

The Legacy of *Brown* in the Obama Era

Jonathan Alger

Senior Vice President and General Counsel

Rutgers, The State University of New Jersey

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Over fifty years after the Supreme Court's landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954)—which overturned the long-standing and now notorious “separate but equal” doctrine embraced decades earlier by the Court in *Plessy v. Ferguson*, 163 U.S. 537 (1896)), and held that true equality required integrated educational institutions—our society is still debating the meaning and significance of *Brown* with regard to the integration and diversification of institutions of higher education. In 2003 the Supreme Court provided significant guidance regarding whether, and under what circumstances, race can be considered as one of many factors in admissions in its landmark decisions in the Michigan cases. See *Grutter v. Bollinger* (reiterating the principle that the educational benefits of diversity constitute a compelling interest in higher education, and upholding the consideration of race as one of many factors in a holistic admissions process), 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down a point-based system in admissions as being an unduly mechanical method of considering race). While this guidance focuses on the admissions context, many of the principles are relevant for programs in financial aid, outreach, recruitment, etc. See, e.g., 59 Fed. Reg. 8756 (Feb. 23, 1994) (policy guidance on race-targeted financial aid from the U.S. Department of Education). Different standards and precedents apply in the employment context, where the law is far from settled (this outline will focus on student body diversity).

The Michigan decisions did not end the debate about whether and how to integrate and diversify institutions of higher education, however. On the one hand, advocates of race-conscious measures argue that such measures continue to be necessary—especially in light of continuing inequities in the educational system and many other aspects of American life. Opponents counter that the only way to get beyond the use of race is to stop using race as a factor altogether. See, e.g., *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 551 U.S. 701 (2007) (striking down race-conscious voluntary integration efforts of school districts which the Court found not sufficiently premised on the educational benefits of a diverse student body). The election of Barack Obama as President raised new questions about educational opportunity in our society and its relationship to race and other factors.

This outline will provide a quick recap of the history and current state of the law regarding “affirmative action” in higher education based on race and other factors. It will then explore some of the current challenges and opportunities related to race-conscious programs, as well as some of the next-generation legal questions and issues that may merit further exploration and debate. It is not intended to serve as legal advice, but rather as a background educational tool only. Even today, the legacy of *Brown* remains a

source of legal and social controversy as we continue to struggle with assuring true equality of opportunity throughout our educational system.

I. Historical Overview

The constitutional provisions and civil rights statutes directed at race and gender (among other forms of) discrimination were originally developed as societal responses to a long history of societal and institutional discrimination. The focus of *Brown v. Board of Education* in 1954 and the Civil Rights Act of 1964 were on ending formal segregation in the schools and other institutions. In the 1960s and early 1970s, institutions such as universities began to make affirmative efforts to reach out to groups that had been historically denied access. These efforts were spurred in part by Executive Orders (such as E.O. 11246 and 11375) that required institutions that were federal contractors to develop affirmative action plans. The federal government's initiatives had a dual aim: "to bar like discrimination in the future" and to "eliminate the discriminatory effects of the past." *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). Thus, the original laws and cases on affirmative action had a clear remedial and social justice basis.

A backlash quickly developed against race-conscious programs, however, leading to legal challenges based on the notion of "reverse discrimination" against non-minorities. As formal segregation and de jure discrimination ended, the remedial rationale gradually fell into disfavor. In 1978, the Supreme Court in *Bakke* (discussed further below) dealt a significant blow to the use of the remedial justification for race-conscious policies when it limited the use of this notion to remedying present effects of past discrimination at a particular institution—rather than allowing institutions to remedy societal discrimination on their own. In his pivotal opinion, Justice Powell moved away from the remedial rationale but instead embraced another basis on which to justify some race-conscious action by universities—namely, the educational benefits of a diverse student body (based upon its relationship to the institution's educational mission).

After 1978, colleges and universities nationwide adopted and relied upon the diversity rationale as articulated by Justice Powell. The U.S. Department of Education issued guidance on race-conscious programs based on Powell's opinion.

