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## RACE AND HIGHER EDUCATION COMMENTARY SERIES

### WHAT ONCE WAS LOST MUST NOW BE FOUND: REDISCOVERING AN AFFIRMATIVE ACTION JURISPRUDENCE INFORMED BY THE REALITY OF RACE IN AMERICA

*Lee C. Bollinger\**

This academic year has seen college and university students across America calling on their institutions to do more to create campus cultures supportive of African American students and other underrepresented minorities. There have been demands to increase faculty and student diversity, change curricular requirements, and adopt mandatory cultural sensitivity trainings.<sup>1</sup> There have been efforts to rename buildings, remove images, and abandon symbols associating schools with major historic figures who were also proponents of slavery, segregation, or other forms of racism.<sup>2</sup> As in all tumultuous periods for higher education, these events have provoked useful discussions about fundamental principles and brought to the fore some essential truths.

First, freedom of speech must remain a core value on our campuses, even as it inevitably causes offense. If we believe, as I do, that colleges and universities are defined by their capacity to ensure uninhibited debate and to promote critical thinking, then we cannot abandon that belief in times of controversy.

Second, our pursuit of diversity would benefit from a greater collective awareness of the relationship between today's concerns and historic events recent enough to have occurred during my lifetime, for without that awareness it is difficult to understand the complexity of race in America.

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<sup>1</sup> See, e.g., Biddy Martin, *President Martin's Statement on Campus Protests*, AMHERST C. (Nov. 15, 2015), <https://www.amherst.edu/amherst-story/president/statements/node/620480> [<http://perma.cc/B4SE-GH2G>]; Peter Salovey, *Statement from President Salovey: Toward a Better Yale*, YALENEWS (Nov. 17, 2015), <http://news.yale.edu/2015/11/17/statement-president-salovey-toward-better-yale> [<http://perma.cc/6XXB-DYUV>].

<sup>2</sup> See, e.g., Ellen Brait, *Princeton Students Demand Removal of Woodrow Wilson's Name from Buildings*, THE GUARDIAN (Nov. 23, 2015, 6:35 PM), <http://www.theguardian.com/education/2015/nov/23/princeton-woodrow-wilson-racism-students-remove-name> [<http://perma.cc/XR55-6AB6>]; Anemona Hartocollis, *Harvard Law to Abandon Crest Linked to Slavery*, N.Y. TIMES (Mar. 4, 2016), <http://www.nytimes.com/2016/03/05/us/harvard-law-to-abandon-crest-linked-to-slavery.html>.

It would be reasonable to look to the Supreme Court for such guidance: after all, the modern struggle for racial equality in this country traces back through judicial pronouncements that forced a rethinking of constitutional principles and social attitudes. *Brown v. Board of Education*<sup>3</sup> did more than reject over a half century of enforcement of the “separate but equal” doctrine in the context of public schools. Embracing a construction of equal protection infused with the fundamental ideals and values embedded in the Constitution and the Bill of Rights, the Court explained to the nation that the promise of equality requires a collective effort to achieve integration.<sup>4</sup> *Brown*’s call to end racial discrimination reverberated across both the private and public sectors and reshaped our conceptions of our communities and our families.<sup>5</sup> And while jurists and legal scholars wrestled over defining the particular contours of the Court’s reach in directing the nation toward its goal, *Brown* provided a foundation essential to the civil rights movement: a powerful acknowledgement of this country’s legacy of slavery and racism and of the lingering and pervasive effects of that past. Yet for many years now, Supreme Court jurisprudence has conspired to turn our attention away from our history — and erode our shared understanding — with decisions that assume the existence of the very colorblind society that we have yet to achieve. I want to review how we arrived at this place and to begin a discussion about the consequences.

Readers of this *Forum* well know that until *Brown* was decided on May 17, 1954, *Plessy v. Ferguson*<sup>6</sup> was the law of the land, constitutionally sanctioning discrimination in language that is difficult to read today. With a unanimous decision, *Brown* finally abandoned *Plessy*’s holding, recognizing that separate was inherently unequal in a racially stratified society. Federal courts across the nation then set about doing the work of enforcing desegregation measures. But courts went well beyond striking down race-based school assignment policies: they supported voluntary government efforts affirmatively designed to integrate the nation.<sup>7</sup>

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<sup>3</sup> (*Brown I*), 347 U.S. 483 (1954).

