University of Arkansas at Little Rock Law Review

Volume 21
Issue 4 *The Ben J. Altheimer Symposium: Racial Equity in the Twenty-First Century*

Article 14

1999

Race and Higher Education: A Rallying-Cry for Racial Justice and Equal Educational Opportunity

Pace Jefferson McConkie

RACE AND HIGHER EDUCATION: A RALLYING-CRY FOR RACIAL JUSTICE AND EQUAL EDUCATIONAL OPPORTUNITY

Pace Jefferson McConkie[*]

In 1984, I came to this University's law school as a student desiring to obtain a legal education that would serve as a foundation for a career in civil rights advocacy, particularly in the realms of public education. It was my intent that this legal education would naturally be heaped upon the groundwork that had already been cultivated by my family, political, religious, and general life's experience to that point. I had never suffered the direct indignities of racial discrimination, but I was no less indignant by it. Utter contempt and disdain for the stain of racism and racial inequality burned in my veins. For reasons not to be fully discussed herein, but real and personal to me, equal justice under law and equal educational opportunity, in particular, were driving forces in my own educational pursuits. Attending a law school in the shadow of Little Rock Central High School meant something to me. It still does. I felt as though I were a stakeholder in the Little Rock school desegregation case long before I arrived in Arkansas.

In my third year of law school, I wrote a mock brief in John DiPippa's civil rights seminar, representing the NAACP in a school desegregation case based on materials provided in Derek Bell's treatise on *Race, Racism and American Law*.[1] Four and one-half years later I *was* writing briefs for the NAACP as a trial attorney in school desegregation cases in Florida, Georgia, Delaware, Ohio, and Massachusetts.

I came to law school fully prepared to live out Charles Hamilton Houston's directive that a lawyer is either a social engineer or he is a parasite on society. Though I am certain that a handful of my professors would have cringed at the thought, I am gratified that each and every one of them contributed to my eventual abilities to practice law as Mr. Houston expected.

In 1986, I eagerly attended the Ben J. Altheimer Lecture Series to hear from Judge A. Leon Higginbotham, Jr., of the United States Court of Appeals for the Third Circuit. In his voice was heard the promise of equal opportunity

---

* Legal Counsel, Maryland Higher Education Commission; Assistant Attorney General, State of Maryland; B.A., University of Utah, 1984; J.D., University of Arkansas at Little Rock School of Law, 1987.

The author is a civil rights lawyer with a primary focus in the areas of constitutional law, public education, and equal educational opportunity. Prior to his appointment with the State of Maryland, he served with the National Litigation Project of the Lawyers' Committee for Civil Rights Under Law and as an Assistant General Counsel with the NAACP. The views expressed herein are solely his own and do not necessarily reflect those of the Attorney General of Maryland or any State agency.

1. *See* DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW (Little Brown & Co., 2d ed. 1980).

and equal justice under law. To me Judge Higginbotham was, for our day, a continuation of the long-line of superb legal scholars and advocates in the tradition of Mr. Houston, Thurgood Marshall, James M. Nabritt, Jr., Constance Baker Motley, Wiley A. Branton (of this great State), Robert L. Carter, William H. Hastie, Spotswood Robinson, III, Louis L. Redding, George E.C. Hayes, Jack Greenberg, Bernard G. Segal and Clarence M. Mitchell to name only a few legal giants who inspire me. Judge Higginbotham recently passed away, on December 14, 1998. He had written earlier that year, partly in response to the political and judicial assault on equal educational opportunity and affirmative action in higher education, as evidenced by the *Hopwood v. Texas*[2] decision, among others: "[F]orty-seven years ago, I witnessed the birth of racial justice in the Supreme Court and . . . now, after forty-five years as a lawyer, judge, and law professor, I sometimes feel as if I am watching justice die."[3]

When the preeminent constitutional scholars, jurists, and advocates of our day talk like that, it is a very sobering signal. I am not naive as to the political and judicial climate that prompted Judge Higginbotham's lament. I have been a practitioner for only one-quarter of the expanse of his distinguished legal career, but that is long enough to fully understand the impact of which he spoke. Still, I am reminded of the response of Thurgood Marshall, reflecting upon the staggering legal battles of the civil rights movement, stating simply that "we do the best we can with what we've got." With respect to equal opportunity in higher education, we still have something: the power of the law, coupled with the strength of morality, practicality, good judgment, and common sense. It is imperative that we understand "what we've got," and use it to get what we still need in this nation's long struggle for racial equality and justice. That includes the possibility of race-based measures necessary to ensure access and an opportunity to succeed for qualified individuals who seek only to compete and excel on a level playing field. It also includes a visionary reformation of continuing educational practices necessary to eliminate institutional discrimination and inequality in education.