By the early 1990s, a further backlash had developed against the diversity rationale and the notion of "political correctness" at colleges and universities, which were accused of social engineering. Groups such as the Center for Individual Rights and Center for Equal Opportunity formed and made it their mission to eliminate racial "preferences" in higher education and elsewhere. They began challenging race-conscious programs in federal agency proceedings (such as in front of the U.S. Department of Education's Office for Civil Rights) and the courts, with some notable successes—most notably the 5th Circuit's 1996 decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (in which a federal court of appeals said that Justice Powell had gotten it wrong and that diversity was not a compelling interest in higher education—a decision later abrogated by the Supreme Court's decision in the *Grutter* case discussed below). Emboldened by their success, they saw the filing of the Michigan cases in 1997 as "the Alamo" for affirmative action.

An unprecedented coalition of educational organizations and institutions banded together with professional organizations, corporations, civil rights groups, political leaders, former military leaders, and others to defend the principle of diversity and its importance in our society, culminating in the landmark University of Michigan decisions in 2003. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003). In *Grutter*, Justice O'Connor and a majority of the Court clearly embraced and reinforced Justice Powell's approach and the diversity rationale, while at the same time providing detailed guidance on the elements of "narrow tailoring" that are necessary for such programs to pass constitutional muster (see below). The Court took note of the fact that institutions had relied in good faith on Justice Powell's opinion in *Bakke* for a generation.

The American Civil Rights Institute (led by Ward Connerly) and other organizations then turned their attention from the courts to the political arena, pursuing state ballot initiatives to prohibit the consideration of race and gender in public institutions (modeled after California's Proposition 209, the first such initiative which was passed in 1996).

The election of Barack Obama has been proffered by these groups as proof that race-conscious affirmative action is no longer needed, but disparities in educational opportunity based on race and gender persist in many fields. Critics such as Shelby Steele argue that affirmative action has been a distraction that has prevented our society from dealing with the underlying lack of educational preparation and development of particular groups (especially blacks). *See, e.g.,* Shelby Steele, *Affirmative Action is Just a Distraction* (The Washington Post, July 26, 2009). Proponents of affirmative action counter that the underlying societal-wide problems can and should be addressed, but that in the meantime race-conscious measures are necessary to provide opportunities for the generations caught in this phase of American history. The dialogue has become more difficult because the legal framework for individual institutions has shifted from the historical remedial/social justice rationale to the diversity rationale. In an era of globalization and financial uncertainty, corporations and other employers have also pushed an argument that they need colleges and universities to produce diverse workforces in order to maximize our human capital. In addition to the benefits of diversity in an educational context, proponents of diversity measures are now also focusing on research demonstrating the benefits of diversity for other broad societal purposes—e.g., to improve health care outcomes through increased diversity in the medical professions.

II. Levels of Scrutiny

Different levels of judicial scrutiny are applied to different types of classifications or characteristics. Most of this outline will focus on race-conscious classifications, because they are subject to the highest level of judicial review and have caused the most controversy in recent years.

A. Strict Scrutiny (Race/National Origin): Under the Equal Protection Clause of the Constitution (which applies to public institutions) and Title VI of the Civil Rights Act of

1964 (which applies to public and private institutions alike that receive federal financial assistance—i.e., any federal money, including student loans), race/national origin is subject to “strict scrutiny”—the highest degree of judicial scrutiny. This is true even if an institution is using racial classifications for “benign” purposes to help historically disadvantaged groups. *See Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Strict scrutiny does not mean that racial classifications can never be used; it simply sets forth a very high burden that institutions must meet in order to justify race-conscious policies or practices.

Strict scrutiny requires that an institution demonstrate two things: (1) that it has a “compelling interest” that justifies the consideration of race; and (2) that its race-conscious program or policy is narrowly tailored to meet that interest. This is sometimes called the “Spandex” test, as there must be a very tight fit between the means and the ends.

