing "into action that mass of talents which lies buried in poverty."¹⁹⁶ Moreover, both Washington and Jefferson believed that institutions of higher education had unique potential to help reduce the regional and religious prejudices that separated members of the populace from one another and fed the seeds of disharmony.¹⁹⁷ Jefferson emphasized the role of education in preventing the concentration of power in new aristocracies based upon wealth and family connection.¹⁹⁸

Commissioners saw public elementary education as laying the ground for good citizenship, since it served to assist a pupil.

To understand his duties to his neighbors and country, and to discharge with competence the functions confided to him by either; To know his rights; to exercise with order and justice those he retains; to choose with discretion the fiduciary of those he delegates; and to notice their conduct with diligence, with candor, and judgment; And, in general, to observe with intelligence and faithfulness all the social relations under which he shall be placed. To instruct the mass of our citizens in these, their rights, interests and duties, as men and citizens, being then the objects of education in the primary schools, whether private or public, in them should be taught reading, writing and numerical arithmetic, the elements of mensuration, (useful in so many callings,) and the outlines of geography and history.

Id.

196. Thomas Jefferson saw that the nation would benefit by choosing:

[F]rom the elementary schools [pupils] of the most promising genius, whose parents are too poor to give them further education, to be carried at the public expense through the colleges and university. The object is to bring into action that mass of talents which lies buried in poverty in every country, for want of the means of development, and thus give activity to a mass of mind, which, in proportion to our population, shall be the double or treble of what it is in most countries.

Letter from Thomas Jefferson, President of the United States, to José Correa da Serra (Nov. 25, 1817), *available at* <http://www.yamaguchy.netfirms.com/7897401/jefferson/1817.html>.

197. *See, e.g.*, Washington Letter, *supra* note 195 ("The time is therefore come, when a plan of Universal education ought to be adopted in the United States. Not only do the exigencies of public and private life demand it; but if it should ever be apprehended that prejudice would be entertained in one part of the Union against another; an efficacious remedy will be, to assemble the youth of every part under such circumstances, as will, by the freedom of intercourse and collision of sentiment, give to their minds the direction of truth, philanthropy, and mutual conciliation."); Letter from Thomas Jefferson, President of the United States, to Thomas Cooper (Nov. 2, 1822), *available at* <http://etext.virginia.edu/jefferson/quotations/jeff1370.htm> ("And by bringing the sects together, and mixing them with the mass of other students, we shall soften their asperities, liberalize and neutralize their prejudices, and make the general religion a religion of peace, reason, and morality.").

198. Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), *available at* <http://www.yamaguchy.netfirms.com/7897401/jefferson/1813b.html> ("Worth and genius would thus have been sought out from every condition of life, and completely prepared by education for defeating the competition of wealth and birth for public trusts."). Jefferson's concerns seem to resonate with those that prompted Adams to write into his 1779 draft of the Massachusetts Constitution a directing that the

Nor were the views of Washington and Jefferson idiosyncratic musings of the elite leadership. As early as 1785, still constituted under the Articles of Confederation, Congress recognized formally the national interest in fostering education. The Ordinance of 1785 regulating the disposition of western lands purchased from the Indians specified that “[t]here shall be reserved the lot N 16, of every township, for the maintenance of public schools, within said township,” and “the Federal Government has included grants of designated sections of the public lands for school purposes in the Enabling Act of each of the States admitted into the Union since 1802.”¹⁹⁹ Some eighty years later, Congress pledged resources of the national government to expand access to the university.

The Morrill Act of 1862 nationalized the policy goal of using the public university to facilitate individual social mobility thereby to enrich society. The Morrill Act subsidized state university creation, provided that states agreed to establish:

[A]t least one college where the leading object shall be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life.²⁰⁰

The Morrill Act reflected a broader commitment to spur national development by subsidizing the efforts of individuals to improve their livelihoods and the ability of industrialists to create an infrastructure for settlement and commerce. The Homestead Act of 1862 subsidized the development of unoccupied federal lands.²⁰¹ The Pacific Railway Act of

legislature spread “the opportunities and advantages of education in the various parts of the country, and among the different orders of the people.” See JOHN ADAMS, THE REVOLUTIONARY WRITINGS OF JOHN ADAMS, *supra* note 194.

