FROM DESEGREGATION TO DIVERSITY AND BEYOND:

OUR EVOLVING LEGAL CONVERSATION ON RACE AND HIGHER EDUCATION

JONATHAN R. ALGER*

I. INTRODUCTION

At the dawn of the twentieth century, civil rights leader W.E.B. Du Bois famously declared that "the problem of the Twentieth Century is the problem of the color-line."[1] He was speaking at a time when slavery had been abolished but when "separate but equal" segregation was nevertheless recognized and reinforced by the law of the land,[2] and when true equality of opportunity was far from a reality. His prediction foreshadowed a century of conflict and change in race relations, which was perhaps nowhere more prominent than in the field of education. By 1960, when the National Association of College and University Attorneys (NACUA) was founded, the law in a formal sense had already begun to shift significantly away from formal, legally sanctioned segregation at all levels of education. However, true functional integration of most institutions of higher

* Senior Vice President and General Counsel, Rutgers, The State University of New Jersey (B.A., Swarthmore College; J.D., Harvard Law School) and First Vice President of the National Association of College and University Attorneys, 2009–10. The author would also like to thank Sarah Luke, Assistant General Counsel at Rutgers, for her research and editorial assistance.

1. W.E.B. DU BOIS, THE SOULS OF BLACK FOLK xxxi (A.C. McClurg & Co., 1903).

2. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

education was barely beginning. Over the next half-century, the law with regard to the role of race in higher education would continue to evolve as decision-makers in all branches of government coped with continuing challenges to equal opportunity on the basis of race. The legal debate during this period has reflected an ongoing societal debate about the role and relevance of race in our history and development.

A key set of questions throughout this evolving national dialogue has been whether, to what extent, and under what circumstances race should be considered as a factor in making decisions in the context of education. These questions have been especially prominent in the context of access and admissions for students, although they have also been the source of heated debate and litigation in employment and other contexts within higher education.[3] While the conversation at the beginning of NACUA's history was focused on remedying a long history of discrimination against specific groups (particularly African-Americans) in higher education, the basis for the consideration of race at colleges and universities gradually shifted toward a different sort of rationale focused on the educational benefits of diversity for all students. The Supreme Court has made clear that the legal argument must start with the identification of a "compelling interest" that could justify the consideration of race in a particular context,[4] and for legal purposes the Court has considered the remedial/social justice rationale and diversity/educational rationale as quite distinct. In reality, however, these rationales are related—they both reflect stages in the gradual evolution of our nation's long history and social development in dealing with issues related to race.

As we look toward the future, the arguments with regard to race and education are continuing to evolve. In an age of increased global competition and financial instability and uncertainty, an economic rationale is emerging focused on the need for the full development of human capital as an important strategic asset. Issues of access to education are now linked explicitly to economic development and competitiveness. At the same time, some opponents of race-conscious[5] measures argue that the 2008 election of a mixed-race President with stellar academic credentials demonstrates that the nation no longer needs to consider race as a factor in providing access to higher education.[6]

---

3. This essay will focus on the legal rationales related to the consideration of race in the context of student access and admissions.

4. *See* Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (holding that any governmental action that is explicitly race-based—even if intended for "benign" or positive purposes—must be "necessary" to achieve a "compelling" governmental interest).

5. For the purposes of this essay, the phrase "race-conscious" will be used to refer to decisions, policies, and programs in which race, color, or national origin is an explicit consideration.

6. *See, e.g.*, Joan Indiana Rigdon, *The Future of Affirmative Action*, THE

This essay will briefly explore this evolution of the legal rationales related to the use of race-conscious measures in higher education, with an eye toward lessons learned from this ongoing national dialogue and its implications for the future of higher education law.[7]

II. STRICT SCRUTINY

During the civil rights era that marked the first stage of NACUA's existence, institutions began to adopt race-conscious policies and programs that utilized race in ways that did not necessarily disadvantage "discrete and insular minorities"[8]—but that instead were intended to help such minorities. The Supreme Court eventually made clear that the legal standard applied to all intentional racial classifications used by both public and private institutions is one of strict scrutiny—requiring that any such classifications (even if intended for positive purposes) be narrowly tailored to further compelling interests.[9] As Justice Powell stated in the 1978 *Bakke* decision, "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[10]

However, when the Court revisited Justice Powell's opinion in *Bakke* a generation later in *Grutter v. Bollinger*, Justice O'Connor made clear that strict scrutiny does not mean that all such classifications automatically violate the constitutional guarantee of equal protection.[11] As O'Connor noted, "[c]ontext matters when reviewing race-based governmental action under the equal protection clause."[12] The special nature of the context and mission of higher education must therefore be taken into account when analyzing whether a particular purpose constitutes a "compelling interest" within this context.

WASHINGTON LAWYER, Dec. 2009, at 21 (referring to Roger Clegg, president and general counsel of the Center for Equal Opportunity).

7. This essay is by no means intended to be a comprehensive history of this complex legal topic, about which entire books have been and will continue to be written.