B. Intermediate Scrutiny (Gender): Under the Constitution and Title IX of the Education Amendments of 1972, gender is subject to “intermediate scrutiny.” In recent years, the Supreme Court has strengthened this standard to require institutions to provide an “exceedingly persuasive justification” in order to uphold gender-based classifications. *See U.S. v. Virginia*, 518 U.S. 515 (1996). In particular, courts are unlikely to uphold gender-based classifications if they appear to be based on faulty generalizations or stereotypes.

C. Rational Basis (Non-Suspect Classifications): Other characteristics or criteria that are not considered suspect classifications under the law are subject only to “rational basis” review—the lowest level of scrutiny. This is true even if the use of a particular classification (e.g., socioeconomic status or geography) might disproportionately favor members of particular historically underrepresented racial groups—so long as the institution is not using that factor as a mere subterfuge or smokescreen for discrimination on the basis of race. Under this standard, an institution must merely articulate some rational reason why a particular characteristic is being considered. When this standard is applied, institutions will almost always have such considerations upheld.

III. Compelling Interests

A. Diversity

In the University of Michigan decisions in 2003, the U.S. Supreme Court held that the educational benefits of a diverse student body constitute a compelling state interest that can justify the consideration of race as one of many factors in the student admissions process. *See Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

Definition of Diversity: The Supreme Court made clear that if institutions are serious about student body diversity, they must focus on more than just race. The premise of the educational benefits is that diversity contributes to the “robust exchange of ideas” on

campus. Therefore, institutions that care about diversity as part of their educational mission should be able to demonstrate that they are considering a wide range of factors.

This does not mean that all criteria need to be given the same weight, or treated in exactly the same way. The needs of each institution will depend on its particular history, mission, and circumstances. Some forms of diversity may occur naturally in an institution's applicant pool such that it does not need to make any special efforts in that regard, whereas other forms of diversity may require more work. Each institution can make its own decision, based on its mission and needs, as to the factors on which it chooses to focus.

Debates about the forms of diversity that matter in higher education continue. In recent years, factors that have been mentioned include the following, among others: race; ethnicity; gender; socioeconomic status; religion; sexual orientation; disabilities; geography; family circumstances; first-generation students; overcoming obstacles of various kinds; veteran status; special skills, interests and talents; special life experiences; cultural and social backgrounds; age; work experience; etc. Critics of race-conscious affirmative action programs have often faulted universities for not doing enough to provide access for students from economically disadvantaged backgrounds in particular.

B. Remediating Discrimination

The other compelling interest identified by the courts in the student context is remediating the present effects of past discrimination. This rationale is limited, however, as institutions cannot rely upon societal discrimination as a rationale to justify their own race-conscious programs. *See, e.g., Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978). Instead, they must make a case that they have had discriminatory policies or practices in the past at their own institution, and that there is a direct nexus between those past policies or practices and limitations on access for particular groups in the present day.

Most institutions are now unlikely to rely upon the remedial rationale to justify their race-conscious programs. It is difficult to establish the direct nexus from past policies and practices to the present (especially if those policies or practices were modified some years ago). Furthermore, it requires an institution to admit its own guilt about all the things it did wrong in the past, and then to demonstrate that conditions in the present (for particular groups) continue to reflect those past bad acts. With the passage of time and the end of de jure discrimination in most circumstances, most institutions now prefer to rely on the diversity rationale to justify race-conscious programs.

C. Other Possible Compelling Interests

In *Grutter*, the Supreme Court made clear that it has never enunciated a conclusive list of all possible compelling interests. In other words, there might be other interests that could be identified as "compelling" if there is enough evidence to support their importance. The burden is very high, however.

In *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978), the University of California-Davis Medical School offered several possible rationales for their consideration of race (in that instance, the school reserved 16 seats in each entering class of 100 for disadvantaged minority students). In that decision, Justice Powell embraced the diversity rationale, but there was controversy about how to “count the votes” and understand the breadth of the holding in light of the Court’s splintered opinion in that case. Justice O’Connor’s opinion in *Grutter* firmly established that the educational benefits of a diverse student body constitute a compelling interest.