199. The General Land Ordinance of 1785, *reprinted in* 28 JOURNALS OF THE CONTINENTAL CONGRESS 375, 378 (Jon Fitzpatrick ed., 1933), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=lljc&fileName=028/lljc028.db&recNum=389&itemLink=D%3Fhlaw%3A2%3A.%2Ftemp%2F~ammem_CU6H%3A%3A%230280006&linkText=1; United States v. Wyoming, 331 U.S. 440, 443 (1947) (“Consistent with the policy first given expression in the Ordinance of 1785, the Federal Government has included grants of designated sections of the public lands for school purposes in the Enabling Act of each of the States admitted into the Union since 1802.”); *see also* Northwest Territory Ordinance of 1787, *reprinted in* 28 JOURNALS OF THE CONTINENTAL CONGRESS 334, 340, *available at* http://memory.loc.gov/cgi-bin/ampage?collId=lljc&fileName=028/lljc028.db&recNum=389&itemLink=D%3Fhlaw%3A2%3A.%2Ftemp%2F~ammem_CU6H%3A%3A%230280006&linkText=1 (“Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”).

200. 7 U.S.C. § 304 (2006).

201. The Homestead Act, ch. 75, 12 Stat. 392 (1862) (homesteading ended in

1862 granted lands to railroad promoters, who had proven their ability to promote land sales to and to encourage settlement, both for the right of way as well as additional lands whose sale proceeds—collected from settlers who purchased railroad land—would help to finance the railroad construction.²⁰²

In the twentieth century, four pieces of landmark legislation renewed the public investment in higher education and supported unprecedented growth and expansion of the nation's college and university system. The G.I. Bill subsidized veteran access to higher education and laid the groundwork of interest in higher education that fueled the enrollment growth from the 1950s through the 1970s.²⁰³ The National Defense Education Act of 1958 provided, *inter alia*, federal matching funding to establish student loan programs with priorities for students studying science, mathematics, engineering or modern foreign languages, and it provided federal funds for graduate fellowships to support students science, humanities, technology and mathematics.²⁰⁴ The Economic Opportunity Act of 1964 created the work-study program that subsidized low-income student employment while at college.²⁰⁵ The Pell Grant program originated as the Basic Educational

1976).

202. The Pacific Railway Act of 1862, ch. 120, 12 Stat. 489; EMERSON DAVID FITE, *SOCIAL AND INDUSTRIAL CONDITIONS IN THE NORTH DURING THE CIVIL WAR* 13 (1963).

203. Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284 (1944); Christopher P. Loss, "The Most Wonderful Thing Has Happened to Me in the Army": *Psychology, Citizenship, and American Higher Education in World War II*, 92 J. AM. HIST. 864, 876 (2005) (noting that the army sought three objectives by supporting investment in soldiers, enhancing understanding of American history and values, improving economic prospects by providing soldiers with an avenue for skills enhancement and professional credentials, and, most critically, providing soldiers with opportunities, through education, to improve their psychological strength); URSULA DELWORTH & GARY R. HANSON, *STUDENT SERVICES: A HANDBOOK FOR THE PROFESSION* 14 (2d. ed. Jossey-Bass Publishing 1989).

204. National Defense Education Act of 1958, Pub. L. 85-864, 72 Stat. 1580 (1958). Section 101 of the Act announced the policy objective of the legislation:

The defense of this Nation depends upon the mastery of modern techniques developed from complex scientific principles. It depends as well upon the discovery and development of new principles, new techniques, and new knowledge. We must increase our efforts to identify and educate more of the talent of our Nation. This requires programs that will give assurance that no student of ability will be denied an opportunity for higher education because of financial need; will correct as rapidly as possible the existing imbalances in our educational programs which have led to an insufficient proportion of our population educated in science, mathematics, and modern foreign languages and trained in technology.

Id.

205. Economic Opportunity Act of 1964, 42 U.S.C. § 2701 (2006). President Lyndon Johnson explained the purpose the provision when he introduced legislation to initiate a war on poverty: "There is no more senseless waste than the waste of the brainpower and skill of those who are kept from college by economic circumstance. Under this program they will, in a great American tradition, be able to work their way

Opportunity Grants²⁰⁶ was established by the Education Amendments of 1972.²⁰⁷

The evolving economic and social conditions of the nation have made the extra-constitutional functions of higher education more essential to preserving the republic than ever before. At the onset of the twenty-first century, responsible political leaders continue to view the human capital development role of education in general and of colleges and universities, in particular, as playing critical roles in enhancing national security²⁰⁸ and spurring economic development.²⁰⁹

through school.” President Lyndon B. Johnson, President’s Message to Congress Proposing a Nationwide War on the Sources of Poverty (Mar. 16, 1964), transcript available at <http://www.fordham.edu/halsall/mod/1964johnson-warpoverty.html>.

