

## Speeches

# From *Grutter* to *Fisher* and Beyond: The Compelling Interest of Diversity in Higher Education\*

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### Preamble

AS A SOCIAL SCIENTIST and educational leader, I approach the topic of diversity in higher education from what may well be the least-contested yet most under-appreciated perspective (from a legal standpoint) in discussions of affirmative action cases: I concentrate on the arguments made for the compelling national interest for public (and

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\* This Article is an adaptation of the remarks delivered by Nancy Cantor, then Chancellor of Syracuse University, at the University of San Francisco Law Review Symposium, *The Future of Affirmative Action After Fisher*, on February 22, 2013.

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private) universities (with selective admissions) to be as racially and ethnically diverse as our nation is.

Having defined this as relatively safe territory, I want, at the same time, to emphasize that while compelling interest arguments tend to draw less heat,<sup>1</sup> in my view they are the critical path from *Grutter*<sup>2</sup> and *Gratz*<sup>3</sup> (or for that matter from *Brown v. Board*<sup>4</sup> and *Bakke*<sup>5</sup>) to *Fisher*<sup>6</sup> and beyond, based as they are in the United States' persistent failure to account fully for the impact of race in defining educational opportunity. That is, they lay out what this country ultimately needs to come to terms with and find acceptable solutions for—even as the tendency is instead too often for advocates and plaintiffs alike in this arena to get quickly into the weeds of narrow tailoring, critical mass, mismatching, and the like.

### Race Matters

The compelling interest argument remained essentially unchanged from *Brown v. Board*<sup>7</sup> to *Fisher*,<sup>8</sup> even as history and the law marched on. The argument is grounded in the notion that race still matters in this country, and it matters a lot, every day, for whites and for persons of color, and for rich and poor and in between.<sup>9</sup> As the essays in the recent volume *Doing Race*, edited by Hazel Markus and Paula Moya, suggest, there is a power and a reality to race and ethnicity, every day, on the ground.<sup>10</sup> This reality is reflected in our census categories, our governmental policies, our politics, our scientific research, our marketing, our allocation of resources, and whom we punish, and must be taken into account if we are to achieve a just society.<sup>11</sup> At the same time, as the work of Patricia Gurin and her col-

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1. See *Grutter v. Bollinger*, 539 U.S. 306, 328–29 (2003) (“Today, we hold that the Law School has a compelling interest in attaining a diverse student body. The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer. . . . Our conclusion that the Law School has a compelling interest in a diverse student body is at the heart of the Law School’s proper institutional mission.”).

2. *Id.*

3. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

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

5. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

6. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).

7. See *Brown*, 347 U.S. at 493.

8. See *Fisher*, 133 S. Ct. at 2419.

9. See *id.* at 2427–28 (Thomas, J., concurring).

10. Paula M.L. Moya & Hazel Rose Markus, *Introduction to DOING RACE: 21 ESSAYS FOR THE 21ST CENTURY* 1, 1–4 (Hazel Rose Markus & Paula M.L. Moya eds., 2010).

11. *Id.* at 92–93.

leagues has shown, difference is not inevitably divisive to our social fabric.<sup>12</sup> Indeed, none of us can afford for it to be so. Working across difference is an essential characteristic of democratic practice, no matter how deep our divisions may appear to be. This notion is reflected in the famous reminder by Rev. Dr. Martin Luther King Jr.: “We all may have come on different ships, but we’re in the same boat now.”<sup>13</sup>

For all the recent talk of “color blindness,” our nation’s long history of racial segregation and structural inequality is still pernicious.<sup>14</sup> Two-thirds of African American children live in high-poverty communities, compared with only six percent of white children.<sup>15</sup> Even in the nation’s twenty most multi-ethnic metropolitan areas, roughly half the black population and forty percent of Latinos reside in neighborhoods with no whites.<sup>16</sup> Compared to white students, students of color are much more likely to attend low-performing, under-resourced, high-poverty schools where many fail to graduate, much less prepare for college.<sup>17</sup> Students of color are also far more likely than their white peers to be suspended from school as a form of punishment.<sup>18</sup>