I. ACCESS TO HIGHER EDUCATION

The Fourteenth Amendment to the United States Constitution mandates: "[N]or shall any State . . . deny to any person within its jurisdiction the equal

2. 78 F.3d 932 (5th Cir. 1996).

3. A. Leon Higginbotham, Jr., *Breaking Thurgood Marshall's Promise*, BLACK ISSUES IN HIGHER EDUC., Feb. 5, 1998, at 20.

protection of the laws."[4] In the realm of public education, this has been repeatedly interpreted as meaning that an opportunity for education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[5] Subsequent desegregation and affirmative action cases involving all levels of public education have not strayed from this foundational principle.

While it may be a nuisance to the agenda of some, the Fourteenth Amendment still applies to minorities in this country, and African Americans are its principal intended beneficiaries. What was true in 1873 is true today. Directly addressing the Civil War Amendments, the Supreme Court ruled:

> [O]n the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.[6]

The Fourteenth Amendment *is* a race-based remedy. Incredibly, I sometimes wonder whether it would pass constitutional muster in certain judicial jurisdictions today. Even with a generous spirit and lending all the respect that is due the opponents of affirmative action, I cannot concede that the Fourteenth Amendment mandates their definition of "a color-blind society" or even that their motives to completely remove race from consideration in, for example, college admissions are free from race as an underlying factor. To paraphrase the distinguished former Senator Dale Bumpers from this State: "When somebody tells you its not about race, its about race." It *is* about race, and the constitutional protections specifically adopted for African Americans must not be diminished in the raging debate.

Title VI of the Civil Rights Act of 1964 also requires that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[7] This applies to any public or private recipient of federal aid and prohibits intentional discrimination and, by virtue of its implementing regulations, policies or practices which have a discriminatory impact or effect. Moreover, with respect to diversity and affirmative action, the Supreme Court

4. U.S. CONST. amend. XIV.
5. *See* Brown v. Board of Education, 347 U.S. 483, 493 (1954).
6. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1973).
7. 42 U.S.C. § 2000d (1996).

has determined that Title VI does not bar affirmative action that satisfies constitutional standards, including non-remedial affirmative action in decisions affecting students in higher education.[8] As a result, regulations implementing Title VI support voluntary efforts to create racial diversity in educational programs, even in the absence of a finding of prior discrimination.[9]

For states which have operated education systems with a history of *de jure*, or official, segregation and discrimination, there are additional obligations. Primarily, these states, must act to completely dismantle their dual systems, eliminate the vestiges or present effects of segregation to the extent practicable, and ensure that the principal wrong of the *de jure* system—the injuries and stigma inflicted upon the race disfavored by the violation—are no longer present.[10] This appropriately includes, where necessary, the formulation of "new and further remedies" to insure full compliance with the command of the Constitution.[11] In *United States v. Fordice*, the leading higher education case, the Supreme Court reaffirmed that a state has an "affirmative duty" to dismantle its discriminatory system and to eliminate "to the extent practicable and consistent with sound educational practices [those] policies and practices traceable to its prior system that continue to have segregative effects."[12] Significantly, it is clear from this and other decisions that race-neutral policies and practices are not sufficient and that the state must take affirmative measures to remedy the constitutional violation.[13] This extends to all policies and practices traceable to a prior system of segregation *and* to any present or continuing policies and practices that foster discrimination or perpetuate conditions that are indicative of the prior dual system.[14]

Additional obligations are also often imposed by state law. In Maryland, for example, the Charter for Higher Education provides that "[p]ublic higher education should be accessible to all those who seek and qualify for admission,"[15] and requires each institution to ensure that women and minorities are

8. *See* United States v. Fordice, 505 U.S. 717, 732 n.7 (1992); Regents of the University of California v. Bakke, 438 U.S. 265, 287 (1978) (opinion of Powell, J.). *See also Bakke*, 438 U.S. at 328 (Brennan, J., joined by White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part).