206. 20 U.S.C. § 1070a (2006).

207. Pub. L. No. 92-318, 86 Stat. 248 (1971). In 1971, Senator Claiborne Pell of Rhode Island introduced legislation to pursue what he called “a radical approach to Federal aid to education, in that it provides, as a matter of right, a basic educational opportunity grant . . . to every student pursuing a postsecondary education at an institution of higher education.” 117 Cong. Rec. 2008 (1971) (statement of Sen. Pell). Senator Birch Bayh of Indiana reiterated the purpose of the act to establish access to higher education as:

[A] basic Federal right. By establishing a minimum level of scholarship assistance for each needy student who wishes to pursue postsecondary education, we hope to break forever the bonds that have tied generation upon generation to the ghettos and economic backwaters of America.

117 Cong. Rec. 30403 (1971) (statement of Sen. Bayh).

208. *Homeland Defense: Exploring the Hart Rudman Report: Hearing before the Subcomm. on Technology, Terrorism, and Government Information of the S. Comm. on the Judiciary*, 107th Cong. 28 (2001) (statement of Gary Hart, Warren Rudman, Lee Hamilton, and Donald Rice, Members of the U.S. Commission on National Security/21st Century), available at <http://www.gpo.gov/fdsys/pkg/CHRG-107shrg239/pdf/CHRG-107shrg239.pdf> (“In the world we have entered, knowledge and agility are vital. This Commission views U.S. shortcomings in science policy and education as national security problems. We recommend major investments to bolster science and mathematics teaching, and a doubling of the public research and development budget within this decade.”).

209. *Challenges to American Competitiveness in Math and Science: Hearing before the Subcomm. on 21st Century Competitiveness of the Committee on Education and the Workforce*, 109th Cong. 13–14 (2005) (statement of Norman R. Augustine, Retired Chairman and CEO, Lockheed Martin Corporation), available at <http://www.gpo.gov/fdsys/pkg/CHRG-109hrg10921303/pdf/CHRG109hrg10921303.pdf>

A number of studies have shown that over half the jobs created in America during the past half century were the direct consequence of earlier investments in science and technology. That is, the ability to provide jobs for our citizen’s and support their standard of living can be seen to depend to a very substantial degree on our nation’s competitiveness in science and technology. . . . How well equipped is America to deal with these challenges? On the positive side, we have built what is generally recognized to be the world’s finest higher education system, but it is noteworthy that over half the PhD’s awarded in engineering in our universities are granted to foreign citizens. Until recently, many of these talented individuals remained in

The deepest grains of American experience and political thought abjure aristocracy, both in its social and its political form. Time and again, the nation's leaders have invested the resources of the nation to sweep away barriers grown from wealth and connection and to expand educational and economic opportunities to the American people. The Justices of the Burger, Rehnquist, and Roberts majorities seem to have lost sight of this broader constitution.²¹⁰ Unlike those who framed the Constitution or the Fourteenth Amendment, these Justices seem not to have understood the perpetual need to tend the broader constitution. The nation can never surrender its power to protect and repair the broader constitution by drawing in from the margins of society peoples that prejudice or circumstance have pushed aside; and, of course, the nation must take the disadvantaged as it finds them, even if that means that government must reach out to those whose disadvantages reflect vicissitudes that fall disproportionately on members of disfavored minority communities.

2. Two hundred years of American public policy make it inevitable that institutions will attempt to extend access for members of minority groups.

The convictions that have informed American public policy for well over two hundred years make inevitable university efforts to extend access

America and became major contributors to our society, but more recently fewer foreign students are enrolling in America's universities and of those who do more are returning home once their academic work is completed. Further, only 20 percent of bachelor's degrees in engineering are received by women; still fewer by minorities, with the consequence that this major potential source of talent goes underutilized.

Id.