A consequence of isolation and exclusion is stereotyping, which can and does limit and kill educational opportunity for all who get swept into its indiscriminate net.<sup>19</sup> As Claude Steele has amply demonstrated, the effects of stereotyping and stereotype threat reach far and

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12. Patricia Gurin, Biren (Ratnesh) A. Nagda, Cookie White Stephan & Walter G. Stephan, *Intergroup Dialogue: Its Role in Contemporary Society*, in *DIALOGUE ACROSS DIFFERENCE: PRACTICE, THEORY, AND RESEARCH ON INTERGROUP DIALOGUE* 11, 15–16 (Patricia Gurin, Biren (Ratnesh) A. Nagda & Ximena Zúñiga eds., 2013).

13. Although this saying does not appear in transcriptions of the speeches by Rev. Dr. Martin Luther King Jr., it is widely attributed to him. See e.g., *Rev. Dr. Martin Luther King, Jr. Quotes*, CORP. FOR NAT’L & CMTY. SERV., <http://mlkday.gov/plan/library/communications/quotes.php> (last visited Feb. 26, 2014).

14. See PATRICK SHARKEY, PEW CHARITABLE TRUSTS, *NEIGHBORHOODS AND THE BLACK-WHITE MOBILITY GAP 2* (2009), [http://www.pewtrusts.org/uploadedFiles/wwwpewtrusts.org/Reports/Economic\\_Mobility/PEW\\_SHARKEY\\_v12.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrusts.org/Reports/Economic_Mobility/PEW_SHARKEY_v12.pdf).

15. *Id.* (studying children born from 1985–2000).

16. JOHN R. LOGAN & WENQUAN ZHANG, US2010 PROJECT, *GLOBAL NEIGHBORHOODS: NEW EVIDENCE FROM CENSUS 2010*, at 1 (2011), <http://www.s4.brown.edu/us2010/Data/Report/globalfinal2.pdf>.

17. NANCY McARDLE, THERESA OSYPUK & DOLORES ACEVEDO-GARCÍA, *DIVERSITYDATA.ORG, SEGREGATION AND EXPOSURE TO HIGH-POVERTY SCHOOLS IN LARGE METROPOLITAN AREAS: 2008–2009*, at 12 (2010), [http://diversitydata.sph.harvard.edu/Publications/school\\_seggregation\\_report.pdf](http://diversitydata.sph.harvard.edu/Publications/school_seggregation_report.pdf).

18. George Theoharis & Douglas Biklen, *School Suspensions Lead to Nowhere Good*, SYRACUSE POST-STANDARD (June 5, 2013), [http://blog.syracuse.com/opinion/2013/06/school\\_suspensions\\_lead\\_nowher.html](http://blog.syracuse.com/opinion/2013/06/school_suspensions_lead_nowher.html).

19. See McARDLE, OSYPUK & ACEVEDO-GARCÍA, *supra* note 17, at 9 (arguing that being educated in less isolated, more diverse environments tends to benefit both students and the community).

wide, across the socioeconomic continuum, from under-resourced inner city schools to high-achieving schools in America's suburbs.<sup>20</sup> It is no surprise, then, that gaps specifically linked to race are borne out consistently in grade point averages, standardized test scores, and college entrance examinations, as well as in self-reported measures of academic achievement—even in high-achieving schools across the nation.<sup>21</sup>

As Earl Lewis and I wrote in an opinion piece on the *Fisher* case:

For a long time universities have been told to review the entire person. Yet if narrow tailoring comes to mean excluding ethnic background, gender or race, colleges and universities will find ourselves in a curious social position.

Think of it, race is noted when you are born; it is registered when you die. Race is observed in close human interactions; its characteristics are collected by the state for a range of reasons. It could be that the only time race won't be considered is when an admissions counselor makes a decision about how to shape a given college class. Is that in the nation's interest as we attempt to compete on the world's stage, where we need to tap the full range of human talent in the United States?<sup>22</sup>

## A Nation at Peril

Fundamental to the compelling interest argument laid out in *Grutter* and *Gratz*, and that many of us repeated in amicus briefs in *Fisher*,<sup>23</sup> is the warning that our nation can only hide from race at its own peril, and that getting it right in the arena of educational access and success is vital.