8. *See* United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938) (suggesting that classifications that disadvantage "discrete and insular minorities" must be subject to strict scrutiny).

9. *See* Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); *see also* Grutter v. Bollinger, 539 U.S. 306, 308 (2003); Guardians Ass'n v. Civil Serv. Comm'n of the City of New York, 463 U.S. 582 (1983) (Title VI prohibits intentional classifications based on race for the purpose of affirmative action to the same extent and under the same standards as the equal protection clause); Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978).

10. *Bakke*, 438 U.S. at 289–90.

11. *Grutter*, 539 U.S. at 326 ("Strict scrutiny is not 'strict in theory, but fatal in fact.'" (citation omitted)).

12. *Id.* (emphasis in original removed).

Of course, the underlying reason that the equal protection clause came into being in the first place—and the reason for the origin of the strict scrutiny standard—was to deal with the nation's tortuous history of slavery, race discrimination and segregation.[13] Without that difficult history, racial classifications would perhaps be subject to a much lesser standard of scrutiny. It may be hard to imagine (in light of our history) a society in which racial classifications would matter so little that they could be subjected to a much lesser standard of review—and yet in some respects that is the long-term vision contemplated by the dream of a truly color-blind society in which one's race has essentially no impact on one's opportunities in life. It is precisely because race has mattered so much in our history and development that legal structures have been put in place to provide the highest possible level of scrutiny for any classifications based on race.

III. A HISTORY OF DISCRIMINATION AND THE REMEDIAL RATIONALE

While each nation has its own unique history with regard to issues of race and ethnicity, these are issues that have created significant tensions within many societies since Biblical times. As Justice Ginsburg noted in the oral argument in *Gratz v. Bollinger*, "other countries operating under the same equality norm have confronted" similar issues and have approved race-conscious measures to address their histories.[14] Groups of human beings have always found it convenient to differentiate themselves from people who look different from themselves or who come from different backgrounds, often with tragic consequences.[15] Racial integration has never been easy or quick, and significant steps of legal and social progress have predictably (and seemingly almost inevitably) faced a serious backlash from forces within society.

In 1960, as NACUA came into being and the field of higher education law was in many respects in its infancy, institutions of higher education were largely segregated by race. The Supreme Court had issued its landmark opinion in *Brown v. Board of Education*[16] just six years earlier, holding that segregation deprives students of minority groups equal education—even where public schools have equal physical facilities and resources—and therefore reversing the doctrine of "separate but equal" facilities that had been embraced by the Court in the now-infamous *Plessy v. Ferguson* decision of 1896.[17]

---

13. *See generally Bakke*, 438 U.S. at 289–300.

14. Gratz v. Bollinger, 539 U.S. 244 (2003), oral argument, http://www.oyez.org/cases/2000-2009/2002/2002_02_516/argument/.

15. *See, e.g.*, ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (Ballantine Books ed., Ballantine Books 1992).

16. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

17. Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding the "separate but equal"

Several cases involving equal access to higher education had actually preceded *Brown*.[18] In each of these cases, African-American plaintiffs sought admission to traditionally white (and segregated) institutions. Although the Supreme Court had yet to go so far as to overturn the fundamental reasoning of *Plessy v. Ferguson* in any of these higher education cases, it did find violations of equal protection based on actual inequalities of facilities and opportunities available to their plaintiffs. For example, in *Sweatt v. Painter* the Court compared the facilities and resources of law schools (e.g., the number and quality of faculty members, financial resources, alumni networks, institutional reputations, etc.) that were open to white and black students, respectively, and found that the schools were not in fact equal.[19] In a finding that foreshadowed subsequent arguments about the need for law school graduates to interact with people of diverse backgrounds,[20] the Court noted that students who were forced to attend an all-black school would be disadvantaged because they would not have access to 85 percent of the state's population with whom they would be expected to deal as lawyers.[21]

In light of the nation's long history with slavery and its aftermath, the legal argument in these initial landmark cases was understandably focused on the need to remedy discrimination within the major institutions of society—including educational institutions at all levels. The problem was seen primarily through a "black and white" lens because of this history, even though other racial and ethnic groups had also suffered from discrimination in American society and demographic trends would continue to reflect increases in the population of at least some of these other groups (such as Latinos). The arguments about the need for integration to provide true equality of opportunity were based in part on how people interact with and learn from each other through face-to-face contact—themes that were reiterated from an educational perspective in later cases focused on the educational benefits of diversity.[22]

The early desegregation cases were followed by the civil rights

---

doctrine).

18. *See* Sweatt v. Painter, 339 U.S. 629 (1950) (plaintiff sought admission to University of Texas Law School even though the state opened a law school specifically for black students); McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637 (1950) (plaintiff was admitted to Ph.D. in education program at the University of Oklahoma, but challenged the institution's practice of forcing him to sit separately from other students in the classroom, reading room, and cafeteria); Gaines v. Canada, 305 U.S. 337 (1938) (plaintiff sought admission to University of Missouri School of Law because Missouri had no law schools that black students could attend, even though state law permitted black students to qualify for admission to universities in adjacent states).