<sup>4</sup> See *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300–01 (1955); see also *Brown I*, 347 U.S. at 495–96.

<sup>5</sup> See Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2012); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (finding busing an appropriate remedy to desegregate schools); *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating law prohibiting interracial marriage).

<sup>6</sup> 163 U.S. 537 (1896).

<sup>7</sup> See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1515–21 (2004).

Then, on June 28, 1978, in *Regents of the University of California v. Bakke*,<sup>8</sup> Justice Powell, announcing the judgment of the Court, rejected U.C. Davis's presumed and historically grounded construction of the Equal Protection Clause as allowing racial classification by the state to remedy the effects of "societal discrimination."<sup>9</sup> He favored instead a construction that focused on the Fourteenth Amendment's "universal terms, without reference to color, ethnic origin, or condition of prior servitude."<sup>10</sup> The medical school admissions policy at issue was constitutionally impermissible, said Justice Powell, because it gave preferences to "members of relatively victimized groups at the expense of other innocent individuals."<sup>11</sup> Race and ethnicity could be considered, however, to the extent necessary to achieve an alternate goal rooted in the First Amendment: the creation of "a diverse student body"<sup>12</sup> composed of "students who will contribute the most to the 'robust exchange of ideas'"<sup>13</sup> for the purpose of training leaders of "this Nation of many peoples."<sup>14</sup> At its best, Justice Powell's ruling was wrapped in the idealism of colorblindness and in the concern that, regardless of a corrective or benign purpose, any race-based classification is "likely to be viewed with deep resentment."<sup>15</sup> Its effect, however, has been to constrain all that *Brown* aspired to in this consequential respect: advocates for an integrated America have to content themselves with talking about the utility of "diversity" and allowable ways to achieve it. In court briefs and oral arguments, America's historical racism is off limits.

No jurist will ever have a more acute understanding of the cost of the Court's ahistorical decision in this matter than Justice Marshall. Having led the litigation strategy producing *Brown*, he witnessed the Court's turn away from those ideals from within its chambers. Justice Marshall's opinion in *Bakke* expressed utter disbelief that against a backdrop of nearly two centuries of constitutional interpretation permitting "the most ingenious and pervasive forms of discrimination," the same Constitution would now be interpreted — only one generation after *Brown* — to forbid State action aimed at "remedy[ing] the effects of that legacy of discrimination."<sup>16</sup> Justice Marshall did not mince words in his warning that the failure of the Court to recognize

<sup>8</sup> 438 U.S. 265 (1978).

<sup>9</sup> *Id.* at 310 (opinion of Powell, J.); see also *id.* at 328 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

<sup>10</sup> *Id.* at 293 (opinion of Powell, J.).

<sup>11</sup> *Id.* at 307.

<sup>12</sup> *Id.* at 312.

<sup>13</sup> *Id.* at 313.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 294 n.34.

<sup>16</sup> *Id.* at 387 (opinion of Marshall, J.).

remedial actions as “a state interest of the highest order” will “ensure that America will forever remain a divided society.”<sup>17</sup>

The impulse to push our history and its continuing consequences into a more distant past — and advert to reasoning divorced from present reality — runs deep in our jurisprudence and across our society. It is almost always expressed affirmatively, passionately, and in high-minded language. Just two decades after the Emancipation Proclamation itself, the Supreme Court declared in the *Civil Rights Cases*<sup>18</sup> that it was time for African Americans to “take[] the rank of . . . mere citizen[s], and cease[] to be the special favorite of the laws.”<sup>19</sup> In 2007, Chief Justice Roberts offered a similar refrain with his admonition that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>20</sup> That statement, authored in a case considering integration plans in the Seattle and Louisville public school systems, was supported by the Chief Justice’s suspect assertion of moral equivalency: “Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again — even for very different reasons.”<sup>21</sup>

The “very different reasons” behind the Topeka School Board’s insistence on separate but equal and the efforts in Seattle and Louisville decades later to achieve racially integrated school systems were treated by Chief Justice Roberts as an afterthought — a caveat worth noting — rather than the heart of the matter. The symmetry championed by the Chief Justice has a legalistic resonance, but the consistency demanded by the Court is otherwise asked to bear too heavy a weight. Why is the genius of our Constitution inadequate for recognizing the difference between Topeka and Seattle? And why must we look for that answer through an ahistorical lens?