The University of California had offered some other additional rationales for the consideration of race in *Bakke*, however. In his opinion, Justice Powell rejected the remedial rationale with regard to societal discrimination (as discussed above). Powell also rejected the University’s arguments that the consideration of race was necessary to reduce the historic shortage of minority medical students and doctors, or to increase the number of doctors who would practice in historically underserved communities. On the latter point, Powell noted that institutions should not assume that individuals of color are more likely than others to serve such communities, and that in any event there was not sufficient evidence to back up this assertion. Since 1978, however, there have been a number of studies to provide additional evidence on this point. Nevertheless, institutions may be able to achieve this goal without explicit reliance on the race of applicants because they can ask all applicants more directly to demonstrate their interest in, experience with, or commitment to serving historically underserved communities.

IV. Narrow Tailoring

If a race-conscious policy or program furthers a compelling interest, the consideration of race must be “narrowly tailored” to meet that interest. Here are some relevant aspects of narrow tailoring to keep in mind from the admissions context in particular:

- Review of applicants should be individualized and holistic. All applicants should have the opportunity to demonstrate their own potential diversity contributions.
- No applicant or group of applicants should be isolated from competition based on race. Candidates should not be divided into separate pools for review based on race. Every candidate should compete against the entire pool.
- Race should not be given predominant or automatic weight (but not all factors need to be weighted in the same way). The use of mechanical or numerical criteria for race should generally be avoided.
- If used at all, race should generally be used as a plus factor. The use of race should be calibrated so that it is substantial enough to make a real and effective difference in program outcomes, but not so much that it becomes the predominant or overwhelming criterion for participation in a program. Race-exclusive programs (where being a member of one of a particular set of racial groups is an

absolute prerequisite for participation) are the most difficult to justify, and may not be permissible in many circumstances.

- Institutions can pay some attention to the numbers of students from various racial and ethnic groups, but should also be able to demonstrate that other institutional goals and interests are being weighed and balanced.
- The concept of seeking a critical mass of students from particular backgrounds should be context-specific and should be aimed at achieving the educational benefits of a diverse student body—i.e., to avoid tokenism so that students can see differences within racial groups and similarities across racial lines. Institutions should always use educational justifications for their goals. Racial balancing to match the population at large should be avoided.
- Institutions should have clearly articulated reasons for why certain groups are included or excluded when using race as a factor in decision-making in light of institutional needs, demographics, etc.
- Institutions should give serious, good-faith consideration to workable race-neutral alternatives. You do not have to try and fail at all such alternatives, but you must show (and document) that you have seriously considered them. If such alternatives could provide at least some partial progress with regard to racial diversity, then you should use them to minimize the needed consideration of race.
- When considering race as a factor, do everything possible to minimize the burden on other groups of students who do not receive extra consideration because of their race. Be as flexible as possible to allow individual circumstances to be taken into account.
- Set explicit time limits or sunset provisions for race-conscious programs, and/or ensure that they are subject to periodic review. Their effectiveness and results should be analyzed over time in light of changing circumstances and demographics. Race-conscious programs should not be set in stone or presumed to exist in perpetuity.
- Look systematically at how all of your programs operate together and complement each other (admissions, financial aid, outreach, recruitment, retention). Beware of inconsistencies in focus and approach that seem to be at odds with each other from a practical or theoretical perspective in terms of your overall educational goals.

V. Other Considerations

Judicial Deference: If institutions of higher education make judgments about admissions standards and criteria based on their good-faith academic judgment, then courts are supposed to give them a significant amount of deference. The greater the

extent to which an institution can demonstrate that a decision was based on educational considerations (e.g., through the expert advice and consideration of faculty), the greater the likelihood that a court would show deference to that decision.