19. *Sweatt*, 339 U.S. at 633–34.

20. *See* Grutter v. Bollinger, 539 U.S. 306 (2003).

21. *Sweatt*, 339 U.S. at 634.

22. *See, e.g.*, *Grutter*, 539 U.S. 306 (2003).

movement of the 1960s and legal developments in the other branches of government. The executive branch got into the act with executive orders focused on federal contracts,[23] and Title VI of the Civil Rights Act of 1964 provided a federal statutory basis requiring non-discrimination in educational programs—including those at public and private colleges and universities that receive federal financial assistance.[24]

With these legal frameworks in place, colleges and universities slowly began to take steps to desegregate—often with considerable resistance from within or outside the institutions.

IV. THE FIRST COUNTER-REACTION

As traditionally white institutions of higher education began to admit black students, it did not take long for a backlash to develop. The counter-reaction took various forms at campuses across the country. Resentment began to build among people who thought that opportunities for white (or in some cases Asian-American) students were being displaced by students from other racial and ethnic backgrounds, particularly at selective institutions where the perception was that progress for one group came at the expense of another.[25] This resentment can be particularly acute with regard to admissions at selective institutions that have not significantly increased the size of their entering classes over time—or at least not in a manner proportionate to the growth of the college-bound population. When people view college admissions as a zero-sum game, they are more likely to resent any perceived edge given to members of other groups.

The *Bakke* case in 1978[26] represented the culmination of this first counter-reaction, testing the limits of how far institutions of higher education could go in remedying discrimination and challenging the rationales for the consideration of race as a factor in admissions—particularly in states that had not implemented formally, de jure segregated systems of higher education. *Bakke* was the first high-profile "reverse discrimination" case in higher education to reach the Supreme Court—i.e., a case in which a white plaintiff (namely University of California at Davis Medical School applicant Allan Bakke) alleged that he had been discriminated against in the admissions process because of the consideration of race in favor of members of historically underrepresented

23. *See* Exec. Order No. 11,609, 3 C.F.R. 339 (1964-1965), *reprinted in* 42 U.S.C.A. 2000e, *as amended in* Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 13, 1967) (adding sex to the list of prohibited forms of discrimination), which prohibits race and other forms of discrimination by contractors and subcontractors (including colleges and universities) who receive $10,000 or more in federal government contracts.

24. 42 U.S.C. § 2000d *et seq.* (2006).

25. *See generally* HACKER, *supra* note 15.

26. Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978).

groups.[27] Unlike the Michigan cases that followed a generation later,[28] *Bakke* involved the explicit set-aside of a certain number of seats in the entering class for members of certain historically underrepresented groups.[29] The Court rejected the argument that a single institution of higher education could make findings of societal discrimination on which it could base a remedial program in which race was taken into account.[30]

In his seminal opinion, Justice Powell also rejected the medical school's argument that the consideration of race in admissions was necessary to improve the delivery of health-care services to communities that were currently underserved—citing a lack in the record of evidence to justify such a conclusion.[31] Powell expressed a reluctance to assume that individuals from particular racial groups would necessarily be more likely to practice in disadvantaged communities.[32] He similarly rejected the notion that the medical school's program would increase representation of blacks in the medical profession, citing the small size of the national pool of qualified black applicants.[33] Justice Powell's reaction to these arguments underscored the Court's unwillingness to accept rationales that seemed to rest on stereotypical assumptions about individuals' choices or priorities based on their race, or on broad societal needs that cannot be met by any single institution.

Instead, under the broad umbrella of academic freedom, Justice Powell embraced a positive educational argument—namely that a diverse student body has educational benefits for all students, majority and minority alike—and held that this goal can justify the consideration of race as one of many factors in admissions.[34] In doing so, Justice Powell relied upon earlier landmark cases that discussed the academic mission of institutions of higher education and that established the principle that courts should defer to the educational judgments of institutions with regard to how students are best selected and taught.[35]

At the time *Bakke* was decided, institutions of higher education were far from being fully integrated. Coupled with the Court's refusal to endorse a remedial rationale that contemplated individual institutional action to remedy societal discrimination, Justice Powell's decision to embrace the educational benefits of diversity as a compelling interest shifted the legal

27. *See id.*

28. Grutter v. Bollinger, 539 U.S. 306 (2003) (challenge to consideration of race in law school admissions policy); and Gratz v. Bollinger, 539 U.S. 244 (2003) (challenge to consideration of race in undergraduate admissions policy).

29. *Bakke*, 438 U.S. 265.

30. *Id.* at 307–10.

31. *Id.* at 310–11.

32. *Id.*

33. *Id.* at 311 n.47.

34. *Id.* at 311–19.