9. *See* 34 C.F.R. § 100.3(b)(6)(ii) (1996); 34 C.F.R. § 100.5(I) (1996); 34 C.F.R. § 280.1 (1996); 20 U.S.C. § 7202, 7205 (West Supp. 1997).

10. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 485-90 (1992).

11. *See id.* at 492.

12. *See Fordice*, 505 U.S. at 728-29, 731-33.

13. *See id.*

14. *See id.* at 731-33; Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 538-39 (1979); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 458-61 (1979).

15. 15 MD. CODE ANN., Education § 10-202(2) (1998).

"equitably represented . . . so that the higher education community reflects the diversity of the State's population."[16] The Maryland Higher Education Commission is specifically responsible for "[d]eveloping a program of desegregation and equal educational opportunity, including an enhancement plan, for historically African American colleges and universities" and "[m]onitoring the progress made under, and assuring compliance with, the goals, measures, and commitments contained in the desegregation and equal education opportunity plan."[17]

Moreover, the State must comply with a formal plan submitted to the United States Department of Education, Office for Civil Rights, pursuant to its obligations under Title VI.[18] The principal objectives of this plan are (1) the continued integration of Maryland's traditionally white institutions through a portfolio of enrollment goals, recruitment measures, retention efforts and affirmative action plans, and (2) the enhancement of Maryland's historically black institutions to ensure that they are comparable and competitive with the historically white institutions with respect to capital facilities, operating budgets and new academic programs.

Recent developments in the law have neither replaced nor diminished these legal obligations. Rather, the judiciary has acted to narrow the framework within which the state can act to remedy the effects of discrimination or to pursue the benefits of diversity in higher education. In doing so, it has clearly established that the use of race or of race-conscious programs is subject to strict scrutiny, the most rigorous constitutional standard of review. All race-conscious policies or practices must serve a "compelling state interest" and must be "narrowly tailored" to further that compelling interest.[19] Factors in considering whether a policy or practice is "narrowly tailored" to further a compelling interest include (a) necessity for the policy or practice and the efficacy of alternative remedies, (b) flexibility and duration of the policy or practice, (c) the relationship of numerical goals to the relevant labor market, pool of students, etc., and (d) the impact on the rights of third parties.[20]

In the realm of higher education, the courts currently recognize two governmental interests as "compelling" under the strict scrutiny standard:

---

16. MD. CODE ANN., Education § 10-204(8) (1998).

17. MD. CODE ANN., Education § 11-105(e)(1)(i)-(ii) (1998).

18. *See* MARYLAND STATE BOARD FOR HIGHER EDUCATION, A PLAN TO ASSURE EQUAL POSTSECONDARY EDUCATIONAL OPPORTUNITY (1985) ("OCR Plan").

19. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

20. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); *see also* United States v. Paradise, 480 U.S. 149 (1987).

curing the present effects of identified past discrimination in a system of education and fostering or achieving a diverse student body on college campuses. Outside of the Fifth Circuit, both interests retain some vitality. Remedies for the present effects of past discrimination have certainly been narrowed by such rulings as *Podberesky v. Kirwan*[21] involving a scholarship program at the University of Maryland, and it is certain that the diversity rationale will soon meet its Maker for an accounting. Still, properly fashioned race-based policies and programs remain lawful under the Constitution and Title VI.

In *Bakke*, Justice Powell's opinion establishes that even in the absence of past discrimination against a certain minority group, the "attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education [which] legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."[22] Pursuant to such a program, race may be one of many "plus" factors, but it may not be the only factor. In turn, race may not be used to separate or insulate a minority applicant from competition with other applicants.[23]

Unless properly justifiable for a remedial purpose, it seems clear under *Bakke* that race-exclusive programs will not be upheld under the diversity rationale. However, as long as race is used as one of many "plus" factors and does not preclude all applicants from competing in a single pool, the "narrowly tailored" factor of strict scrutiny will likely be satisfied. It should also be emphasized that in *Bakke*, the determination that educational diversity is a compelling state interest is based on an institution's First Amendment freedom "to make its own judgments as to education" as opposed to any burden to establish, with empirical data or otherwise, the conclusive educational benefits of a diverse student body (though research and data in this respect will have great value).[24] This provides very helpful guidance to an institution attempting to craft a lawful affirmative action program to foster diversity.