Educational Mission: The educational benefits of diversity must be related to the institution’s educational mission. The choice as to whether diversity is seen by an institution as a compelling interest is a voluntary choice made by the institution—it is not mandated by the law.

Definitions of Merit: As a general rule, the law does not define “merit” in the context of student admissions. Therefore, institutions generally have freedom and flexibility to determine admissions criteria (unless they are otherwise set or constrained by state law or other institutional policies).

Responsibility for Privately Funded Programs: Even if a race-conscious program is privately funded (e.g., a race-conscious scholarship program), an institution must comply with strict scrutiny if it administers the program or provides significant assistance to the outside party operating the program. *See, e.g.,* 59 Fed. Reg. 8756, at 8757-58 (Principle 5 of the Department of Education’s guidance on race-targeted financial aid, on “Private Gifts Restricted by Race or National Origin”). Non-governmental entities that are not recipients of federal financial assistance are not subject to the Equal Protection Clause or Title VI themselves, but they may be subject to other statutory restrictions (e.g., relating to the making of contracts).

VI. Current Challenges and Opportunities

Legal, political and social challenges to race-conscious programs continue to abound. Organizations such as the Center for Individual Rights, Center for Equal Opportunity, and National Association of Scholars (among others) continue to comb universities’ websites and literature, seeking to identify and challenge race-conscious programs they deem to be vulnerable. Rather than challenging the validity of the diversity rationale head-on, they are challenging institutions on various aspects of narrow tailoring—arguing, e.g., that institutions have merely engaged in racial balancing, that they have failed to give adequate consideration to race-neutral alternatives, or that they have failed to measure the effectiveness of their diversity-based programs.

With the election of Barack Obama as President, many commentators have argued that the country should move beyond explicit considerations of race and gender. Ballot initiatives that prohibit the consideration of race, national origin and gender in programs at public institutions (including colleges and universities) have succeeded in several states (California, Washington State, Michigan, and Nebraska), although such a measure was defeated in 2008 in Colorado and failed to get on the ballot in several other states.

In *Grutter*, Justice O’Connor expressed an expectation on behalf of the Supreme Court that race would no longer have to be a factor in admissions in 25 years (by the year 2028). That date is now only 19 years away, and yet inequities still abound in our

educational system based on race. Critics of race-conscious policies have pointed to this expectation as evidence that the Court expects race-conscious programs to be temporary and kept on a short leash. Proponents argue, however, that if the Court is serious about this time frame, then aggressive efforts will be necessary in the next few years in order to break down barriers to equal opportunity in our educational system. Coalitions and efforts to work across traditional institutional lines to build and sustain a pipeline of equal opportunity may be among the most promising and far-reaching responses to this challenge. In the months and years to come, new political appointees taking the helm at various federal agencies (such as the U.S. Department of Education's Office for Civil Rights) may also provide some signals as to the administration's stance on these issues.

Effectiveness of Race-Neutral Alternatives: Institutions will also need to continue to pay special attention to the effectiveness of race-neutral alternatives in promoting and sustaining diversity of all kinds. The states in which ballot initiatives have forbidden race-conscious programs at public institutions (e.g., CA, NE, MI) will serve as living laboratories that should be watched carefully by institutions in other states as well. In Texas, a current challenge to the re-introduction of race into the admissions process (after it was prohibited for a period of time following the 1996 *Hopwood* decision discussed above) will bear special attention. The University of Texas was successful at the trial court level in arguing that the use of race was necessary to achieve the full educational benefits of diversity, and that the percent plan that had been in place was not sufficient for this purpose. *See Fisher v. University of Texas at Austin*, __ F. Supp.2d __, Case No. A-08-CA-263-SS (W.D. Tex. Aug. 17, 2009). The opponents of the University's use of race have indicated that they will appeal the decision. The case should ultimately provide insights into the nature and extent of the evidentiary basis institutions will need to justify race-conscious programs.