See also, NATIONAL RESEARCH COUNCIL, INTANGIBLE ASSETS: MEASURING AND ENHANCING THEIR CONTRIBUTION TO CORPORATE VALUE AND ECONOMIC GROWTH: SUMMARY OF A WORKSHOP at 24–24 (Christopher Mackie rapporteur, 2009) (describing a presentation by Carol Corrado supporting the claim that “advanced education (mainly college education) was necessary for managers to evaluate innovations. In this view, education plays a direct role in the innovation process and in business growth in a way that goes beyond simply augmenting raw hourly labor input.”).

210. Here I employ the term “constitution” in the broad sense known in antiquity to suggest the distinctive ways, formal and informal, in which particular communities organize and govern themselves. *See* ARISTOTLE, POLITICS, in 21 ARISTOTLE IN 23 VOLUMES bk. iv, 1289a (H. Rackham trans., Harvard Univ. Press 1944) (“a constitution is the regulation of the offices of the state in regard to the mode of their distribution and to the question what is the sovereign power in the state and what is the object of each community”); *Id.*, bk. vii (discussing how the interplay of physical and political geography, climate, crops and population must be considered when developing a form of government for a city state); PLATO, THE LAWS, in 10 PLATO IN TWELVE VOLUMES bk. v, 747d-747e (R.G. Bury trans., Harvard Univ. Press 1968) (suggesting that different communities require different forms of government to accommodate differences and temperament and morality caused by climate and food).

to persons belonging to disfavored minority groups. The unmistakable expectation of American policy-makers from colonial times to this is that college and university programs afford all persons opportunities for an education that will expand their access to social advantages, improve their ability to provide for themselves, their families and their communities, and deepen their understanding of the principles of representative government. Colleges and universities contribute directly to the security of the nation by assisting persons from all social classes and distinctive groups within society, whatever their privileges or disadvantages, to master the skills on which American society and government depend and to join in the work of leading the nation.

So long as the stubborn disparities of wealth and education that separate some racial or ethnic minority communities from the white majority persist, so too will colleges and universities be subject to pressure to design admission policies or academic programs to alleviate the continuing effects of racial discrimination.²¹¹ Providing individuals opportunities through

211. See, 109 Cong. Rec. S11982 (2005) (statement of Sen. Obama)

In America, the promise of a good education for all makes it possible for any child to rise above the barriers of race or class or background and achieve his or her potential. We live in a world where the most valuable skill you can sell is knowledge. Yet we are denying this skill to too many of our children. This denial has grave consequences, with those consequences falling inequitably on children of color. Of every 100 white kindergartners, 93 graduate from high school, and 33 earn at least a bachelor's degree. But for every 100 Hispanic kindergartners, only 63 graduate from high school, and only 11 obtain that college degree. The school age population of Hispanic students is growing five times faster than the student population at large. If we fail to do better in educating deserving Hispanic youth, this failure will have grave consequences for us all, not just with increased unemployment but in missed opportunities for innovation and competitiveness.

Id.

See also, NATIONAL SCIENCE BOARD, A NATIONAL ACTION PLAN FOR ADDRESSING THE CRITICAL NEEDS OF THE U.S. SCIENCE, TECHNOLOGY, ENGINEERING, AND MATHEMATICS EDUCATION SYSTEM 71 (2007):

Addressing the needs of students with disabilities, English language learners, students from low socio-economic backgrounds, as well as students who have completed high school but who are not prepared for college or the workforce, is a challenge the entire community must acknowledge and accept. These unique student populations often come from impoverished families and attend racially or ethnically segregated and substandard schools. They need to be provided with opportunities and resources for success, including opportunities for STEM education and careers. Making use of the entire talent pool is a priority issue for STEM education since demographics will require major contributions to the workforce from those groups who have been "left behind." We are obligated to provide a level of education that will permit every young person to reach her/his potential. It is also in our best interest to nurture our most talented students. Major revolutions of the 21st century—globalization and technology—require that we foster a culture of innovation and the support the next generation of innovators who will help shape our future We can and must address both the skills gap and the performance

study to acquire the habits of thought, the information and the skills at using information that are the hallmark of educated people positions them to establish the social contacts that facilitate advancement.²¹² Higher education, thus, provides a uniquely powerful instrument to equip persons from disfavored minorities to overcome disadvantages that fall disproportionately upon them and their communities.

When government seeks to break the cycle of race-related disadvantage, colleges and universities will number among the resources that it will employ to address that task.