35. *Bakke*, 438 U.S. at 311–14.

conversation away from the social justice rationale and toward an argument based on educational mission and need. This shift had the political and rhetorical advantage of changing the focus from a zero-sum game pitting various racial groups against one another (in which there were inevitably winners and losers) to a broader perspective on the benefits to all students of diverse educational environments in which all groups, majority and minority alike, had something to gain. Indeed, some critics argue that the diversity rationale shifted the national focus in a way that primarily benefited white students and simply reinforced the status quo at elite institutions, as students from historically underrepresented groups had long had to navigate institutions and social circumstances in which they dealt with people from different backgrounds.[36] The shift to the diversity rationale lessened the focus on the moral imperative of social justice and the continuing impact of the nation's painful history of discrimination, which many members of new generations of Americans were anxious to put behind them.

V. THE DIVERSITY RATIONALE TAKES HOLD AND THE NEXT BACKLASH BEGINS

Although the Court's guidance in *Bakke* was a bit difficult to decipher due to the Court's splintered opinion in that case, colleges and universities relied upon the diversity rationale articulated by Justice Powell as the basis for ongoing race-conscious efforts in admissions and other programs.[37] In the quarter-century between the *Bakke* decision and the Michigan decisions, several successive presidential administrations (Republicans and Democrats alike) also embraced the diversity rationale as articulated by Justice Powell through guidance provided by the U.S. Department of Education in the contexts of admissions and financial aid.[38]

Within a fairly short time, however, another backlash ensued against the diversity rationale as a justification for race-conscious actions—this time in part taking the form of arguments about "political correctness" in higher education. Critics of the diversity rationale argued that it was simply a way to legitimate discrimination in another form and that it treated people as group members rather than as individuals as required by the Constitution.[39]

---

36. *See Grutter* v. Bollinger, 539 U.S. 306, 350 (2003) (J. Thomas, dissenting) (arguing that "blacks can achieve in every avenue of American life without the meddling of university administrators," and that the University of Michigan Law School made choices to be elitist and exclusionary).

37. *See id.* at 325.

38. *See* Jonathan Alger & Marvin Krislov, *You've Got to Have Friends: Lessons Learned from the Role of Amici in the University of Michigan Cases*, 30 J.C. & U.L. 503, 509 (2004).

39. *See, e.g.*, PAUL CRAIG ROBERTS & LAWRENCE M. STRATTON, THE NEW COLOR LINE: HOW QUOTAS AND PRIVILEGE DESTROY DEMOCRACY (Regnery Publishing, Inc., 1995).

Having learned lessons about language and messaging from the civil rights organizations and movement from previous decades, opponents of race-conscious actions formed groups such as the Center for Equal Opportunity and the Center for Individual Rights with the goal of ending race-conscious decisions.[40] In the decade preceding the Michigan cases, these groups enjoyed some significant successes in the court of law[41] as well as in the court of public opinion.[42] When the Michigan cases were filed in 1997, these opponents of race-conscious action asserted that the Michigan cases would be "the Alamo" of race-conscious affirmative action.[43]

Like the proponents of race-conscious policies, the opponents of race-conscious measures have made moral and pragmatic arguments as well as legal arguments in support of their position. For example, some have argued that race-conscious measures of any sort, even if well-intended, are contrary to the basic principle of non-discrimination and to the letter and spirit of the equal protection clause.[44] Critics also argue that students from traditionally underrepresented groups with lesser academic qualifications end up displacing majority students at selective institutions.[45] They also express the concern that these students from traditionally underrepresented groups would be more likely to lack the academic preparation necessary to succeed at such institutions, and that they would in fact be better off at other institutions more well-suited to their level of preparation[46]—an argument that was debated at length by the former presidents of Harvard and Princeton in their landmark study of student success at elite institutions, *The Shape of the River*.[47]

---

40. For a detailed description of the history and interrelationships of these organizations, see LEE COKORINOS, THE ASSAULT ON DIVERSITY: AN ORGANIZED CHALLENGE TO RACIAL AND GENDER JUSTICE (Rowman & Littlefield Publishers, Inc., 2003).

41. *See, e.g.*, Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (rejecting Justice Powell's reasoning in *Bakke* and finding that diversity is not a compelling interest that would justify the consideration of race in higher education admissions), *abrogated by* Grutter v. Bollinger, 539 U.S. 306 (2003).

42. *See, e.g.*, CAL. CONST. art. I, § 31 (California's "Proposition 209," passed by the state's voters, which bans the consideration of race and gender in public higher education as well as in other public programs).

43. *See, e.g.*, Jack E. White, *Affirmative Action's Alamo*, TIME, Aug. 23, 1999, *available at* http://www.time.com/time/magazine/article/0,9171,991820,00.html.

44. *See, e.g.*, CARL COHEN & JAMES P. STERBA, AFFIRMATIVE ACTION AND RACIAL PREFERENCE: A DEBATE (Oxford University Press 2003) (Cohen sets forth the moral and pragmatic arguments against race-conscious programs).

45. *See id.*

46. *See id.*

47. WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (Princeton University Press 1998) (major study of the academic, employment, and personal histories of thousands of students of all races who attended selective colleges and universities between the 1970s and early 1990s).

