

3-18-2004

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Nancy Cantor

Syracuse University, ncantor@syr.edu

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Recommended Citation

Cantor, Nancy, "From Individual Rights to Societal Health: Before, During, and After the Michigan Cases" (2004). *Office of the Chancellor*. Paper 24.

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From Individual Rights to Societal Health: Before, During, and After the Michigan Cases¹

By Nancy Cantor
Chancellor, University of Illinois at Urbana-Champaign

On March 18, 2004, the U. S. Census Bureau predicted that the nation's Hispanic and Asian populations would triple over the next 50 years, and non-Hispanic whites would drop to about half of a total population of 419.9 million by the year 2050.

As the demographic landscape of this nation becomes less and less white, we are reminded almost daily, even on college campuses, how difficult it is to erase the racial stereotypes and resentments that permeate our larger, more segregated society and keep us from truly seeing, hearing, and knowing each other.

We are reminded of just how large the gap is between the principles and dreams set forth 50 years ago in *Brown v. Board* and the practices of daily life in this country today; practices that block access to opportunity at every turn. We learn of race disparities in health care, employment, and criminal justice sentencing, painting a stark portrait of life in this country if you are not white.² We hear from the latest surveys of the Harvard Civil Rights Project that our schools are substantially segregated and differentially resourced by race, and that residential segregation is apparent all across the income spectrum.³ Not only don't we know each other, we don't like each other, with

¹ Keynote address delivered at *Brown Plus 50: A Renewed Agenda for Social Justice*, Metropolitan Center for Urban Education, New York University, May 19th, 2004.

² *Racial Trends and Their Consequences, Vol 1., ed., Neil J. Smelser, William Julius Wilson and Faith Mitchell. Published by the National Research Council, Washington, D.C., 2001.*

³ Frankenberg, Erica; Lee, Chungmei; and Oldfield, Gary, "A Multiracial Society with Segregated Schools: Are We Losing the Dream?" The Civil Rights Project, Harvard University (January, 2003).

smoldering racial tensions in our nation's cities as fierce as those that led Governor Otto Kerner thirty-six years ago to warn: "Our nation is moving toward two societies, one black, one white—separate and unequal. Discrimination and segregation have long permeated much of American life; they now threaten the future of every American."⁴

Unfortunately, Governor Kerner's fears would not be altogether assuaged by the stories that I hear today from students on the flagship campus of his home state. Consider just two examples, one from a student about her own experiences at Illinois and the other from another student describing her younger sister's experience in elementary school in Chicago.

Not long after the Supreme Court's decisions in the Michigan cases, a Latina student came to my office in tears, a casualty of the long-running debate on our campus over whether to keep a Native American mascot, Chief Illiniwek.

After a particularly acrimonious public hearing, this student had returned home to an angry white roommate who told her she didn't like her clothes, her music, or her friends. "You don't belong here," the roommate snapped. "Why don't all you foreigners go back where you came from?"

The Latina was shocked and crushed. She was brown, but she was also a U.S. citizen. She had roomed with the other student for three years and considered her a friend.

* * * *

Another Latina student who has been deeply concerned about diversity on campus has one Anglo parent and one parent of Latin American descent and looks white. Her little sister, the child of a second marriage, is brown.

Not long ago, this child came home from elementary school and tried to rub off her skin. She told her family that people didn't like her color, so she wanted to get rid of it.

⁴ Otto Kerner, Report of the National Advisory Commission on Civil Disorders, 1968, Bantam Books, p. 1.

Education and Social Justice

As we consider the relevance of these stories and of Kerner's warning today, we also turn to questions of education and social justice, as did our heroes in the days of *Brown*. They argued then and we must continue to argue today, that to change the bleak fabric of racial segregation and discrimination in American life requires creating educational opportunity through integration of our nation's schools. Yet, they also knew, and we must take heed, that change is slow and backlash everywhere. Nowhere is this more apparent than in the battle over affirmative action in selective higher education, about which I have been asked to speak today.