In both *Grutter* and *Gratz*, the University of Michigan and many other amici argued that social mobility, national security, prosperity,

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20. See CLAUDE M. STEELE, WHISTLING VIVALDI AND OTHER CLUES TO HOW STEREOTYPES AFFECT US 48–52, 54–60, 85–88, 95–98, 209–10 (2010).

21. See RONALD F. FERGUSON, WHAT DOESN'T MEET THE EYE: UNDERSTANDING AND ADDRESSING RACIAL DISPARITIES IN HIGH-ACHIEVING SUBURBAN SCHOOLS 1–5 (2002).

22. Nancy Cantor & Earl Lewis, *Two Views: Affirmative Action*, ATLANTA JOURNAL-CONSTITUTION (Aug. 9, 2012), <http://blogs.ajc.com/atlanta-forward/2012/08/09/two-views-affirmative-action/>.

23. Brief for Amici Curiae Ass'n of Am. Med. Colls. et al. in Support of Respondents at 6–8, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345); Brief of Amici Curiae Coal. of Bar Ass'ns of Color (Nat'l Bar Ass'n, Hispanic Nat'l Bar Ass'n, Nat'l Asian Pac. Am. Bar Ass'n, and Nat'l Native Am. Bar Ass'n) in Support of Respondents at 9–15, *Fisher*, 133 S. Ct. 2411 (No. 11-345); Brief for the Howard Univ. Sch. of Law Civil Rights Clinic as Amici Curiae Supporting Respondents at 2–4, *Fisher*, 133 S. Ct. 2411 (No. 11-345); Brief of Soc. and Organizational Psychologists as Amici Curiae Supporting Respondents at 3, *Fisher*, 133 S. Ct. 2411 (No. 11-345); Brief for the United States as Amicus Curiae Supporting Respondents at 8, *Fisher*, 133 S. Ct. 2411 (No. 11-345).

and global competitiveness, as well as the legitimacy of democratic institutions, depend upon the pathways to and through higher education being demonstrably open to Americans of all ethnic, racial, and gender backgrounds.<sup>24</sup> Between the arguments made directly in the briefs for *Grutter* and *Gratz*<sup>25</sup> and those contained in amici briefs from corporate, labor, and military leaders,<sup>26</sup> several key dimensions of the compelling interest of diversity in higher education emerged.

### Cannot Leave Talent Behind

American competitiveness, the economy, and the maintenance of social mobility in a global knowledge economy depend on educating more of our population through higher education—especially in science, technology, engineering, and mathematics. Further, the demographic composition of our country makes it imperative that we educate a diverse cadre of students so we do not leave critical talent behind. National and international studies underline this urgency,<sup>27</sup> which is amplified by the fact that since 1995 the United States has slid from second to fourteenth among Organisation for Economic Co-Operation and Development (“OECD”) nations in terms of postsecondary educational attainment and ranks near the bottom of that group in social mobility.<sup>28</sup>

24. *Gratz v. Bollinger*, 539 U.S. 244, 258 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003); Brief of Amici Curiae Coal. of Black Male Achievement Initiatives in Support of Respondents at 1–2, *Fisher*, 133 S. Ct. 2411 (No. 11-345) (discussing race); Brief of Nat’l Women’s Law Ctr., et al., as Amici Curiae in Support of Respondents at 3–4, *Fisher*, 133 S. Ct. 2411 (No. 11-345) (discussing gender).

25. See Brief for Respondents at 21–33, *Grutter*, 539 U.S. 306 (No. 02-241) [hereinafter Brief for Respondents, *Grutter*]; Brief for Respondents at 21–32, *Gratz*, 539 U.S. 244 (No. 02-516) [hereinafter Brief for Respondents, *Gratz*].