VI. THE ESTABLISHMENT REACTS TO DEFEND DIVERSITY

By the time the Michigan cases were in front of the Supreme Court, the ground had shifted dramatically in higher education and in society more generally.[48] Public and private institutions alike had come to rely upon the diversity framework from *Bakke* as a means to diversify their student bodies. At least some research had been done analyzing the educational benefits of diversity,[49] although it was certainly not enough to appease the critics of race-conscious policies. Employers and professional organizations relied upon colleges and universities to produce a diverse workforce that could compete in a global economy,[50] and even the military relied upon colleges and universities to help produce a diverse officer corps to promote racial harmony and unit cohesion.[51] In her opinion, Justice O'Connor took note of this broad, deep coalition of institutions across American society.[52] She went even further than Justice Powell's opinion in *Bakke* by highlighting the importance of diversity in organizations and institutions beyond higher education, for which colleges and universities served as the gateway to opportunity:

> Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.
>
> . . . .
>
> In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.[53]

This language referring to "effective participation" and "the path to leadership" hints at a separate interest in access to education at all levels, although the Court has yet to fully flesh out that concept.

---

48. *See* Alger & Krislov, *supra* note 38.

49. *See, e.g.*, Brief for the American Educational Research Ass'n et al. as Amici Curiae Supporting Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), *and* Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516). *See also* CIVIL RIGHTS PROJECT (HARVARD UNIVERSITY), DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION (Gary Orfield & Michal Kurlaender eds., Harvard Educational Publishing 2001).

50. *See, e.g.*, Brief for General Motors Corp. as Amicus Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (No. 02-241) *and Gratz*, 539 U.S. 244 (No. 02-516); Brief for Amici Curiae 65 Leading American Businesses Supporting Respondents, *Grutter*, 539 U.S. 306 (No. 02-241) *and Gratz*, 539 U.S. 244 (No. 02-516).

51. *See* Consolidated Brief for Lt. Gen. Julius W. Becton et al. as Amici Curiae in Support of Respondents, *Grutter*, 539 U.S. 306 (No. 02-241) *and* Gratz, 539 U.S. 244 (No. 02-516).

52. *Grutter*, 539 U.S. at 330–31.

53. *Id.* at 332.

At the end of her opinion, however, Justice O'Connor sent a cautionary signal in dicta addressing the continuing need for race-conscious programs in a rapidly changing society.

> It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.[54]

It was apparent that Justice O'Connor wanted to make a point about the need for such programs not to endure indefinitely. Her emphasis on a 25-year period—a sort of generational notion—was especially striking in light of the nation's much longer history with race discrimination and continuing challenges to equal opportunity.

VII. WHERE IS THE LEGAL DIALOGUE GOING NEXT?

After the Michigan cases, the opponents of race-conscious measures in higher education shifted their attention in large part to the political realm, pursuing state ballot initiatives modeled after California's Proposition 209.[55] At the same time, the great coalition that came together to support the University of Michigan has looked for ways outside of the litigation context to foster programs across traditional institutional lines and to foster pipelines of diverse students in a variety of fields.[56]

As NACUA and its members prepare for the next half-century of higher education law, the questions about race and higher education have not disappeared. Where might the national legal conversation go next? Are we really in a position at this point to expect that race will no longer need to be a factor in admissions programs anywhere by the year 2028? While much progress has been made with regard to reducing racial disparities in education, there are continuing barriers to equal opportunity in higher education that must be addressed. In the meantime, the world is changing rapidly around us, and the American educational system must keep pace with these changes if the nation is to remain competitive and prosperous.

Given its inability to predict the future, the Supreme Court has wisely resisted the temptation to shut the door altogether on the possibility of future rationales for race-conscious programs and policies. In her opinion in *Grutter*, Justice O'Connor explicitly rejected the notion that the remedial

---

54. *Id.* at 343.

55. *See, e.g.*, MICH. CONST. art. I, § 26; NEB. CONST. art 1, § 30.

56. *See, e.g.*, Future Diversity 2008, http://www.groundshift.org/events/future-diversity-2008 (summarizing national conference sponsored by the Center for Institutional and Social Change at Columbia Law School, Rutgers, The State University of New Jersey, Columbia University, and The College Board— and focusing on innovative initiatives to increase diversity in higher education that cross traditional institutional lines).

rationale was the only permissible basis for race-conscious actions, instead declaring that "we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination."[57]

So what might we expect in terms of the next generation of arguments related to race-conscious policies and procedures? From *Bakke* through *Grutter*, the diversity rationale was premised first and foremost on an argument about the nature and experience of higher education.[58] The coalition that supported the University of Michigan broadened the argument, however, by shining a light on the importance of, and need for, diversity in other contexts beyond education. These interests are not unrelated, as the learning experiences stemming from the interactions contemplated in *Bakke* and *Grutter* are replicated to some extent in contexts beyond higher education. In other words, this latest shift in the argument highlights the fact that colleges and universities have goals with regard to what happens to students (both in and outside the classroom) while they are enrolled at these institutions, and with regard to how students use what they have learned once they graduate. The mission of institutions of higher education, therefore, can have both internal (with regard to what happens within their walls) and external (with regard to what their graduates do with their education) components.[59] After all, it is through their graduates that institutions of higher education can ultimately have an impact on their society.