In the months since the Michigan affirmative action cases were decided, backlash is everywhere. It is stoked by the dramatic change that has taken place in our economy, from one based on industry to one based on knowledge, where a seat at the table of higher education is an indispensable credential. The competition for jobs is keen, and job loss and unemployment are dreaded. In this atmosphere, a place at the table of selective higher education is a very scarce, very scrutinized resource. When everyone wants a piece of the pie, some who always assumed they would go to the college of their choice now fear being shouldered aside.

And, as debate goes on in the legal arena of affirmative action, scrutiny in the legislative arena is on the increase as well. For example, more public attention was paid to the recent debate in California over a proposition to prevent the collection of data on race (the "racial privacy" Proposition 54) than when Proposition 209 forbidding race-conscious affirmative action was passed in November 1996. Indeed, from the courts to

the legislatures, in states across the country, public opinion has once again galvanized around issues of race and education, as it did those 50 years ago.

In fact, in the six year debate over the Michigan affirmative action cases, an extraordinary range of diverse sectors and stakeholders in our great melting pot of races and voices were heard. As we think about renewing the agenda for social justice through educational opportunity, it seems appropriate to consider those many voices. It is indeed a rich melting pot of noise brought about perhaps by the electronic nature of our media or by the intensity of clashing demands for a place in society---or both.

The debate also demonstrates how intertwined the local and national contexts can be, and how both local and national aspirations and demands are played out. Cases in California, Texas, and Michigan, for example, all produced very different outcomes and dialogues. I believe it mattered enormously to the outcome of *Grutter* and *Gratz* that they were filed in Michigan, a Midwestern, industrial, labor state, instead of California, with its own very complex multi-racial politics, or Texas, with its culture of individualism. In fact, part of the miscalculation by the Center for Individual Rights (the organization supporting the plaintiffs in the Michigan cases) may have been the failure to realize how much the Michigan context would recall history and grab the national imagination about the future.

Melting Pot of Voices in the Michigan Affirmative Action Debate

During the six years of debate over these cases, at least five broad categories of stakeholder voices/positions emerged, with both a national and a local Michigan articulation. Here, in chronological order as they entered the debate, are brief sketches of each.

“Bowling Alone”⁵ Voice of Individual Rights. This is the voice that spoke the loudest for the first two to three years of this national dialogue. It is the voice of the plaintiffs and numerous others interviewed in the public media, expressing resentment about the loss of a place that they view as having been rightfully earned and expected. It reflects how scarce a seat at the table of higher education truly is and how much some fear losing access in the face of the nation’s changing demography. This voice is always articulated at the level of individual comparisons, never at the level of comparative pools of applicants – vastly larger for majority than minority applicants. Everyone seems to know a case where they assert that a seemingly less deserving minority applicant was admitted and some presumptively more deserving white student was *therefore* rejected. Their resentment is not tempered by any realization that the white student’s true competition is not the relatively small pool of applicants of color, admitted or rejected. Instead, it comes from other (also apparently less deserving) white students invited to attend the college of their choice.

This is the voice of presumption and expectation. In the Michigan context, it is the voice of Jennifer Gratz, who expected to be admitted as an undergraduate to the University of Michigan and did not apply anywhere else. Meanwhile, amongst the pool of white applicants – numbering ten times the pool of applicants of color in Jennifer’s year – are many other white students with tests and grades less than Jennifer’s, whose dreams were not dashed.

