

In the Face of Resistance: Advancing Equity in Higher Education

Historical Framing: Equity as Reparative Justice, Diversity as Beneficial for All, Progress as Both

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In providing an historical framing of the trials and tribulations surrounding affirmative action, I want to highlight two themes that have been ever-present over the 45 years since the *Bakke* decision— that of *equity as reparative justice*, on one hand, and *diversity as beneficial for all*, on the other hand. In debates, court rulings, state actions, and national dialogues, there has been a constant push for and pull back from a reparative framework in which the focus is specifically on equity and racial justice – taking down what Gary Orfield calls the “walls around opportunity” that have sidelined students and communities of color for so long. The reparative justice framework stands sometimes on its own as a rationale for taking affirmative action (in education, employment, and voting rights cases). While at other times, especially in the context of higher education, it is seen as a necessary path to achieve the broader compelling interest of the educational and societal benefits of diversity writ large. Still at other times, it is explicitly sidelined, often expressly to assuage a white majority backlash, so that the compelling interest of the (educational) benefit of diversity *for all* must be argued in and of itself, by itself, disentangled from our national history of injustice and the continued systemic inequities that realistically impede the very full participation that would ensure we reap those benefits of diversity. And that reality, and the backlash it generates, continues to this day, reflected in the legislative action in state after state on DEI, and in the Court’s ruling on cases dealing with plans to diversify K-12 districts or re-draw voting maps, for example. In this regard, the history and current reality of debates surrounding affirmative action in higher education poignantly reflect the long-running and persistent reluctance of this nation to reckon with our past (and its long-arm today), even as we try to set a different course for our future. Most relevant to our discussion today, this reluctance leaves us with the question of whether it is really possible to achieve the educational benefits of diversity for all without dismantling the systems that persistently sideline some. Do we need to reckon in order to equitably move forward?

The Bakke Era: Narrowing the Scope of Affirmative Action by Avoiding Reparative Justice

As my colleagues on this panel consider that path forward, I thought it might be useful to first review the various ups and downs of affirmative action over the last 45 years, starting, of course, with Justice Powell’s opinion in *Regents of the University of California v. Bakke*.²

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² *Regents of the University of California v. Bakke*, 438 U.S. (1978).

Powell's arguments in *Bakke* not only set the legal precedent at issue today in the Harvard and UNC cases being adjudicated by the Supreme Court, but it also set the stage for decades of debate to follow, as he explicitly repudiated the use of a reparative framework as a rationale for affirmatively taking race into account in admissions decisions. Powell, in rejecting a reparative rationale, said: "Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered."³

At the same time, Powell argued for a narrower consideration of race as a plus factor (along with other characteristics of an applicant) explicitly in order to support the compelling interest of achieving the pedagogical benefits of a diverse student body. Drawing on the experiences of William Bowen, then President of Princeton, Powell pointed to Bowen's assessment that "A great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences..."⁴ While his argument set an important justification and precedent for *race-conscious admissions* – one that would be used repeatedly in subsequent defenses of affirmative action – it also set clear guardrails of strict judicial scrutiny of that compelling interest, as well as the need for narrow tailoring in the methods used to effect it. Interestingly, and often forgotten, are the arguments of four of the other Justices (Brennan, Blackmun, Marshall, and White) who agreed with Powell on the plus factor (versus race-targeted) approach, but also argued strongly that a reparative framework was constitutional. They wrote that the "articulated purpose of remedying the effects of past societal discrimination is, under our cases sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities."⁵ As such, and taken as a totality, I would say that the various arguments in the *Bakke* case laid out the landscape of considerations, both pro and con, in the pursuit of equity and diversity, and the decades that followed have continued to unpack this landscape.

From Grutter to Fisher II: Unpacking the Diversity Rationale

Most prominent in the unpacking of arguments since *Bakke* has been the affirmation of race-conscious (but not race-targeted) admissions in recognition of judicial deference to universities specifically to pursue, with narrowly tailored plus-factor approaches, the educational benefits of diversity *for all*, as laid out again in a series of cases from *Grutter* to *Fisher II*, and now repeated in the current cases before the Supreme Court. A key feature of the arguments in

³ *Bakke*, p.310.

⁴ Jeffrey Lehman, in his essay in the volume *Defending Diversity Affirmative Action at the University of Michigan* (2004, University of Michigan Press), describes how Powell drew from William Bowen's writing on this question of the compelling interest of diversity, referring to Bowen, W. Admissions and the Relevance of Race, Princeton Alumni Weekly, Sept, 26, 1977.