V. CONCLUSION

The nation's colleges and universities will participate in the effort to correct the equal protection decisions of the Burger, Rehnquist and Roberts Courts in order to assure that errant notions equal protection do not strangle equal opportunity. The equal protection decisions of the Burger, Rehnquist and Roberts Courts will inevitably result in further litigation. Even assuming *arguendo*, that these doctrines had merit, they constrain the ability of the nation to meet the demands presented by demographic changes that are already well advanced and that cannot be ignored.

Nearly one half the children born in America in 2005 belonged to minority groups.²¹³ Most of these children face lives that are very different from white children born that year, greater poverty, poorer health, greater exposure to crime, poorer education, poorer employment prospects, and fewer avenues to break free from such adversity.²¹⁴ In 2023, many of them will be graduated from high school and will begin to enroll in colleges and universities. In 2030, they will be old enough to be elected to the House of Representative; in 2035, they will be eligible for election to the Senate; and, in 2040, they will be eligible to be elected President. The nation's future well-being depends upon its ability to free these very children from the serial disadvantages that presently burden persons who are members of disfavored minorities. There is no time to wait for generational, social

gap. We cannot pit equity and access against competitiveness and innovation.

Id.

See also, Congressional Commission on the Advancement of Women and Minorities in Science, Engineering and Technology Development, Land of Plenty Diversity as America's Competitive Edge in Science, Engineering and Technology 30–32 (2000) (contrasting underrepresentation of racial minorities in science, engineering and technology fields, and high drop-out rates for those who enroll, with substantially higher than average persistence rates — 98% versus 36% over six years — for students who were selected by means other than standardized testing and provided all selected students with a “rigorous, intensely focused academic workshops during their senior year in high school.”).

212. *See supra* notes 147, 163–173, 185, and accompanying text.

213. *See supra* note 179–180 and accompanying text.

214. *See supra* notes 116–180 and accompanying text.

changes to overcome or to undo the impediments to progress that obstruct the lives of persons in disfavored minorities.

In a world where education is the key to economic independence and national security, the danger of ignoring the disadvantages that confront these children is immediate and great. The Court lost its bearings before and embraced doctrines that impaired the ability of the nation to address the challenges that changing society presented. *Dred Scott*²¹⁵ and *Lochner*²¹⁶ could not stay the will of the people to remove the problems bedeviled the nation, nor should any expect that *Bakke*²¹⁷ or *Parents Involved*²¹⁸ shall survive. What will replace the restrictive version of equal protection created by the Burger, Rehnquist and Roberts Courts remains to be seen, but it will surely afford latitude to consider race where consideration of race helps to provide sensible assistance in mitigating race-related disadvantages.

The wisest leaders of the nation have always understood that the security of the nation depends both upon the protections inscribed in the formal constitution and upon policies that provide real opportunities for its people. The nation has always invested in programs that help disadvantaged individuals to overcome the circumstances of their birth and upbringing. It has always provided them with education or other opportunities to improve themselves, their families, and their communities. At a time when serial disadvantages disproportionately beleaguer members of minority communities and when those communities are fast growing to comprise half of the available workforce, the well-being of the nation requires that the needs of those communities be addressed. Because it is an instrument to extend opportunity, the nation's leaders will continue to expect the higher education to find ways to meet the needs of persons belonging disfavored minorities. Hence, it is inevitable that colleges and universities will be drawn into the contest to reshape equal protection jurisprudence to support, rather than to strangle, programs that extend equal opportunity.

When NACUA was founded, the effort to dismantle segregation and to undo socially accepted discrimination was accelerating to full swing, but the successes achieved in those days have brought neither an end to the gross social, educational, and economic disparities associated with race, nor relief from the human and economic costs of such disparities. The great national endeavor remains unfinished, but it is a task that the nation can never put aside. The ideal of liberty that shaped the nation was grounded firmly in the realization that individual freedom can exist only within a community where government is made responsive to all and where each has a fair opportunity to advance self and family. As the nation

215. 60 U.S. 393 (1857).

216. 198 U.S. 45 (1905).

217. 438 U.S. 265 (1978).

218. 551 U.S. 701 (2007).

continues its struggle to perfect the republic, its colleges and universities will play their roles; and it appears certain that during the early decades of NACUA's second fifty years, higher education lawyers will help to rework the nuances of equal protection jurisprudence and to assist in developing programs, consistent with the Constitution, to carry forward the unfinished task of providing equal opportunities for all persons to improve themselves through study.