Once students graduate from a college or university and enter the workforce or are otherwise engaged in institutions and organizations in an increasingly diverse democracy, they continue to interact with (and learn from) people from diverse backgrounds. In the face of economic pressures related to globalization,[60] concerns about the nation's continuing competitiveness may press public officials to focus more on an economic (rather than purely educational) rationale related to the full development of human capital as a strategic asset.

The economic argument can be expressed in several ways. A starting point for this argument is that the nation's human capital is its most important single natural resource, and that we cannot afford to allow

57. *Grutter*, 539 U.S. at 328.

58. *Id.* at 330.

59. Note, however, that courts may be less likely to defer to judgments made by institutions about what happens to their students after they leave the institutions—because such judgments are not premised solely on the pedagogical benefits of diversity within the academic setting about which educators are expected to have special expertise. *See generally* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 726 (2007) (discussing need for schools to establish pedagogic basis for level of diversity needed to obtain asserted educational benefits).

60. *See, e.g.*, FAREED ZAKARIA, THE POST-AMERICAN WORLD (W.W. Norton & Company, Inc., 2008); THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY (Farrar, Straus & Giroux 2005).

barriers related to race, ethnicity, or related factors to prevent individuals from achieving their full potential because it results in inefficiency and lost opportunity. In the Michigan cases, over eighty major corporations joined one of several amicus briefs supporting the importance of training students in diverse environments, linking this preparation to increased productivity and global competitiveness, and reduced discrimination and stereotyping in the workplace.[61] As these corporations pointed out, higher education is critical to economic competitiveness. Fareed Zakaria observed, in reflecting upon America's place in the global economy of the 21st Century, that "[h]igher education is America's best industry. . . . In no other field is America's advantage so overwhelming."[62] The economic consequences of a robust system of higher education can also be seen indirectly in a host of other areas, whether in improved crime statistics, reduction of welfare costs, or in health outcomes for citizens, to name but a few.

Another perspective, articulated and analyzed by Scott Page in his path-breaking work, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies*,[63] is that individuals work together in teams in the workplace to solve complex problems—and that teams that are more diverse with regard to backgrounds and perspectives will produce better, more creative results. While it may have its faults with regard to access and equal opportunity, the American educational system may be particularly well suited to prepare students to take advantage of diversity in this way because of the system's relative strength in interactive learning that teaches students how to think and be creative (rather than simply how to memorize facts or how to take certain kinds of tests).[64] The nation's demographic vibrancy further enhances this strategic advantage.[65] Taken together, if properly understood and utilized, these arguments collectively lead to the conclusion that our nation's diversity may be its greatest economic asset—and therefore worthy of significant attention and investment.

Yet another argument that played a significant role in *Grutter* was the importance of diversity in the military and its relationship to national security. In an influential amicus brief, former military leaders described

---

61. *See* Brief for General Motors Corporation as Amicus Curiae Supporting Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) *and* Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516); Brief for Amici Curiae 65 Leading American Businesses Supporting Respondents, *Grutter*, 539 U.S. 306 (No. 02-241) *and Gratz*, 539 U.S. 244 (No. 02-516); and Brief for Amici Curiae Massachusetts Institute of Technology et al. Supporting Respondents, *Grutter*, 539 U.S. 306 (No. 02-241) *and Gratz*, 539 U.S. 244 No. 02-516) (joined by IBM and DuPont among others).

62. ZAKARIA, *supra* note 60, at 190.

63. SCOTT PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES (Princeton University Press 2007).

64. ZAKARIA, *supra* note 60, at 193.

65. *Id.* at 196.

the importance of racial and ethnic diversity in ensuring troop cohesion, and described how leadership in the military is provided by the military academies and Reserve Officers' Training Corps programs on college and university campuses.[66] The timing of the brief and the oral argument in the Supreme Court in 2003 coincided with the start of the Iraq War, not long after 9/11 when issues of national security were foremost on many people's minds.

While these economic and national security arguments are important, they are not the only reasons to embrace true integration of our nation's colleges and universities—or of society in general. A fully functioning and healthy democracy is premised on the assumption that all citizens can participate actively in government at all levels.[67] As Justice O'Connor stated eloquently in *Grutter*,

> We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to "sustaining our political and cultural heritage" with a fundamental role in maintaining the fabric of society. This Court has long recognized that "education . . . is the very foundation of good citizenship." For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.[68]

The systematic exclusion of particular groups based on race or other factors from major institutions in society can foment distrust and cynicism, undermining faith in the democratic system itself. Of course, opponents of race-conscious measures counter that such measures fail to treat people as individuals and therefore pose an equally dangerous threat to democracy.