Social Justice Voice of Emerging Minority Populations. This is the voice of both demography and history. It reflects the bleak racial disparities in our multiracial society

⁵ Robert D. Putnam, 2000, *Bowling alone: The collapse and revival of American community*, New York: Simon & Schuster.

in health, housing, employment, and the criminal justice system. It has experienced segregation and discrimination as bad as it has ever been in our nation's cities, and it contains a powder keg of resentments about exclusion from and the need for access to the American dream. Locally, this is Detroit, with its race history of riots, white flight, segregation, and poverty. This is the University of Michigan, with top "feeder" states for applicants that have some of the most racially segregated K-12 schools in the nation. This is the predominantly black city of Benton Harbor, Michigan that erupted in riots last summer next door to the virtually all white St. Joseph, Michigan. This voice speaks of individual rights as civil rights, justice for those denied a piece of the American dream. This voice has heard nearly 50 years of broken promises about equal educational opportunity. This is the voice of the student "interveners" who filed briefs in the Michigan cases, arguing for redress for a history of institutional discrimination.

Voice of Societal Productivity, Security, and Legitimacy. From the midst of these competing views, a third coalition of voices emerged to focus on the health—in fact, the very survival—of our society. These voices include groups such as the corporations, labor unions, and military leaders that filed "friend of the court" briefs in the Michigan cases. The testimony that diversity is necessary in preparing the workforce came not only from the *amicus* brief filed by the AFL-CIO but also from the brief filed by a host of Fortune 500 companies.

As the lawyers who wrote on behalf of the AFL-CIO asserted, and I quote: "higher education represents a unique opportunity and, from the vantage point of the workplace, the last opportunity, to foster interaction between diverse individuals."⁶

⁶ *Amicus* brief filed by the AFL-CIO in *Grutter and Gratz*, p.17.

Similarly, the military does not want to lose the ground they gained after realizing, at the end of the war in Vietnam, that the very survival of the military was at stake because of racial discord between largely white officers and predominantly minority enlisted men. At the U. S. Military Academy at West Point, where there were only 30 African-American cadets in 1968⁷, a successful affirmative action program has yielded more than 300 today.⁸ Minorities now make up 19% of the officer corps in the armed forces generally, and 8.8 % of all officers are African-Americans.⁹

In addition to voicing concerns about economic productivity and national security, this coalition includes major national leaders, such as former President Gerald Ford. He is heard reminding us that the very legitimacy of our democratic institutions is at stake in the affirmative action cases because selective higher education produces the lion's share of our nation's leaders. Joining President Ford are other major organizations in Michigan who connected the local with the national contexts. General Motors takes a leadership role in organizing the brief from the Fortune 500 companies and the United Auto Workers weighs in on the labor front. Colin Powell goes on talk radio in Detroit, endorsing affirmative action, and invoking it in describing his own path to success in the military.

Voice of Educational Institutions and Admissions Policies. These are the voices of our public and private institutions and their allied organizations, such as ACE, AAU, NASULGC, ETS, and the College Board, that want to keep institutional autonomy over policy-making as it affects their core educational mission. They regard academic admission as a choice based on many factors, not as an entitlement based solely on past

⁷ *Grutter and Gratz*, Consolidated *Amicus* brief of Lt. Gen. Julius W. Becton Jr., et. al., p. 19

⁸ *Ibid*, p. 19.

⁹ *Ibid*, p. 17.

accomplishments. In selecting students from a pool of qualified applicants, as the former president of Princeton, William Bowen once remarked, no one wants to compose a freshman class made up entirely of high school valedictorians. These institutions see merit as broadly defined, not restricted to any particular measure and especially not to test scores. In the Michigan context, the pool of admitted applicants includes white students with lower test scores who had been accepted while white students with higher test scores had been rejected. As the experts who created these tests repeatedly assert during these debates, no single standardized test should stand on its own as a (uniquely reliable or valid) tool for predicting success at college or beyond.