Some commentators have argued that the nation's colleges and universities have used race-conscious measures as band-aids in a way that masks or minimizes deeper problems of socioeconomic disadvantage in society. At a time when budgetary challenges are making it more difficult than ever to sustain commitments to providing access for students from disadvantaged socioeconomic backgrounds, institutions will continue to face pressure to expand their outreach, recruitment and support of such students. Experts continue to debate whether class-based affirmative action can serve as an adequate substitute for race-conscious measures as a way to provide broad and meaningful student body diversity. *See, e.g., "Is It Time for Class-Based Affirmative Action?"*, Insidehighered.com (Dec. 16, 2009); *see also* Richard D. Kahlenberg, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (BasicBooks, 1996).

Expanding and Changing Definitions of Diversity: Institutions will continue to face challenges to expand definitions of diversity as more and more groups advocate for recognition and inclusion (e.g., veterans, LGBT students, first-generation students, individuals with disabilities, etc.). Programs that were initially designed to benefit individuals of particular types of backgrounds will need to be reviewed periodically to determine whether they should be expanded or amended in light of changing definitions

of diversity and demographics. Demographic changes may also alter historical assumptions about what groups are (or are not) underrepresented over the course of time.

Budget Constraints: In an era of severe fiscal constraints, many questions are being raised about the continued priority and vitality of institutional diversity initiatives (e.g., offices and programs that support diversity-related outreach and recruitment efforts) and on diversification efforts in general. At some institutions, concerns have been expressed that diversity programs and staff are often portrayed as “non-essential” and therefore are likely to become obvious targets for budget cuts. For example, the University of Colorado recently cut the job of chief diversity officer in its system office (although it retained campus-based diversity officers).

At other institutions, declining resources for the support need-blind admissions or need-based financial aid, along with related budgetary pressures, are making it harder for students from historically disadvantaged backgrounds—many of whom are students of color—to enroll and stay in school. *See, e.g.,* “Diversity Takes a Hit During Tough Times,” *Insidehighered.com* (Oct. 11, 2009).

Assessment of Outcomes: The continuing push for measurement and assessment of student learning outcomes is also likely to have an effect on diversity-related programs. Institutions will need to be prepared to study the impact of such programs to determine whether they are effective over time in accomplishing their stated goals. If such programs are not demonstrably having the intended impact over time, institutions must be ready and willing to modify them as needed.

Role of Accreditation: The debate about the nature and extent of diversity efforts required of institutions of higher education continues to be reflected in the field of accreditation, where diversity is often seen as essential to particular types of schools or fields of study. For example, the American Bar Association requires law schools to demonstrate good-faith efforts at diversifying their student bodies. *Standard 212. Equal Opportunity and Diversity*, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (American Bar Association Section of Legal Education and Admissions to the Bar, 2009-10 Edition). Institutions will thus need to continue to pay attention to relevant accreditation standards, which may become more difficult in an era of severe budgetary constraints.

Academic Freedom: Questions have also arisen about programs directed at ensuring that faculty members are committed to institutional principles and priorities related to diversity. For example, in 2009 Virginia Tech backed off from proposed new guidelines for tenure and promotion that would have required faculty members to discuss their involvement in activities related to diversity. Critics of the guidelines argued that the guidelines could be seen as establishing a “loyalty oath” in violation of the academic freedom rights of faculty. *See* Robin Wilson, “Critics Challenge Diversity Language in Virginia Tech’s Tenure Policy,” *The Chronicle of Higher Education* (Mar. 26, 2009).

From another angle, the University of Vermont recently endured criticism from civil rights groups when attention was drawn to a tenured professor's extensive and sympathetic writings about white nationalism. *See* Stephanie Lee, "The (Pro)-White Professor, Insidehighered.com (June 17, 2009). Even as institutions take a strong stand in favor of the educational benefits of diversity, they must take care to respect core principles of academic freedom so as to protect dissenting voices on all sides in these often contentious debates.