Justice Marshall properly understood that the Supreme Court’s change in direction in *Bakke* would sideline the Court from confronting our “sorry history of discrimination and its devastating impact”<sup>22</sup> and that public debate would be diminished without this crucial context. Framed as group-based racial preferences disconnected from any recognition of the deep origins of structural racism in this country that endure through our policies and practices, affirmative action has been

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<sup>17</sup> *Id.* at 396.

<sup>18</sup> 109 U.S. 3 (1883).

<sup>19</sup> *Id.* at 25.

<sup>20</sup> *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (opinion of Roberts, C.J.).

<sup>21</sup> *Id.* at 747.

<sup>22</sup> *Bakke*, 438 U.S. at 396 (opinion of Marshall, J.).

increasingly rejected not only by the courts but also by state referenda, legislation, and executive orders. The Equal Protection Clause has become a sword in the service of maintaining the status quo of racial stratification and is no longer a shield protecting the less powerful and the historically oppressed. And the resentment and outrage that Justice Powell sought to avoid engendering has instead festered and grown within those disenfranchised groups. All of these factors are reflected in the persistent claim that we live today in a post-racial society, notwithstanding the familiar scenes from our city streets and college campuses that say otherwise. Were the nation governed by constitutional rulings that continued to recognize as worthwhile the goal of an integrated society identified in *Brown*, it is fair to speculate that misguided assertions of a post-racial America would find much less traction.

The second hearing of *Fisher v. University of Texas*<sup>23</sup> provides the Supreme Court the latest opportunity to review the constitutional rationale for allowing college admissions offices to consider race “holistically” among several factors when assembling a diverse student body. The case was argued last term and, because of the vacancy left by Justice Scalia’s death and Justice Kagan’s recusal in the matter, now awaits decision by a panel of seven Justices. It is a moment to broadly consider the shape of an alternative jurisprudence neither subservient to popular views nor cabined by damaging precedent — an exercise that need not rely solely on imagination. We can look to a line of concurring and dissenting opinions that run from Justice Marshall in *Bakke* to Justice Sotomayor in *Schuette v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality by Any Means Necessary (BAMN)*.<sup>24</sup> Indeed, it is Justice Ginsburg, in her opinions in the companion cases *Gratz v. Bollinger*<sup>25</sup> and *Grutter v. Bollinger*,<sup>26</sup> decided in 2003, who gives us the clearest glimpse of such an alternative.

In her dissent in *Gratz*, Justice Ginsburg cast an unflinching eye on our nation’s history and demanded that our Constitution have the flexibility to be both colorblind and color-conscious for the purposes of achieving the integrated society envisioned by *Brown*.<sup>27</sup> And much like the Court did in *Brown*, she flatly rejected the dictates of ever-growing precedent that the same standard of judicial review must apply to all race-based classifications.<sup>28</sup> For Justice Ginsburg, a one-size

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<sup>23</sup> 135 S. Ct. 2888 (2015) (granting certiorari).

<sup>24</sup> 134 S. Ct. 1623 (2014).

<sup>25</sup> 539 U.S. 244 (2003).

<sup>26</sup> 539 U.S. 306 (2003).

<sup>27</sup> See *Gratz*, 539 U.S. at 302 (Ginsburg, J., dissenting).

<sup>28</sup> *Id.* at 301–02.

construction of the Constitution “would be fitting were our Nation free of the vestiges of rank discrimination long reinforced by law. But we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools.”<sup>29</sup> Her logic is rooted in the disheartening facts that are evident to anyone willing to take a hard look: in the years since *Brown*, segregation in our public school system, and concomitant disparities in educational opportunities, have not only persisted but have also grown.<sup>30</sup>

Justice Ginsburg was moved to write a separate concurring opinion in *Grutter* to address the unusual twenty-five-year expiration date that Justice O’Connor imposed as a “logical end point”<sup>31</sup> to race-conscious admissions programs. This date was calculated to place *Grutter* at the expected halfway mark between *Bakke* and the elimination of consideration of race in its entirety. Noting the remarkable brevity of the same twenty-five-year time period between the *Bakke* decision and *Brown*’s “end to a law-enforced racial caste system, itself the legacy of centuries of slavery,” she argued that an appropriate endpoint cannot be measured in years.<sup>32</sup> Instead, Justice Ginsburg stressed that measures implemented to bring about an integrated society must necessarily be left in place until equal treatment and opportunity are achieved in fact.<sup>33</sup>