26. Brief Amicus Curiae of Am. Fed’n of Labor & Cong. of Indus. Orgs. in Support of Respondents at 2, *Grutter*, 539 U.S. 306 (No. 02-241); Brief Amicus Curiae of Am. Fed’n of Labor & Cong. of Indus. Orgs. in Support of Respondents at 2, *Gratz*, 539 U.S. 244 (No. 02-516); Consol. Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents at 5–9, *Grutter*, 539 U.S. 306 (No. 02-241) [hereinafter Brief of Lt. Gen. Julius W. Becton, Jr., *Grutter*]; Consol. Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents at 5–9, *Gratz*, 539 U.S. 244 (No. 02-516).

27. See NAT’L ACADS. COMM. ON SCI., ENG’G, AND PUB. POLICY, RISING ABOVE THE GATHERING STORM: ENERGIZING AND EMPLOYING AMERICA FOR A BRIGHTER ECONOMIC FUTURE (2007), available at <http://www.nsf.gov/attachments/105652/public/NAS-Gathering-Storm-11463.pdf>; OECD, EDUCATION AT A GLANCE 2012: OECD INDICATORS (2012), available at [http://www.oecd.org/edu/EAG%202012\\_e-book\\_EN\\_200912.pdf](http://www.oecd.org/edu/EAG%202012_e-book_EN_200912.pdf); Orsetta Causa & Asa Johansson, *Intergenerational Social Mobility in OECD Countries*, 2010 OECD J. ECON. STUD. 1 (2010), available at <http://www.oecd.org/eco/growth/49849281.pdf>.

28. OECD, *supra* note 27, at 63 (showing that the United States is fourteenth in terms of first-time graduation rates among OECD nations); see generally Causa & Johansson, *supra*

### Need to Educate Leaders with Legitimacy

The legitimacy of our future leaders—be they civic, corporate, military, governmental, or educational—resides in their representation of all segments of our nation’s diverse population as we face challenges together. This argument is made perhaps most clearly in amicus briefs by the military generals in *Grutter* and *Gratz* who pointed to Vietnam and the failure of a largely white officer corps to effectively lead a largely enlisted corps of color.<sup>29</sup> Military leaders again argued in *Fisher* that disallowing race consciousness, whether in admission to the military academies or to Reserve Officers’ Training Corps programs at public and private institutions nationwide, “[w]ould [s]eriously [d]isrupt the [m]ilitary’s [e]fforts to [m]aintain [m]ilitary [c]ohesion and [e]ffectiveness.”<sup>30</sup>

### Today’s Challenges Require the Ability to Work Together

Collaborative problem-solving—at the center of solutions to everything from what ails our nation’s metros (with failing schools, crumbling infrastructure, and polluted environments) to the effectiveness of juries or the entrepreneurship that can jump-start a stalled economy—works best when groups are diverse and know how to interact to bridge differences and draw strength from diversity, as Scott Page, Sam Sommers, Katherine Phillips, and others have repeatedly shown in both experimental and field studies.<sup>31</sup>

Moreover, as the aforementioned briefs all asserted, higher education is one of the few proving grounds for developing a diverse talent pool of leadership that has legitimacy in the eyes of the public. Being educated in a diverse learning environment also is highly effective as training for global competitiveness, effective problem-solving, and democratic practices of civic engagement more broadly de-

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note 27 (showing that the United States is lower ranked in many intergenerational social mobility indicators).

29. See Brief of Lt. Gen. Julius W. Becton, Jr., *Grutter*, *supra* note 26, at 16–17.

30. Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents at 27–29, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345).

31. See generally SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (2007); Katherine W. Phillips, *The Effects of Categorically Based Expectations on Minority Influence*, 29 *PERSONALITY & SOC. PSYCHOL. BULL.* 3 (2003); Samuel R. Sommers, *On Racial Diversity and Group Decision Making*, 90 *J. PERSONALITY & SOC. PSYCHOL.* 597 (2006).

fined.<sup>32</sup> Diversity benefits the quality and robustness of higher education, generating positive ripple effects on society more generally.<sup>33</sup>

### Diversity has Compelling Educational Benefits

The briefs filed by the University of Michigan in *Grutter* and *Gratz* (and a slew of similar ones in *Fisher*) presented an extensive body of evidence to support the positive effects of a diverse environment, both in- and outside the classroom, on the depth and breadth of active learning.<sup>34</sup> Following are just a few of the main points from that record.