Podberesky is indicative of the increasing difficulty of meeting the strict scrutiny standard of review. First, the race-exclusive Banneker scholarship program at issue was implemented pursuant to the approved OCR plan as an affirmative action program necessary to remedy the present effects of past segregation and discrimination. Even though the program was defended as necessary to meet the OCR standard for Title VI compliance, and, in fact,

21. 38 F.3d 147 (4th Cir. 1994).
22. *Bakke*, 438 U.S. at 311-12.
23. *See id.* at 311-12, 316-20.
24. *See id.* at 312-13.

satisfied OCR, it did not satisfy judicial review under strict scrutiny. Second, the program was invalidated even in the face of a comprehensive record containing extensive administrative and judicial findings of present effects of past discrimination at the University of Maryland. A "strong basis in evidence" that the university had (a) a poor reputation in the African American community, (b) under-representation of African Americans in its student body, (c) a disproportionately low retention and graduation rate of African American students, and (d) a hostile racial climate on campus was insufficient to justify a race-exclusive measure under strict scrutiny.[25]

It is important to be reminded of the reach of *Podberesky* in considering other programs designed to enhance equal educational opportunity for minority students. While there was sufficient evidence of past discrimination in that case, there was not a sufficient showing, according to the Fourth Circuit, of present effects of that past discrimination, primarily because the findings were too remote in time and were not shown to be directly connected to conduct of the institution itself. Among other things, the court of appeals ruled that mere knowledge of historical facts is insufficient to connect present effects with past discrimination and that a race-exclusive measure cannot be used as a remedy for general societal discrimination. The court of appeals then held that even if it had been proven that the program was necessary to remedy the present effects of past discrimination, it was not narrowly tailored to further that objective.

Podberesky does not establish that race-based or even race-exclusive measures cannot be implemented by a university. Those measures will be upheld if proven necessary to remedy the present effects of past discrimination—a compelling interest under the strict scrutiny analysis—and if they are narrowly tailored to further that purpose. As demonstrated, this is a difficult task, even in light of the dictum that strict scrutiny should not mean "strict in theory, but fatal in fact."[26] The diversity rationale was not a meaningful factor in *Podberesky* because, as the court of appeals determined, the Banneker program was not established to increase diversity but rather as a desegregation measure to remedy the present effects of past discrimination. It was also determined that race-exclusive programs were not subject to the *Bakke* analysis allowing for race to be considered as a "plus factor" among many in college admissions.[27]

---

25. *See* Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994).

26. *Adarand Constructors*, 515 U.S. at 237.

27. *But see* Hayes v. North State Law Enforcement Officers Assoc., 10 F.3d 207 (4th Cir. 1993) (a non-education case where a race-based promotion policy to achieve diversity in a city's police department was held invalid because, in substantial part, the city did not provide sufficient evidence that racial diversity is essential to effective law enforcement and constitutes

The more troubling opinion, of course, was rendered by the United States Court of Appeals for the Fifth Circuit in 1996, affecting colleges and universities in Texas, Louisiana, and Mississippi only.[28] With complete disregard for *Bakke* as the controlling Supreme Court precedent, the court of appeals categorically rejected diversity as a compelling interest and ruled that race cannot be considered as a factor in college admissions. While it was determined that race cannot be used as a proxy for other factors, the court acknowledged that race-neutral factors that may have a disproportionate impact on or for certain racial groups are permissible so long as there is no intent to discriminate. It also reasoned that remedying the present effects of past discrimination may be a compelling interest, but only for discrimination by the governmental unit or actor involved, and only for present effects that are causally related to that discrimination. Like *Podberesky*, the court ruled that there is no compelling interest in remedying the present effects of general societal discrimination. Because the compelling interest prong of strict scrutiny was not satisfied, the court did not reach the issue whether the affirmative action program was narrowly tailored.

It is interesting to note that in a decision rendered late last year by a federal district court in Maryland, diversity was found to be a compelling governmental interest for the purposes of strict scrutiny. The case involves review of the Montgomery County Public Schools' use of a "diversity profile" with regard to requests for student transfers among its schools. The school district (53.4% White, 20.3% African American, 13.2% Hispanic, and 12.7% Asian in its student body) uses the profile to avoid inadvertently creating segregated schools and because of its "profound interest in maintaining a diverse school system." In upholding the denial of a transfer request, the court rejected the *Hopwood* rationale and ruled that "the diversity interest remains a compelling governmental interest in the context now being considered."[29] An appeal is pending.