Who can say with any certainty how Supreme Court case law would have differently evolved if Justice Ginsburg’s opinions had been written on behalf of a majority of Justices? This much, though, seems clear: It is very unlikely that the Court would have twice chosen to hear a case (*Fisher*) where the defendant is a state university system with an admissions policy that, because of extreme resegregation at the secondary school level, primarily relies on a neutral criterion (finishing at the top of your high school class) to achieve diversity. Nor is it likely that a jurisprudence informed by Justice Ginsburg’s views and continuing on the path of *Brown* would have featured a virtually unbroken string of white plaintiffs claiming injury from state-sanctioned

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<sup>29</sup> *Id.* at 298 (internal citation omitted).

<sup>30</sup> See JOHN KUCSERA WITH GARY ORFIELD, THE CIVIL RIGHTS PROJECT, NEW YORK STATE’S EXTREME SCHOOL SEGREGATION (2014), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/ny-norfler-report-placeholder/Kucsera-New-York-Extreme-Segregation-2014.pdf> [<http://perma.cc/75GT-MSKC>]; Nikole Hannah-Jones, *Segregation Now*, PROPUBLICA (Apr. 16, 2014, 11:00 PM), <https://www.propublica.org/article/segregation-now-full-text> [<http://perma.cc/8J5C-3X57>]; N.R. Kleinfield, “Why Don’t We Have Any White Kids?”, N.Y. TIMES (May 11, 2012), <http://www.nytimes.com/2012/05/13/education/at-explore-charter-school-a-portrait-of-segregated-education.html>.

<sup>31</sup> *Grutter*, 539 U.S. at 342.

<sup>32</sup> *Id.* at 345 (Ginsburg, J., concurring).

<sup>33</sup> *Id.* at 345–46.

policies dedicated to greater equality. And while the search for narrowly tailored means and race-neutral alternatives could be expected to be among the issues at stake in a given litigation, those concerns would not have come to define the entire legal playing field in case after case after case. Instead, the Court's jurisprudence might have embraced Justice Sotomayor's sharp counter-position that "[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race."<sup>34</sup>

The Supreme Court is at its best when it articulates and explains the fundamental values of the nation as embedded in the Constitution, and the Bill of Rights in particular. The path suggested by Justices Ginsburg and Sotomayor reaches for this aspirational role in a way that controlling case law on affirmative action does not. Great decisions, such as *Brown*, elevate a specific controversy into a framework that explains the larger ideals we hold dear as a country. The significance of the Court raising its sights to focus on larger societal interests and enduring values is nowhere more evident than in the evolution of the First Amendment over the course of the last century. Constricted holdings in *Abrams v. United States*<sup>35</sup> and *Whitney v. California*<sup>36</sup> eventually gave way to the minority views of Justices Holmes and Brandeis as fully realized several decades later in *New York Times Co. v. Sullivan*,<sup>37</sup> where we were told that public officials must endure even negligent falsehoods injurious to their reputations because citizens cannot be constrained when exercising the rights and responsibilities of self-government.<sup>38</sup> Viewed from this perspective, the question becomes not whether Justice Sotomayor's call to speak "openly and candidly on the subject of race" leads inevitably either to the stigmatization of African Americans or to greater resentment from whites, but rather whether those concerns should be subordinated to the higher goal of creating an integrated society that has fully come to grips with its history of racism.

To reject Justices Sotomayor and Ginsburg is to contribute to the forces of forgetfulness and amnesia — including disregard for the very real successes achieved through affirmative action thus far — which taken together already function to shield us from the underlying reality of segregation and discrimination that continue to exist. And therein lies what may be the decisive shortcoming of an approach that under-

<sup>34</sup> *Schuetz v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting).

<sup>35</sup> 250 U.S. 616 (1919).

<sup>36</sup> 274 U.S. 357 (1927).

<sup>37</sup> 376 U.S. 254 (1964).

<sup>38</sup> *Id.*; see also *Whitney*, 274 U.S. at 372–80 (Brandeis, J., concurring); *Abrams*, 250 U.S. at 624–31 (Holmes, J., dissenting).



stands the value of racial diversity only in terms of its educational benefits, without acknowledging the persistent reality of race in America. Such an approach leads, on balance, to what we have today: a greater sense of injustice that comes from the feeling that injustice is being ignored or slighted or denied. In the end, if one set of damages based on perception (stigma or resentment) is being remedied at the cost of creating another set (feeling ignored or slighted), then isn't the better course to insist on a discussion that is uninhibited, wide-open, and fully accountable to the past?