⁵ *Bakke*, p.362.

all of these cases that we should keep in mind as we consider how to advance equity going forward (no matter the outcome of the current cases) is the substantial database reaffirming the *public benefits* of education in a diverse setting, including producing more engaged, inquisitive and tolerant citizens for our pluralistic democracy.⁶ This public-spirited goal was very much at the heart of our defense of affirmative action in the *Grutter* and *Gratz* cases at Michigan, as outlined by Pat Gurin and colleagues, in the collection of essays written after the O'Connor decision, entitled *Defending Diversity*, and drawing directly on the experiences at Michigan in pioneering the Inter-Group Dialogue Program.⁷

As we again fast forward to today's debates, it seems relevant to draw a line from that argument in *Grutter and Gratz* to the current work of scholars like Scott Page, arguing that there is a *Diversity Bonus* to be reaped when individuals learn to fulsomely interact in diverse teams pursuing innovations in a knowledge economy.⁸ Moreover, building off what might be called a "business proposition" for diversity, linking full participation to a prosperous society, I am reminded of how consequential the corporate and military amici briefs appeared to be in Justice O'Connor's opinion in *Grutter*. As Jeffrey Lehman noted in his essay in *Defending Diversity*, the corporate briefs "made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints" and the military briefs sounded a similar note, arguing that a "highly qualified, racially diverse officer corps... is essential to the military's ability to fulfill its principle mission to provide national security."⁹

O'Connor, writing for the majority in *Grutter*, then extended the compelling interest argument in what I believe to be a critical direction, arguing that the very legitimacy of American institutions is at stake. She wrote: "because universities, and in particular law schools represent the training ground for a large number of the Nation's leaders, *Sweatt. Painter*, 339 U.S. 629, 634, the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity."¹⁰ In other words, although the thrust of O'Connor's decision was totally in keeping with Powell's emphasis on the educational benefits of diversity, she extended the compelling interest argument, as Jeff Lehman suggests: "to incorporate not only *pedagogic* interest but also an interest in *democratic legitimacy*"¹¹. In doing so, I believe she raises the question of how institutions can realize the benefits of diversity without addressing the obstacles that systemically sideline some groups from journeying along that path to leadership. This is a key question to which I will return, one that brings us full circle to the links between a reparative approach and the compelling interest of diversity writ large.

⁶ Bowen, W.G. and Bok, D. 1998. *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*. Princeton, NJ.: Princeton University Press.

⁷ Gurin, P., Dey, E. L., Gurin, G., Hurtado, S. (2004). The Educational Value of Diversity. In P. Gurin, J. Lehman, & E. Lewis (Eds): *Defending Diversity: Affirmative Action at the University of Michigan*, Ann Arbor, MI: University of Michigan Press, p 97-188.

⁸ Page, S.E., (2017). *The Diversity Bonus: How Great Teams Pay Off in the Knowledge Economy*, Princeton, NJ.: Princeton University Press.

⁹ Lehman, J. (2004). The Evolving Language of Diversity and Integration in Discussions of Affirmative Action from *Bakke* to *Grutter*, In P. Gurin, J. Lehman, & E. Lewis (Eds): *Defending Diversity: Affirmative Action at the University of Michigan*, Ann Arbor, MI: University of Michigan Press, p.90.

¹⁰ Sandra Day O'Connor, writing for the majority in *Grutter v. Bollinger*, No. 02-241, Supreme Court, June 23, 2003.

¹¹ See footnote 6, p.91.

The Colorblind Pushback and the Resurgence of White Anxiety

Before considering reparative justice as part and parcel of equity, the elephant in the room is the resurgence of colorblind doctrines, previewed many decades ago by Justice Powell and on full display now in states across our country. As Jeannie Suk Gersen noted, in her piece in *The New Yorker* entitled, *Education After Affirmative Action*, Chief Justice Roberts has famously argued that: “the only way not to discriminate is not to discriminate” (countering the words of Justice Blackmun in *Bakke*, who said “In order to get beyond racism, we must first take account of race. There is no other way.”¹²