The Pedagogical Benefits of Diversity: If institutions are serious about the educational benefits of diversity in and outside the classroom, they must find ways to work with faculty and staff members to ensure that educational interactions are being fostered so as to bring those educational benefits to fruition. For example, faculty members may need assistance in understanding and employing pedagogical techniques (for discussion, group projects, collaborative problem-solving, etc.) that take advantage of more diverse classrooms. Institutions cannot assume that faculty members in various disciplines have learned such skills elsewhere. Colleges and universities might also look for faculty candidates who have demonstrated, successful experience in working with diverse student populations. Institutions might also seek to create or strengthen other types of programs that foster inter-group dialogues, diversity in residential and extracurricular experiences, etc. Changes in the curriculum have also been considered at many institutions to reflect their changing needs and demographics.

The Economic Argument: At a time when college graduates are more concerned than ever about employment opportunities after graduation, institutions will need to find ways to work with the organizations and companies that employ their graduates and to meet their needs with regard to a workforce that understands and appreciates diversity and difference. Researchers such as Scott Page have made the argument that more diverse teams of people are better at solving complex problems in the workplace. *See* Scott Page, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (Princeton University Press, 2007).

International competitive pressures related to globalization may force public officials (including leaders in higher education) to focus more on an economic (rather than purely educational) rationale related to the full development of human capital as a strategic asset. Indeed, the competitiveness argument is that diversity can be a great strategic asset if our society fully develops the potential of people from the widest possible variety of backgrounds, experiences and perspectives. *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 and Giroux, 2005). While factors such as race and ethnicity are far from the sole determinants of diversity in this argument, they are among the many factors that contribute to diversity. These rationales have implications for how institutions of higher education define and articulate their mission statements, focusing not just on internal educational experiences but also on the outcomes and impact they hope to produce vis-à-vis their graduates in the world.

VII. Legal Questions/Issues for the Future

The Supreme Court provided much-needed guidance on diversity and admissions in *Grutter* and *Gratz*, but many open questions remain. Here are some of the next-generation legal questions and issues that may merit further exploration and debate.

- How to develop and document that a particular institution's interest in diversity is sufficiently based on academic judgment, and is sufficiently tied to its academic mission
- The type and degree of evidence needed to prove that a particular program is working to achieve the educational benefits of diversity; how to assess such programs to determine whether or for how long they may still be necessary
- How to demonstrate that an institution is doing everything necessary to foster the educational benefits of a diverse student body
- How to define the notion of critical mass for various groups in different contexts at different institutions, and how to differentiate this educational concept from numerical concepts of racial balancing
- How to deal with mixed-race ancestry
- How to deal with subcategories within racial and ethnic groups (e.g., domestic v. international diversity; groups within large categories such as Asian-American or Hispanic/Latino)
- How to deal with ongoing demographic changes that affect previous assumptions on which programs were based (e.g., the increasingly imbalanced gender ratio at some institutions in which men are now underrepresented)
- How to address the intersection of various protected categories (e.g., the combination of racial and gender inequities that might face African-American males or females)
- How to demonstrate and document adequate consideration of race-neutral alternatives, and what lessons can be learned from ongoing experiments and approaches in states that were subject to ballot initiatives (e.g., CA, WA, MI, NE) or percent plans (e.g., CA, TX)
- How to deal with concerns of race or gender bias in standardized test scores and other numerical measures; when and how standardized test scores should be utilized in higher education; looking at alternatives to standardized tests
- How to measure when success has been achieved with regard to diversity and its educational benefits such that race no longer needs to be considered as a factor

- How the standards from the Michigan admissions lawsuits would apply in other contexts such as financial aid, outreach, recruitment, etc.—and whether race-exclusive programs might ever be justified in these other contexts
- The extent to which Congress can make findings at the federal level regarding racial and gender inequities which can be addressed through federal grant programs or other means
- Whether diversity would be considered a compelling interest in the employment context (e.g., with regard to faculty) that would justify some consideration of race or gender in particular circumstances
- Whether any other compelling interests might yet be identified that could justify the consideration of race in particular circumstances

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