For the moment, at least, the prevailing culture favors individual achievement over collective advancement; it does not help matters that government action is rarely celebrated and market outcomes always are. In such an environment, college admission is seen to be a zero-sum game; preferential treatment is equated with injustice; and thus there is an unsurprising yearning for achieving the goal of diversity by focusing only on family income.<sup>39</sup> The reality is different. America's demographics combined with the persistence of structural impediments and lingering discrimination mean that focusing exclusively on socio-economic diversity in admissions is certain to be inadequate.<sup>40</sup>

As we live through a period of dramatic political conflict over filling Justice Scalia's seat and await the results of a frequently unrecognizable presidential election, it is anyone's guess as to whether we are on the cusp of a changed environment, one more hospitable to the values and constitutional interpretation that prevailed from 1954 to 1978. Also uncertain is how the current round of *Fisher* will be resolved by the Supreme Court.

In light of that uncertainty, I want to conclude with a personal observation. I believe deeply that the highest levels of excellence in post-secondary scholarship, teaching, and research exist only in a diverse university or college community. I was proud to lead the University of Michigan in its litigation resulting in a landmark Supreme Court decision recognizing the state interest in promoting these specific educa-

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<sup>39</sup> RICHARD D. KAHLBERG, THE CENTURY FOUND., *ACHIEVING BETTER DIVERSITY* (2015), <https://s3-us-west-2.amazonaws.com/production.tcf.org/app/uploads/2015/12/03173324/AchievingBetterDiversity-11.pdf> [<http://perma.cc/X5NV-T3MK>]; RICHARD D. KAHLBERG, THE CENTURY FOUND., *A BETTER AFFIRMATIVE ACTION* (2012), [https://s3-us-west-2.amazonaws.com/production.tcf.org/app/uploads/2012/10/03175956/tcf\\_abaa-8.pdf](https://s3-us-west-2.amazonaws.com/production.tcf.org/app/uploads/2012/10/03175956/tcf_abaa-8.pdf) [<http://perma.cc/C2EE-VVEK>].

<sup>40</sup> See Ford Fessenden & Josh Keller, *How Minorities Have Fared in States With Affirmative Action Bans*, N.Y. TIMES (June 24, 2013), <http://www.nytimes.com/interactive/2013/06/24/us/affirmative-action-bans.html>; see also Sharon Bernstein, *Black Students Lagging in Admissions to University of California*, REUTERS (Dec. 5, 2013, 9:35 PM), <http://www.reuters.com/article/us-usa-california-race-idUSBRE9B504120131206> [<http://perma.cc/4JXV-26G3>]; Carla Rivera, *Cal State's African American Enrollment Down Despite Years of Outreach*, L.A. TIMES (Feb. 18, 2015, 4:00 AM), <http://www.latimes.com/local/education/la-me-calstate-sunday-20150218-story.html> [<http://perma.cc/TDR3-2EFG>].

tional benefits. As Columbia University's president, I have been asked to steward one of the longest standing commitments to these values in all of higher education. The value of a marketplace of ideas is widely appreciated now, and we generally embrace the mysterious ways in which a diversity of beliefs and perspectives yields better ideas than would emerge from a single vantage point.

Every college admissions committee vigilantly observes the bounds of Justice Powell's diversity rationale for considering race and ethnicity in assembling a class; and every university president and general counsel stands ready to ensure their compliance. We all are sincere when we say we value diversity. But because *Bakke* forced a decoupling of the value of diversity from the realities of race past and present, we are consigned to hollow and banal discussions of its educational benefits in every speech, publication, convocation, and commencement ceremony. The failure of our institutions and of our leaders to continue to remind us, with the passion of the Court in *Brown*, of the larger context for why we must all commit to the value of racial and ethnic diversity robs it of its meaning and, I fear, some of its beneficial effect. Obscuring history and its present-day consequences does not bring us any closer to the ideals of a truly integrated nation. Higher education and all of American society would benefit immeasurably if the Court were to unite in leading a more meaningful discussion of diversity and to rediscover the constitutional basis for this endeavor that was embraced all too briefly in *Brown* and then abandoned in *Bakke*.