The district court in *Grutter* noted that “classroom discussion is livelier, more spirited, and simply more enlightening and interesting” when the students have “the greatest possible variety of backgrounds.”<sup>35</sup>

Patricia Gurin, an expert witness in both cases, analyzed three sources of data: multi-institutional national data, the results of an extensive survey of students at the University of Michigan, and data drawn from a specific classroom program at the University of Michigan.

Carefully controlling for factors other than diversity, she found statistically significant and consistent results that “[s]tudents who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills.”<sup>36</sup>

A diverse educational environment, a curriculum that addresses racial issues, and engagement with peers from diverse backgrounds will result in “a learning environment that fosters conscious, effortful, deep thinking” as opposed to automatic, preconditioned responses.<sup>37</sup>

As a social scientist, I will say that the central argument about the educational benefits of diversity—that diverse learning environments

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32. See Brief of Soc. and Organizational Psychologists as Amici Curiae Supporting Respondents at 17–21, *Fisher*, 133 S. Ct. 2411 (No. 11-345).

33. *Id.*

34. See Brief of the Am. Soc. Sci. Researchers as Amici Curiae Supporting Respondents at 6, *Fisher*, 133 S. Ct. 2411 (No. 11-345) [hereinafter Brief of the Am. Soc. Sci. Researchers]; Brief for Respondents, *Gratz*, *supra* note 25, at 27–28; Brief for Respondents, *Grutter*, *supra* note 25, at 46–47; Patricia Gurin, *Expert Report of Patricia Gurin*, 5 MICH. J. RACE & L. 363, 365 (2000).

35. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 849 (E.D. Mich. 2001).

36. Gurin, *supra* note 34, at 365.

37. *Id.* at 372.

lead to more active and critical thinking, stretching people's minds and views in ways that have profound and long-lasting impact—is not new. Indeed, this argument is grounded in profoundly influential thought about the social nature of education, for example in the traditions and legacy of the great educational philosopher John Dewey.<sup>38</sup>

What was somewhat new, at least in the context of higher education, was putting together the literature on how race matters in our society with the literature, theory, and data about the role of diversity in creating a more vibrant and livelier social learning environment *for all students*. Because race matters in such pervasive and normal ways, it is one dimension that can stimulate diverse perspectives and experiences to be brought into the mix of learning, thereby raising the level of cognitive and social exploration on all participants' parts.

I emphasize this point for two very important reasons, both of which were stressed by Gurin in her testimony in these cases, and which have spurred much social science work since, as well as much discussion in the courts and media in the decade following *Grutter* and *Gratz* and leading up to and beyond *Fisher*.

First, as Gurin stressed and her data supported, this is a model of active learning.<sup>39</sup> The strongest effects (for all students) occurred in settings that encompassed active engagement and interaction across difference—what Gurin called “interactional diversity” as compared to “structural diversity,” in terms purely of representation in the setting of different races and ethnicities.<sup>40</sup> The importance of direct interaction and intergroup engagement is especially relevant in producing the effects of diversity in an educational environment on students' skills for and proclivity toward civic engagement—what we might call democratic practices.

We know from the decade of social science research since *Grutter* that direct intergroup experiences translate into sustained increases in civic agency, civic mindedness, and intergroup understanding that matter to our collective prosperity.<sup>41</sup> Importantly, the necessary condi-

38. See JOHN DEWEY, *DEMOCRACY AND EDUCATION* 10–22 (1966).

39. See Gurin, *supra* note 34, at 365 (“Extensive research in social psychology demonstrates that active engagement in learning cannot be taken for granted.”).

40. *Id.* at 385.