Other courts have been careful not to follow the *Hopwood* court's disregard for *Bakke*. In the current litigation involving admission practices at the University of Washington Law School, U.S. District Judge Thomas S. Zilly ruled that *Bakke* is still "good law" and that the case would proceed under the standard that "educational diversity is a constitutionally permissible

---

a compelling state interest). This does not, however, diminish the ruling in *Bakke* that diversity is a compelling interest in college admissions based upon an institution's First Amendment rights.

28. *See* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

29. Eisenberg v. Montgomery County Pub. Sch., 19 F. Supp. 2d 449, 453 (D. Md. 1998).

goal for an institution of higher education," emphasizing that race-conscious programs will be subjected to the "most exacting scrutiny possible."[30]

In October 1998, the United States Court of Appeals for the Tenth Circuit upheld the consideration of "durational residency" as a factor in medical school admissions at the University of New Mexico. In doing so, the court applied the *Bakke* analysis, even though this was not a case addressing the consideration of race or ethnicity. The court reasoned that Justice Powell's opinion in *Bakke* "affirms the constitutional power of Federal and State Governments to act affirmatively to achieve equal opportunity for all,"[31] and held that "[d]espite the absence of a clear majority opinion, *Bakke* remains the leading jurisprudential authority in this area."[32]

The United States Court of Appeals for the First Circuit invalidated a policy governing the admission of students to the prestigious public Boston Latin School after analyzing—under the strict scrutiny standard—both the diversity rationale advanced by the public school system and the asserted need to remedy the present effects of past discrimination. Still, the court proceeded on the foundation "that *Bakke* remains good law and that some iterations of 'diversity' might be sufficiently compelling, in specific circumstances, to justify race-conscious actions."[33]

There remains considerable room for policies and practices which, when properly crafted, fall within the current legal framework governing diversity and affirmative action. It is emphasized that institutions of higher education should clearly articulate their lawful objectives and justification for any program that is race-based or which considers race as a factor among many. In turn, "narrow tailoring" is a continual process and an institution should always be aware of its diversity related needs and assess what has been accomplished and what still needs to be accomplished. Where race-neutral measures will, in reality, meet the objectives, such measures should be pursued. Otherwise, a narrowly tailored use of race, where necessary, should not be avoided or abandoned. Finally, it is suggested that any program that satisfies the applicable legal standard can also be defended politically. Thus, carefully crafted programs should not be disregarded or avoided in the face of political challenges.

It is also clear that various means to enhance access to higher education remain significantly undeveloped, such as meaningful and effective recruit-

30. *See* Smith v. Univeristy of Washington Law School, No. C-97-335Z (W.D. Wash. Feb. 12, 1999) (order).

31. *See Bakke*, 438 U.S. at 324 (Brennan, J., concurring in part and dissenting in part).

32. Buchwald v. University of New Mexico Sch. of Med., 159 F.3d 487, 499 (10th Cir. 1998).

33. Wessmann v. Boston School Committee, 160 F.3d 790, 796 (1st Cir. 1998).

ment and outreach programs among inner city schools, under-represented populations, the rural poor, and other socioeconomically disadvantaged communities. In Texas, for example, the state at least responded to *Hopwood* in some fashion by passing legislation that would ensure that a student who graduated in the top 10% of his or her high school class anywhere in the state could be admitted to public colleges and universities in Texas. In addition, institutions of higher education in that state are now considering such race-neutral factors as the educational level of an applicant's parents and grandparents, community of the applicant, high school district, geography, income, family income, wealth, employment of parents and grandparents, subsidized housing, home value, number of siblings, subsidized lunches, English as a second language, medically underserved areas, percentage of college expenses earned, unique cultural and social experience, age, and second careers.[34]

II. EDUCATIONAL PRACTICES

To borrow a phrase from The Education Trust, "College begins in kindergarten."[35] Access to higher education cannot adequately be addressed while ignoring the pernicious educational practices that leave all too many disadvantaged and minority students on a track that ends long before the dream of college even begins.

Earlier this month, a class-action lawsuit was filed by eight minority college students and a handful of civil rights organizations against the University of California at Berkeley on grounds that the institution's admissions policy for freshmen has an unjustified effect of denying admission to a disproportionate number of qualified, high-achieving applicants from those minority groups.[36] In large part, the plaintiffs assert that by placing greater emphasis on SAT scores and giving "bonus points" to students who have taken Advanced Placement courses and exams, the institution fails to fully and fairly consider minority applicants who often do not have access to test-taking preparation or to Advanced Placement classes at their high schools.