Voice of the Disciplines in the Cases. Last to be heard in this debate are the voices of the scholars and their disciplines – social science and constitutional law – woven through the court records. They reflect the multiplicity, and in some ways, the division in perspective of the earlier voices in this melting pot of stakeholders. The social sciences and educational research address the compelling societal interest in creating a multiracial democracy, and the legal scholarly arguments focus on achieving access via the narrow tailoring of affirmative action to meet the constitutional protections of the fourteenth amendment (equal protection) in the service of protecting individual rights. In many respects, the social science arguments are about race and inter-group relations in America, while the legal arguments are about individual educational opportunity. In other words, while the social science data address the very hard work of overcoming race disparities, building integrated living and learning communities, and of dispelling stereotypes, the legal arguments look for narrow, procedural ways to garner access to educational opportunity. The social science arguments recognize the long road ahead,

while the legal arguments look to time-limited and specifically-crafted solutions. The social science arguments call for admitting a “critical mass” of students of color from all walks of life (to dispel stereotypes), while the legal arguments hope to minimize the burden on the majority.

Encompassing Individual Rights, Civil Rights, and the Good of the Nation

As it turns out, Justice Sandra Day O’Connor, writing for the majority in *Grutter*, blends social science and the law in ways that reflect all of these stakeholder voices as she shifts the ground of the argument from individual rights to social health.

She writes:

“The Law School’s claim is further bolstered by numerous expert studies and reports showing that such diversity promotes learning outcomes and better prepares students for an increasingly diverse workforce, for society, and for the legal profession. Major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. High-ranking retired officers and civilian military leaders assert that a highly qualified, racially diverse officer corps is essential to national security. Moreover, because universities, and in particular, law schools represent the training ground for a large number of the Nation’s leaders, Sweatt v. Painter, 339 U.S. 629, 634, the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity.”¹⁰

She emphasizes the compelling interest of diversity for the legitimacy of our democratic institutions, the training of our leaders, the productivity of our economy, the security of our armed forces, and the harmony of our society.

Yet Justice O’Connor does not deny the pain of those who fear being displaced, or of those who want the scale, for once, to tip in their direction. Instead she asserts, and

¹⁰ Sandra Day O’Connor, writing for the majority in *Grutter v. Bollinger, et.al.*, No. 02-241, Supreme Court of the United States, June 23, 2003, pp 3-4

so can we, that race-conscious policies can achieve a critical mass of students of color from all walks of life without placing an undue burden on the chances of white students because of their race. She crafts a narrow path that merges social science and the law, and considers individual rights on both sides.

During oral arguments in *Grutter*, Justice Ruth Bader Ginsburg had asked: “Do we know what would be the increase of the named plaintiffs, the increase in their chance of admission, were there no affirmative programs?”

Maureen E. Mahoney, attorney for the law school, answered: “I don’t know what the increase for the – for Barbara Grutter would have been, for instance, we do know that across the class, it would have been approximately 5 percent.”

“One might say that that could vary, you know, by individual,” she continued. “The record evidence would indicate, however, that Barbara Grutter would not have been admitted under a race-blind program, although that issue has not been litigated to conclusion.”

In the *Grutter* decision, instead of mechanical “preferences,” the Court supports universities’ making thoughtful, though decidedly race-conscious, choices. Although Barbara Grutter was not admitted, other white students—as well as students of color—with grades and scores lower than hers were admitted, because the Michigan Law School evaluates many assets beyond tests and grades. Their goal is to engage a broader pool of the nation’s future talent base and to give each of them a better education. Justice O’Connor hopes they will sufficiently change the landscape of educational opportunity to produce a very different picture in twenty-five years. (Revealing, perhaps, that she

doesn't quite get the social scientists' claims of the hard *social* work ahead of us in learning how to get along.)

Moving Forward from Across the School Yard?

As reasonable as the race-conscious procedures endorsed by the Court are, the real victory in *Grutter* (and also in *Gratz*) is less about affirmative action as a procedure and more about the re-emergence of a dialogue about race and racial harmony as a compelling national imperative. The real message from the six years of debate in the Michigan cases is essentially the same message as heard in *Brown*: We as a nation simply must figure out how to create (educational) opportunity for Americans of color. Then we must try to all benefit from living and learning in a multiracial democracy.