41. See Patricia Gurin, Biren (Ratnesh) A. Nagda, Walter G. Stephan, Cookie White Stephan, Gary Anderson, Delia Saenz & Gloria Bouis, *Intergroup Dialogue: A Response to the Challenges of Demography, Democracy, and Dispersion*, in *DIALOGUE ACROSS DIFFERENCE: PRACTICE, THEORY, AND RESEARCH ON INTERGROUP DIALOGUE* 328, 339–45 (Patricia Gurin, Biren (Ratnesh) A. Nagda & Ximena Zúñiga eds., 2013); Sylvia Hurtado & Linda DeAngelo, *Linking Diversity and Civic-Minded Practices with Student Outcomes: New Evidence from National*



tion is not just structural diversity but interactional diversity. Not surprisingly, the diversity of a college campus, for example, does not, in and of itself, ensure that students will care about overcoming the interracial and interethnic fractures of the communities where they grew up.<sup>42</sup>

Indeed, a recent study by Rude, Wolniak, and Pascarella suggests that students become *less* committed to promoting racial understanding over the four-year (liberal arts) college experience, just as they become less inclined to a host of other behaviors such as exercise and community service.<sup>43</sup> By contrast, the authors of the study suggest that college experiences directly promoting interracial interaction, friendships, and dialogue result in students leaving college more (not less) committed to promoting racial understanding.<sup>44</sup>

In fact, a recently published longitudinal study conducted by Gurin and her colleagues at nine institutions in the decade since *Grutter* found that genuine intergroup experiences such as those occurring in a structured intergroup dialogue curriculum have sustained and positive effects on students' interest in and commitment to promoting social understanding and community prosperity.<sup>45</sup> Sylvia Hurtado and the UCLA Higher Education Research Institute's survey group have similar data.<sup>46</sup> And one longitudinal study, conducted by Nicholas A. Bowman and his colleagues, showed these positive effects 13 years after graduation.<sup>47</sup>

The second reason I emphasize the importance of interactional diversity—diversity that is leveraged versus merely represented—in

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*Surveys*, 98 LIBERAL EDUC. 14, 14–16 (2013); Nicholas Bowman, Jay W. Brandenberger, Patrick L. Hill & Daniel K. Lapsley, *The Long-Term Effects of College Diversity Experiences: Well-Being and Social Concerns 13 Years After Graduation*, 52 J. C. STUDENT DEV. 729, 735 (2011).

42. See generally Mary R. Jackman, *General and Applied Tolerance: Does Education Increase Commitment to Racial Integration?*, 22 AM. J. POL. SCI. 302, 302 (1978) (challenging “the longstanding proposition that higher education produces stronger commitment to the democratic norm of tolerance”).

43. JESSE D. RUDE, GREGORY C. WOLNIAK & ERNEST T. PASCARELLA, RACIAL ATTITUDE CHANGE DURING THE COLLEGE YEARS 17 (2012), available at [http://www.norc.org/PDFs/AERA%20Annual%20Meeting/Racial%20Attitude%20Change%20during%20the%20College%20Years%20\(AERA%202012\).pdf](http://www.norc.org/PDFs/AERA%20Annual%20Meeting/Racial%20Attitude%20Change%20during%20the%20College%20Years%20(AERA%202012).pdf).

44. *Id.* at 17–18.

45. See Gurin, Nagda, Stephan & Stephan, *supra* note 12, at 4–5 (attempting to show that intergroup dialogues among students increase intergroup understanding through a post-*Grutter* study of nine universities). R

46. See, e.g., Sylvia Hurtado, Adriana Ruiz & Hanna Whang, *Advancing and Assessing Civic Learning: New Results from the Diverse Learning Environments Survey*, 15 DIVERSITY & DEMOCRACY 10, 11 (2012).

47. Bowman, Brandenberger, Hill & Lapsley, *supra* note 41, at 735. R

promoting active learning and civic engagement is that it highlights why *critical mass* is so central to all of these discussions about affirmative action. Ironically, while plaintiffs in *Grutter* and *Gratz* (and in *Fisher* as well) pointed to arguments about critical mass as akin to quotas, the impact of critical mass in these studies is exactly the opposite. Critical mass is essential precisely because it translates into enough variation in experiences both *within* and *across* any given racial and ethnic group to both add to the vibrant mix in the learning environment and to enable interactions to occur in which common experiences can form across race and ethnicity—in ways that actually reduce the (stigmatizing) relevance of race in the students' minds going forward.