In light of these fundamental concerns about democratic participation and citizenship, do utilitarian arguments about diversity and its benefits for the educational environment, economic development, or even national security cause us to turn a blind eye to fundamental historical issues of social justice? Moreover, does a focus on these utilitarian arguments reduce the role of higher education to a strictly instrumental one that ignores more basic virtues of liberal learning and scholarship?[69]

These are important questions with which we must continue to grapple.

---

66. Consolidated Brief for Lt. Gen. Julius W. Becton et al. as Amici Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (No. 02-241) *and Gratz*, 539 U.S. 244 (No. 02-516).

67. *See, e.g.*, SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 258–59 (Random House 2003).

68. Grutter v. Bollinger, 539 U.S. 306, 331 (citations omitted).

69. *See* Drew Gilpin Faust, *The University's Crisis of Purpose*, N. Y. TIMES, Sept. 6, 2009, at BR19, available at http://www.nytimes.com/2009/09/06/books/review/Faust-t.html.

The diversity rationale has been treated as a voluntary choice that individual institutions can pursue (or not) based on their own sense of mission, whereas the remedial rationale involves a mandatory legal obligation. One could argue that the equal protection clause is about human dignity first and foremost; it was not adopted primarily to serve pragmatic educational, economic, or even national security aims. While these utilitarian rationales are extremely important to our nation and worthy of significant attention, questions of social justice stubbornly remain and should not be forgotten—even if the law has developed so as to make it much more difficult in practice for colleges and universities to rely upon moral, remedial arguments as a justification for their own race-conscious programs. Furthermore, as colleges and universities struggle to justify their immediate relevance in a time of economic turmoil, the broader ultimate mission of higher education in a democracy—and its underlying values of academic freedom and inquiry—must not be forgotten.

VIII. SOME REFLECTIONS ON THE DEBATE AND WHAT WE'VE LEARNED

The conversation about race and its role in higher education has never been easy or comfortable. The nation's historical baggage on this subject is heavy and real. As a microcosm of our society in which larger debates about race play out, higher education is hardly an isolated ivory tower that sits apart from the real world in this respect. The actions of colleges and universities—especially their decisions about whom they admit and educate in various fields and programs of study—have real and long-term consequences for the rest of society. Higher education at its best can be a great engine of opportunity, but if access is not open it can also serve as a barrier that reinforces and legitimates privilege and stratification. In a knowledge-based economy in which higher education is essential for success and participation in many different fields and careers, the role of higher education as a gateway to opportunity is more essential than ever.

When economic stratification is strongly correlated with a factor such as race over the long run, it can be a recipe for social unrest and instability. The recipe becomes even more toxic when racial disparities are persistently reflected over time in a myriad of other aspects of society such as the criminal justice system, health care, housing, etc. World history is replete with examples of societies that have been torn apart by racial and ethnic strife. As Justice O'Connor suggested in *Grutter*, public perceptions related to the fairness and openness of institutions such as colleges and universities matter.[70]

Theories and arguments related to race and education must be backed up with evidence and research to be sustained over time. The courts of law, as well as the court of public opinion, eventually lose patience with mere

70. *Grutter*, 539 U.S. at 331–32.

theories and suppositions that are based solely on emotion or anecdote. The current focus on accountability in higher education—and the assessment of learning outcomes—is likely to have an impact on diversity-based efforts as well as other types of programs and policies in higher education.[71] Institutions must not be afraid to ask the hard questions of their own race-related policies and practices to determine whether they are in fact working as intended.

The debate about race and higher education is also directly related to deep moral questions on which there is still no clear societal consensus.[72] Is higher education (as related to individuals) primarily a public or a private good? Is the concept of merit in higher education primarily a function of an individual's achievements or potential in isolation, or does it have a community aspect to it that must be considered (e.g., when putting together an entering class of students at a college or university)? To what extent must merit be measured against available opportunities and the relative circumstances in which individuals have lived and studied?

The issues of race and higher education are also no longer simply black and white.[73] As our national dialogue has become more sophisticated and nuanced on issues related to race, so too has the discussion in higher education changed in ways that have implications for the development of the law. For example, how are issues of mixed race to be addressed? What are the justifications for treating members of various historically underrepresented groups the same or differently?

The very breadth of the definition of diversity can also obscure the significance of the role of race in higher education. How is race different from the many other factors that make up the whole person (socioeconomic status, family circumstances, geographic background, special skills and talents, life experiences, hardships overcome, gender, sexual orientation, age, religion, etc.) and that can contribute to a diverse learning environment? In her discussion of diversity, Justice O'Connor emphasized the importance of giving each individual an opportunity to demonstrate what he or she can contribute to a learning environment through a holistic, individualized review of many factors.[74] The debate about the importance

71. *See, e.g.*, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 212 (American Bar Association Section of Legal Education and Admissions to the Bar, 2009-10) (articulating accreditation standard for law schools focused on demonstration of a commitment by concrete action to having a diverse student body).