Just as this debate began with the clash of voices between those asserting individual rights as already earned entitlements and those demanding anew the civil rights they never fully obtained, it ended (for the moment), with a call to action from the Court to try to move forward together, for the good of *all*. This transition from "Bowling Alone" to living and working together – from individual rights to societal health – has the potential to make everyone better. White students with the skills and inclinations to work comfortably in a multiracial, global workplace will be more marketable. Students of color who take their place at the table of selective higher education will also begin, finally, to move up the economic and social ladder of opportunity and into our otherwise segregated neighborhoods and schools. And when this social change begins to take form, then our democratic institutions will gain legitimacy sorely lacking in the years since *Brown*.

That is the dream laid out in the melting pot of stakeholder voices heard in this debate. But, we must ask now, in the months following the decisions, are we ready to turn from individual rights to social health? Are we finally ready to keep the promises of *Brown*? After all, as we all reconsider that great victory, our celebrations are more like commemorations, and the patterns of segregation and discrimination alive and well, for example in Clarendon County, SC – home to the first “Brown” case – sound a cautionary note.

Unfortunately, it is still not clear that this country wants to move forward together, as can be seen by a quick scan of some of the voices emerging post-*Grutter*.

The Department of Education wants college admissions based on race-neutral mechanical procedures that would use social class as a proxy for race, despite years of research showing that integration based on socio-economic status, however desirable, is not sufficient to achieve racial diversity in selective higher education.¹¹

Ironically, using class instead of race to achieve diversity would tend to exclude the children of minority parents who have made it to the professional classes. And these are the very students most-equipped, at least at the outset, to dispel racial stereotypes, which are best undermined with evidence of the great diversity *within* any group.

In Michigan and in other states, Ward Connerly has been promoting blanket legislative referenda in an effort to trick the public into believing that if we don’t talk about race it will go away.

¹¹ Bowen’s recent analysis of applicants from 19 selective institutions again demonstrated that, for example, giving all applicants from the poorest fourth of society the same edge as relatives of alumni, would result in minority enrollments dropping by nearly half, from 13.4% to nearly 7.1% at those 19 colleges and universities. See William G. Bowen, *The Thomas Jefferson Foundation Distinguished Lecture Series*, University of Virginia, April 6, 2004.

The media is weighing in with story after story of racial tensions and self-segregation on college campuses, as if we could imagine otherwise in a country in which fewer and fewer schoolchildren ever sit next to a person of another race or ethnicity before they get to college.

And educators are scratching our heads and wondering how to achieve that much-desired integration, on campus and beyond, while attention is distracted and effort drained on fighting off yet further procedural assaults, from the Center for Equal Opportunity and others.

Fulfilling the Promises of *Brown*

As the voices of impatience, even resentment, re-emerge post-*Grutter*, we should not forget the lessons of 50 years of unfulfilled promises since the Court's call to action in *Brown v Board*. We need to understand that the Court and the Congress can shift the ground of the argument, as Justice O'Connor has done, but we are the ones who must change the ways in which we conduct our business and live our lives. And we'll have to step up the pace if we want to meet that 25-year deadline.

Certainly, no one post-*Brown* would have imagined that so little progress would have occurred on the ground in changing patterns of integration (or separation) in American life. As John Payton told the Justices in oral arguments last spring, "I think all of us would be quite surprised... to realize that today in Michigan students live in such segregated circumstances growing up, it's really quite unbelievable. We could not have foreseen that. I think people thought that we were coming together in a way, and that hasn't occurred."

Higher education needs affirmative action now, so we can roll up our sleeves, open our hearts and minds, and try to begin this work. Affirmative action, as we have learned on my campus and hundreds more, is simply one step from the corner of the school yard. To go further, we need to recognize how hard it is to talk and eat together, to speak up and complain about each other, to respect and learn from each other, when we have all been shouting from our respective corners.

If we want a healthy society, we had better let our colleges and universities try to change our habits of separation on the ground, not only in the Courts. They can—and we must—succeed.