In this regard, critical mass is not about a number or a percentage per se. It involves a much more complex notion of *meaningful numbers*: enough members of underrepresented minority students to participate in the classroom and not feel isolated; enough to bring diverse interests and backgrounds to enhance classroom discussion and educational experiences inside and outside the classroom; and enough so that racial stereotypes lose their force because non-minority students learn there is no “minority viewpoint” but rather a variety of viewpoints among minority (as well as majority) students.<sup>48</sup>

As the American Social Science Researchers, representing scholars from 42 states and 172 educational institutions, observed in an amicus brief in *Fisher*, the “dynamics of diversity are contextual, interdependent, participatory, and cross-racial.”<sup>49</sup> Interactional diversity presents opportunities for both students of color and white students, and not only benefits their understanding of how race plays out in modern American society but also charts a course for how its effects are rendered in the future.

### Diversity & Democracy

Let me end, then, with what I know was the central animating force in our defense of affirmative action at the University of Michigan, and what is reflected in Justice O'Connor's opinion representing a majority of the Court in *Grutter*.<sup>50</sup> Diversity in higher education is a compelling national interest because it will determine the fate of our democracy—the opportunity to improve one's lot in life through education, the robustness of the nation's talent pool, the legitimacy of the

48. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

49. Brief of the Am. Soc. Sci. Researchers, *supra* note 34, at 6.

50. *See Grutter*, 539 U.S. at 330–33.

leaders we educate, their ability to work together in diverse groups that stimulate world class innovation, and their proclivity to look beyond the stereotypes that have divided communities and eroded the fabric of society upon which democracy depends.

Indeed, a National Task Force commissioned by the U.S. Department of Education and led by the Association of American Colleges and Universities called today a “crucible moment” for higher education—one that calls for “hands-on, face-to-face, active engagement in the midst of differing perspectives about how to address common problems that affect the well-being of our nation and the world.”<sup>51</sup> This vision cannot materialize without all the talent and all the openness to collective problem solving that comes from being educated in a diverse and interactive learning environment.

This is why many of us filed amicus briefs in *Fisher*—as I did in joining the brief drafted by the Center for Institutional and Social Change at Columbia Law School on behalf of the National League of Cities, higher education organizations like Campus Compact, the Anchor Institution Task Force, and Imagining America, and educational and civic leaders in metropolitan communities across America from Syracuse to Baltimore to New Orleans.<sup>52</sup> As we argued in that brief, “[we] submit that the challenges facing our nation’s metropolitan communities today demand racially diverse leadership with the legitimacy and skills of the kind that the *Grutter* Court recognized as necessary.”<sup>53</sup> In turn, these skills fundamentally depend upon the ability of higher education to train our next generation in a diverse, collaborative environment, one that faces down rather than ignores the pervasive influence of race and racial divides not only in our history but in our lives today. Sadly, in true déjà vu all over again fashion, the same risks to diversity and democracy are still at stake, even as the legal machinery marches on from *Brown v. Board* to *Fisher* and beyond.

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51. NAT’L TASK FORCE ON CIVIC LEARNING AND DEMOCRATIC ENGAGEMENT, A Crucible Moment: College Learning & Democracy’s Future 3 (2012), available at [http://www.aacu.org/civic\\_learning/crucible/documents/crucible\\_508F.pdf](http://www.aacu.org/civic_learning/crucible/documents/crucible_508F.pdf).

52. Brief of the Nat’l League of Cities, Campus Compact, Imagining Am., Anchor Insts. Task Force, Transformative Leadership Working Grp., Ctr. for Democracy and Citizenship, Chancellor Nancy Cantor, Superintendent Sharon Contreras, President Freeman Hrabowski, President Scott Cowen, CEO Nolan Rollins, Chancellor James Dworkin, Superintendent Glade Montgomery, President Thomas Rochon, Superintendent Luvelle Brown, President James T. Harris, Superintendent Cheryl Cunningham as Amici Curiae Supporting Respondents, *Fisher v. Univ. of Tex. At Austin*, 133 S. Ct. 2411 (2013) (No. 11-345).

53. *Id.* at 7.