72. For a discussion of current philosophical and legal arguments related to race-conscious policies and programs, see JAMES P. STERBA, AFFIRMATIVE ACTION FOR THE FUTURE (Cornell University Press 2009).

73. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (discussing the limitations of voluntary affirmative action plans in school districts that were based primarily on white/nonwhite or black/"other" distinctions, and contrasting them with the holistic review upheld in *Grutter*).

74. Grutter v. Bollinger, 539 U.S. 306, 337.

of racial diversity in higher education has spurred discussion of other factors on the basis of which individuals also have been subjected to stereotyping and discrimination (e.g., socioeconomic status, gender, religion, disabilities, sexual orientation, etc.).

Ironically, in the long run the forces on both sides of the debate about race-conscious policies and practices geared to improve diversity advocate for the same goal. In the Michigan cases, both sides claimed inspiration from Martin Luther King, Jr.'s dream of a color-blind society in which people are judged on the content of their character rather than the color of their skin.[75] The fundamental difference, therefore, was on how to get to this point. In 2007, four years after the Michigan cases were decided, Chief Justice Roberts wrote in a plurality opinion in a case involving voluntary efforts to integrate school districts that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[76]

Is the "quitting cold turkey" approach to the consideration of race advocated by Chief Justice Roberts really possible in the midst of continuing racial disparities in educational opportunities, or is it too simplistic and idealistic? That is a central question in the ongoing debate about whether, and for how long, race-conscious policies and programs should be permitted in education if the ultimate goal is to get to the point where race no longer makes a difference in the opportunities available to students at all levels. Among other factors, socioeconomic status, or wealth, has been suggested as one alternative to race that may be a more palatable and legally sustainable criterion in admissions and other programs (not to mention that it is not subject to strict scrutiny)[77]—although such "race-neutral alternatives" have themselves been subject to criticism on moral and practical grounds.[78] Ongoing experiments in several states that have banned the use of most race-conscious measures (at least by public institutions) will continue to serve as a living laboratory of what can happen when race is removed altogether as an explicit factor in the decision-making equation, and will therefore be watched and studied carefully.[79]

As we approach the next half-century of higher education law, the clock seems to be ticking with regard to the ongoing viability of race-conscious measures. If the twenty-five year time frame set forth by Justice O'Connor is to have any real meaning, however, much more work clearly needs to be

---

75. *See* MARTIN LUTHER KING, JR. & CORETTA SCOTT KING, THE WORDS OF MARTIN LUTHER KING, JR. 95 (Coretta Scott King ed., Newmarket Press 1987).

76. *Parents Involved in Cmty. Sch.*, 551 U.S. at 748.

77. *See, e.g.*, RICHARD D. KAHLENBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION (Basic Books 1996).

78. *See* Rigdon, *supra* note 6.

79. *See supra* text accompanying notes 42, 55; *see also* Rigdon, *supra* note 6.

done to provide true equality of opportunity. The interrelationship of opportunity in P–12 education, higher education, and society in general implies that meaningful progress can be achieved only with holistic efforts that look across traditional institutional lines.[80] The notion of lifelong learning has never been more relevant than in today's global, knowledge-based economy. For students growing up in this century, many of the jobs for which they will need to be prepared have probably not yet even been defined or invented. Accordingly, colleges and universities must not see themselves as isolated ivory towers, but rather as an engaged part of a lifelong educational system that extends far beyond formal classroom training.

Having elected its first non-white President, the nation must now confront these continuing challenges with a sense of moral, educational, and economic urgency in an era of unprecedented globalization. Will it be easier or harder to discuss and deal openly with vexing issues of race in light of the progress we have made? Our nation has had to rise to the occasion many times to confront significant challenges related to race and education, and the time may be ripe once again to take a hard look at how far we have come and how far we still need to go. We are in good company, as countries all over the world are having similar debates about equal opportunity and the role of race in their own systems of higher education.[81]

The conversation may be difficult, but in higher education we have to find constructive ways to approach these issues with thoughtful analysis and dialogue. We will not always agree on the exact nature of the problem, much less on the solutions, but the conversation must continue in ways that respect the dignity of all individuals. That imperative goes to the heart of our educational mission, and indeed to the bold vision of a democratic society set forth in the Constitution. Are we up to the task? I believe we are. After all, in the long run, the consequences are too great for failure to be an option.

---

80. *See, e.g.*, Rutgers Future Scholars, http://em.rutgers.edu/programs/futurescholars/ (program that involves a collaboration among a university, school districts, corporations and others, and that is aimed at increasing the numbers of academically talented students from disadvantaged backgrounds who have meaningful access to higher education).

81. *See, e.g.*, Aisha Labi, *Diversity with a British Accent*, THE CHRON. OF HIGHER EDUC., Oct. 11, 2009, at B14; Marion Lloyd, *Affirmative Action, Brazilian-Style*, THE CHRON. OF HIGHER EDUC., Oct. 11, 2009, at B8.