A preference for colorblindness has always been at the core of the Court’s thinking, even when arguing for narrowly tailored race-conscious solutions, as civil rights attorney, Elise Boddie noted: “Justice Powell argued fairly explicitly in *Bakke* that broadening affirmative action would be racially divisive because it would cost whites, as a group, access and power.”¹³ And, as if to prove the power of that white anxiety, California followed on the heels of even the narrow rendering of race-consciousness in *Bakke* with Proposition 209, banning all consideration of race in admissions, as did Michigan with Proposition 2 in 2006 after *Grutter*, and 10 states in total have banned affirmative action to date. Moreover, as Kathrine Mangan documents in her recent piece in *The Chronicle of Higher Education*, the experience of California and Michigan offer sobering news in the quest to enroll a racially representative student body with race-neutral alternatives.¹⁴ Similarly, an extensive study by Anthony Carnevale and his colleagues at the Georgetown Center on Education and the Workforce documents how: “banning race-conscious affirmative action will make it impossible for selective college admissions to mirror the growing racial diversity in high schools,” even as their data suggest that class-conscious alternatives could allow such institutions to partially claw back their current levels of diversity in some cases.” (Interestingly, as an aside point on the debate between race and class-conscious affirmative action strategies, Carnevale notes: “Our models make one thing very clear: the most effective way of increasing socioeconomic diversity at selective colleges is to consider race in the admissions process, not to ignore it.”¹⁵

As Earl (Lewis) wrote in his historical account of debates on race-consciousness vs. colorblindness in *Defending Diversity*, “The debate about affirmative action in the United States is fundamentally about how to reconcile the tension between the need to include and the desire to limit that inclusion.”¹⁶ And that very desire to limit inclusion, taken sometimes to violent extremes as in the chants of the Charlottesville demonstrators in 2017– “we will not be replaced,” is only heightened of late in the face of what demographer William Frey documents as

¹² Gersen, J.S. (2022). *Education After Affirmative Action*, *The New Yorker*, November 7.

¹³ Boddie, E. (2016). *The Future of Affirmative Action*. *Harvard Law Review Forum*, Vol. 130:38, p. 49.

¹⁴ Mangan, K. (2022). *After Affirmative Action: How Effective are Race-Neutral Alternatives?* *The Chronicle of Higher Education*, September 2.

¹⁵ Hazelrigg, K. (2023). *Race-Conscious Affirmative Action: What’s Next*, Press Release from The Georgetown University Center on Education and the Workforce, March 28.

¹⁶ Lewis, E. (2004). *Why History Remains a Factor in the Search for Racial Equality*. In P. Gurin, J. Lehman, & E. Lewis (Eds): *Defending Diversity: Affirmative Action at the University of Michigan*, Ann Arbor, MI: University of Michigan Press, p.46.

a *Diversity Explosion*,¹⁷ raising questions and perhaps fears as to whether demography is destiny, reflected in some of the language nationally as state after state rally against DEI efforts more generally (with 18 states introducing anti-DEI legislation as of April 2023).¹⁸ As the DEI debates underscore, there is very real reluctance to talk about history and systemic racism or to embrace assertively the fastest growing populations in our midst, along with continued adherence to race-neutral solutions to reap the benefits of diversity – which Justice Ruth Bader Ginsburg called out as nothing but a pretense in her dissent in the first *Fisher* case, noting that “only an ostrich could regard the supposedly neutral alternatives as race unconscious.”¹⁹ Nonetheless, as difficult as it is to imagine how a country built, de jure and de facto, on racial classifications, can see a “colorblind” path forward, that option is still very much on the table, not only in court renderings and local debates about higher education, but also in determinations about the legality of efforts to promote equity and integration in public schooling, in employment and contracting, and in voting rights cases.

Most relevant to our discussion here today, as Gary Orfield outlines in detail in his new book entitled: *The Walls Around Opportunity: The Failure of Colorblind Policy for Higher Education*,²⁰ it is more and more evident that enrolling and supporting a representatively diverse student body for success will require universities to reckon with and work to dismantle the host of obstacles in K-12 education, including under-resourced schools segregated by race and class, that sideline so many talented students. As Earl and I wrote in our introduction to the first volume in our series on *Our Compelling Interests: The Value of Diversity for Democracy and a Prosperous Society*, “We cannot simply presume progress, especially as patterns of residential, educational, and economic segregation have in many ways hardened over decades.”²¹

Even in the face of a legal retreat to “colorblindness,” we will all need to look to a set of race-sensitive policies, from expansive outreach and collaborations with our K-12 partners to new ways of evaluating admissibility to comprehensive financial aid attuned to the realities of the families and communities in our midst. We will need, as Lani Guinier wrote some time ago²², to interrogate meritocracy in higher education, seeing the assets of lived experiences that contribute to excellence at a much wider range of institutions and for a much broader set of students than are typically under discussion in these cases or conversations. We will need to creatively move beyond narrow standardized measures known to have disparate outcomes to ways of identifying potential grounded in the diverse experiences that students can bring to the table, ironically harkening back to the original arguments about the value of diversity for the richness of education. It is hard to promote colorblindness in a society that from its founding has been built on color consciousness, and as O’Connor noted in *Grutter*, and as Earl and I asked

¹⁷ Frey, W. *Diversity Explosion: How New Racial Demographics Are Remaking America*. Washington, D.C.: Brookings Institution Press.