---

34. Billy R. Ballard, Associate Dean and Associate Vice-President for Student Affairs and Admissions, University of Texas-Galveston Medical Branch, Remarks at the University of Pennsylvania (Oct. 21, 1998), (A Technical Assistance Workshop on College Admissions and Affirmative Action: Maintaining Legally Sound Institutional Policies, Programs and Administrative Practices).

35. The Education Trust is a non-profit, non-partisan organization created to promote high academic achievement for all students at all levels, kindergarten through college. It is headquartered in Washington, D.C.

36. *See* Rios v. Regents of the University of California, No. CV99-0525 SI (N.D. Cal. filed Feb. 2, 1999).

Last fall, over 750 African American, Latino and Filipino American applicants who had grade-point averages of at least 4.0 were denied admission under the policy. I call this lawsuit a good start at addressing only one of the core problems.

The Southern Education Foundation Maryland Leadership Group recently documented that: 62% of the African American ninth graders in Maryland high schools in 1992 graduated from high school four years later; only 53% of *those* students enrolled in higher education institutions; 57% of *those* students enrolled in community colleges; 19% of *those* students graduated or transferred to a four-year institution within four years; and 33% of *those* students will graduate with a baccalaureate degree.[37] Following these and other startling findings, the Group filed recommendations addressing college readiness and teacher preparation, citing curriculum quality and intensity as the most important pre-college variable determining access to and success in higher education.[38]

Judge Robert L. Carter has taught, and I have learned by experience, that the struggle for equal educational opportunity has not advanced as it might have in part because educators have not defined a workable definition of the term as an educational concept or refined it as educational policy and applied methodology. Lawyers must cast the term in its legal and constitutional dimensions, but the responsibility for embellishing the term as a positive educational criterion rests with the educators and policymakers. Once that is done—more adequately than it has been to date—courts will be able to incorporate it into a framework of the constitutional guarantee of equal protection. Otherwise, courts will, as they have for the most part up to now, avoid coming to grips with the issue.[39]

This presents the challenge of greatest importance, elimination of a two-tiered system of education—one for minority students and a higher level for others. It requires the dismantling of destructive educational policies and practices which, in a very real and literal way, short-change or limit the academic progress of a child and the establishment of teaching methodologies which are grounded in a curriculum of rigorous and demanding intellectual content and based on the foundation that all children can learn and are expected to do so. When fortified by the power of content, precision, and clarity placed by educators on the concept of equal educational opportunity,

37. *See* SOUTHERN EDUCATION FOUNDATION MARYLAND LEADERSHIP GROUP, MILES TO GO IN MARYLAND: PURSUING EDUCATIONAL EQUALITY, ENSURING ECONOMIC GROWTH (Jan. 14, 1999).

38. *See id.* at 18.

39. *See* Robert L. Carter, Remarks at the Ninth Annual Clarence M. Mitchell, Jr. Memorial Lecture Luncheon (July 9, 1993).

legal strategies rise to a new level in persuading courts to make them part of the constitutional Equal Protection Doctrine.[40]

In a suburban Pittsburgh school district, the plaintiff class of African American children have had some success in doing just that. Pursuant to its obligations under a long-standing desegregation decree,[41] the school system was recently ordered to dismantle segregated classrooms within its schools by abolishing the academic "tracking" of children based upon the practice of grouping them by perceived abilities and requiring the delivery of a redesigned curriculum of problem solving and higher order thinking skills to all children in heterogeneously grouped classrooms. The remedy also calls for extensive teacher development to ensure that the curriculum is effectively taught in such heterogeneous classrooms with high expectations for all children.[42]

The practice of ability grouping or tracking of students is an especially egregious practice that permeates the vast majority of school districts across the country, perpetuates segregation within schools, fosters discrimination, and results in significant limitations on the opportunity for minority children to progress academically or prepare for higher education. Normally, it is the practice of separating students based on perceived abilities that are determined at a very early age by standardized testing and less formal teacher assessments. Once a child is placed in a high, average, or low-achieving group, the child will generally follow a corresponding curriculum track through elementary and secondary school, with little or no chance of breaking-out of one group and being placed in another. Simply put, a child placed in a lower-level group is generally sunk, and will likely remain in that group in all core-curriculum classes in all grades, being denied the opportunity to participate in college-bound courses, having been relegated to a curriculum of rote repetition and limited problem solving or thinking skills.

In the metropolitan Wilmington, Delaware school desegregation case, we were unsuccessful in obtaining a remedy for such practices, despite meticulous expert testimony and evidence that went undisputed and actual findings in the record.[43] The results of such practices were astoundingly disturbing. For example: (1) all four school districts tended to place students at the same "ability level" for classes in a variety of subject areas, and to lock students

---

40. *See id.*

41. *See generally* Hoots v. Commonwealth of Pennsylvania, 359 F. Supp. 807 (W.D. Pa. 1973); Hoots v. Commonwealth of Pennsylvania, 587 F.2d 1340 (3rd Cir. 1978).

42. *See* Hoots v. Commonwealth of Pennsylvania, No. 71-538 (W.D. Pa.) (unpublished orders).

43. *See* Coalition to Save Our Children v. State Bd. of Educ., 901 F. Supp. 784 (D. Del. 1995), *aff'd*, 90 F.3d 752 (3rd Cir. 1996).

into the same or lower ability level placement from year to year; (2) White students were consistently over-represented, and African American students were consistently under-represented in high ability classes in all subjects and, in contrast, African American students were consistently over-represented while White students were consistently under-represented in low ability tracks in all subjects; (3) the districts did not attempt to justify their tracking practices on educational grounds and the practices were not representative of what tracking advocates claimed as a trustworthy enactment of a theory of tracking and ability grouping; (4) as a group, African American children scored lower than White children on achievement tests, yet African American children were much less likely than White children *with the same test scores* to be placed in college preparatory and advanced courses; and (5) lower track classes provided African American children with lower expectations from teachers and less access to the whole range of resources and opportunities, including curriculum, instructional approaches, and classroom environments conducive to learning and courses that would qualify them for college.[44]

The persistent racial gap in academic achievement and related education indicators resulting from such practices should surprise no one and should infuriate everyone. Even more repugnant is the continuing response of school systems which, even in the face of compelling evidence establishing such practices, assert that racial disparities in academic achievement are beyond their control, thereby justifying their failure to provide scores of disadvantaged and minority students any real opportunity for academic advancement.

These are exemplary of the conditions that cannot remain unchallenged and which must be resolved if the 21st Century is to provide any sense of equal educational opportunity for children who can now scarcely imagine the excitement of high academic expectation and the hope that can only be born of access to a quality higher education where they can compete on a level playing field. Policymakers, educators, lawyers, judges, parents, and students all have a distinct role to play. Institutions of higher education, in particular, need to rise to new heights and ensure necessary reform in educational strategies and methodologies, curriculum redesign, and teacher preparation in order for this to happen.

---

44. *See id.* (citing DR. JEANNIE OAKES, ABILITY GROUPING, TRACKING AND WITHIN-SCHOOL SEGREGATION IN NEW CASTLE COUNTY SCHOOLS, A REPORT TO THE U.S. DISTRICT COURT FOR THE DISTRICT OF DELAWARE (1995)).

III. CONCLUSION

A few months after *Hopwood* was decided, Judge Higginbotham underwent the first of three open-heart surgeries. He described how late each evening, after his family and friends had left, he would slip in and out of consciousness and dream of a sign he saw long ago on a rickety cab in Lagos, Nigeria. The sign read, in big, bold letters: NO MORE TIME FOR FOOLISHNESS. His own words say it best:

> The long winter ended, the spring rains came, and I got better. But still that sign haunted my dreams. As I returned to the work to which I had dedicated my career, I began to understand—slowly and then clearly—the meaning that sign held for me.
>
> At times, this country seems intent on returning to the foolishness of the past . . . .
>
> It has been a long while since that spring afternoon in 1950 when, as a first-year Yale law student, I heard the promise of freedom in the voice of Thurgood Marshall. Since then, I have observed commendable progress, lately some tragic retrogression, and now I see even more clearly that, in the long, bloody history of race relations in America, there is no more time for foolishness.[45]

As we bridge the centuries, let that be the rallying-cry for racial justice and equal educational opportunity.

45. Higginbotham, *supra* note 3, at 22-23.