¹⁸ See DEI Legislation Tracker, *The Chronicle of Higher Education*, April 7, 2023.

¹⁹ Ginsburg, RB. (2013). Dissent in *Abigail Noel Fisher, Petitioner v. University of Texas at Austin et al.*, No. 11-345, June 24.

²⁰ Orfield, G. (2022). *The Walls Around Opportunity: The Failure of Colorblind Policies for Higher Education*, Princeton, NJ: Princeton University Press.

²¹ Lewis, E. and Cantor, N. (2016). Introduction. In *Our Compelling Interests: The Value of Diversity for Democracy and a Prosperous Society*. Princeton, NJ.: Princeton University Press, p. 10.

²² Guinier, L. (2015). *The Tyranny of the Meritocracy: Democratizing Higher Education in America*. Boston, MA: Beacon Press.

again, “Is the perceived legitimacy of American institutions – from those that educate to those that adjudicate, from those that promulgate free expression to those that safeguard our security – at risk when so many are left behind in the ‘land of opportunity?’”²³ Or to say it another way, we can’t reap the diversity bonus without explicitly redressing decades/centuries of systemic discrimination in order to truly bring everyone to the table together on equal footing. And in this regard, numbers really matter, without a critical mass not even the aims articulated in *Bakke*, *Grutter*, or *Fisher II* can be realized, as the University of Michigan noted in their amicus brief in the current cases from Harvard and UNC. Referring to the decrease in Black student enrollment at Michigan since Proposition 2 went into effect, they noted that: “This reduction in diversity not only denies students the educational benefits of a diverse campus, it negatively affects students’ well-being: Fully one-quarter of underrepresented minority students surveyed indicated that they felt they did not belong at U-M, a 66 percent increase over the last decade.”²⁴ In other words, numbers really matter.²⁵

Coming Full Circle: Reparative Justice, Legitimacy and Shared Fate

Hence, we’ve come full circle to the question of how much collective will there is to recognize shared fate and to understand that *E Pluribus Unum* cannot be achieved without taking down the walls around opportunity, no matter how much anxiety that causes for the long-favored group(s). This is true whether you frame the road forward as about equity and reparative justice or about diversity and educational benefits or about institutional legitimacy – which one could argue combines them all as we know you can’t get the numbers that translate to both legitimacy and educational benefits without some reckoning with systemic realities. Somewhat ironically, the record of opinions from the Supreme Court, starting with *Bakke* and moving through *Fisher II*, in many ways brought us to this day, as I would argue that racial reckoning was never too far from consciousness in those decisions, even if, as Elise Boddie has written: “As in *Grutter*, such a shift would necessarily require the Court to recognize a new brand of compelling interest: promoting the inclusion of racial groups that historically have been abandoned at the margins of society.”²⁶ This is not likely a shift that this Court will make, and they may well shift further from it altogether, but it is a shift that we must find ways to make ourselves, be it through race-sensitive commitments to geography and community along with expanded notions of where we see excellence and how to reap that bonus. For as Gary Orfield says: “A society which fails to develop the talents of a vast share of its people ... is a society with wasted possibilities and a threatened future.”²⁷ Or as Stella Flores notes in her commentary in Gary’s volume, “The move forward is not to deny color, language, and culture but instead for colleges and universities to take into account these factors as assets for a multiracial and globally competitive nation.”²⁸ And I would add, no matter what the Court decides, we have a public responsibility to make this move forward.

²³ See footnote 17, p.6.

²⁴ The Michigan brief and this poll is referenced in an article in *The Chronicle of Higher Education* by Eric Hoover, entitled, *A Cautionary Tale*, September 2, 2022.

²⁵ Lewis, E. and Cantor, N. (2021) Privilege and Racism: Numbers count, in Many Different Ways, *Medium*, January 14.

²⁶ See footnote 10, p.48.

²⁷ See footnote 16.

²⁸ Flores, S. (2022). Commentary in Orfield, G. *The Walls Around Opportunity: The Failure of Colorblind Policies for Higher Education*, Princeton, NJ: Princeton University Press, p 286.