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DECADE Speaker Series

Transcription

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THE LAW CONCERNING DIVERSITY IN HIGHER EDUCATION: THE MYTHS & REALITIES
DEAN ERWIN CHEMERINSKY
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Introduction by Graduate Division Dean Frances Leslie:

Thank you for joining us today for the inaugural talk in the DECADE Speaker Series. DECADE stands for Diverse Educational Community and Doctoral Experience and is a program that is funded through a FIPSE Comprehensive grant from the Department of Education. The goal of the program is to increase the number of women and minorities in programs in which they are underrepresented here at UC Irvine, to identify reasons for underrepresentation in graduate education, and possibly to establish national models for addressing this issue. The DECADE Speaker Series will feature distinguished speakers from across the country and will enable the UCI community to participate in dialogue focused on campus climate and diversity. I am really pleased that Dean Erwin Chemerinsky agreed to talk to us as the inaugural speaker in the series. Dean Chemerinsky is the founding dean here at the UCI School of Law and is a distinguished professor of law. He also has a joint degree in Political Science. Prior to teaching here, he taught for 4 years at Duke Law School and 21 years at USC, so he really is a Southern Californian at heart. One indication of his excellence in teaching is that he won the Duke Scholar Teacher of the Year Award in 2006. His expertise focuses on constitutional law, federal practice, and civil rights and liberties. He has written seven books, most recently *The Conservative Assault on the Constitution,* and nearly two hundred articles in top journals and law

reviews. He frequently argues cases before the nation's highest courts and also serves as a commentator on legal issues for national and local media. I was just hearing that he sat through or read the transcripts of every minute of the O.J. Simpson trial, for those of you who were old enough to remember it. Yesterday he was quoted in an article in the *New York Times* on the constitution, diversity and a possible reversal of Supreme Court doctrine so he really is an expert on diversity and the law. He is going to give two presentations as part of our speaker series. Today he'll give a presentation on "The Law Concerning Diversity in Higher Education: The Myths and Realities," and two weeks from now he will lead a panel discussion on the same issue. Please join me in welcoming Dean Chemerinsky.

DEAN ERWIN CHEMERINSKY:

Thank you so much for the kind introduction. Thank you for coming here. The DECADE program is so important to UCI and higher education. I'm very honored to be the inaugural speaker for it.

In Yiddish there is a word "*shanda*." It is always hard to translate words from other languages into English but it is basically a public embarrassment, something that is a scandal. The underrepresentation of minorities in higher education in the United States is a continuing *shanda*. When you look at professional schools and the very best best law schools you see how much this really is a continuing scandal and a public embarrassment.

What I would like to do is to talk about five things. First I'd like to talk about the state of diversity of higher education in the United States. Second, I will briefly talk about why diversity matters. Third, I want to talk about what the United States Constitution says with regard with regard to diversity efforts in higher education. Fourth, I want to talk about what Proposition 209 means with regard to efforts in diversity for higher education in California. Fifth, I want to talk

about what might be the future with regard to law in this area. I think we may be on the verge of significant changes.

Let me start then by talking about the state of diversity in higher education today. I will discuss the national statistics, and those here at UCI and I especially want to focus on the area I know best: law schools. Nationally, the most recent statistics I find, which are from about a year ago, indicate that about 46% of whites go to college but only 40% of African Americans go to college, and 34% percent of Latinos go to college. Nonetheless, those statistics do not fully describe the reality with regard to the lack of diversity in higher education in the United States. The reality is that the more elite the school, the more white it is likely to be. The higher the level of education, in terms of graduate or professional schooling, the more white it is likely to be.

Let me pause a moment and talk about the UCI statistics. Here are the most recent numbers I could find. For the entering freshmen class of 2010, 47%.3 of the students self reported as Asian, 19.1% self reported as Caucasian, 14% self reported as Mexican American, and only 2.4% of the entering freshman were African American.

I want to talk a little bit about law schools obviously, it is only one professional law program on this campus, but as best as I can tell the numbers regarding law schools are not very different from other professional programs like medical or business schools. African Americans are 12.3% of the population in the United States but they are only 6.5% of law students in the country. In fact, if you look nationally only 4.7% of attorneys in the United States are Black. One very troubling statistic that fits with why I say this is a *shanda* is that the number of African Americans in law schools has gone down over the last decade. A decade ago, over 7% percent of law students in the United States were African American, whereas today it is only about 6.5%. In terms of Latinos the numbers are a bit better but not by all that much. Latinos are 15.8% of the population, but they are only 7.2% of law students across the country, and only 2.8% of

attorneys. If you look over the last decade, the number of Latinos going to law school has increased, but only slightly; about 4 to 5% of law students in the United States are Latinos.

This is a problem that is not likely to be solved in the immediate future. In fact, if you look at the statistics of those applying to law school they're shocking. In 2009, there were only 12 African Americans in the country applying to law school with an LSAT above 170 and a GPA above 3.5. To put this into perspective, our median LSAT at UCI is about 167, at UCLA it's about 168, at Berkeley it's about 169, at schools like Harvard and Yale it's over 170. Having only 12 African Americans in the country where LSAT is above 170 and a GPA above 3.5, demonstrates the tremendous lack of minorities who are competitive for elite schools. In 2009, there were only 118 African Americans with LSAT's above 165 in the country. In terms of the admissions standards, especially at elite law schools, there is a tremendous lack of minorities and the problem isn't getting any better, it is getting worse. This description sets the reality for what we are talking about in the DECADE program at UCI.

Historically disadvantaged and discriminated groups, African Americans and Latinos, are tremendously underrepresented, which brings me to my second question. Why should we care about this? Why does diversity matter? The easiest answer is that diversity matters for the education of all students. Over the course of my 32 years as a law professor teaching courses such as Constitutional Law and Criminal Procedure both in classrooms that are almost all white and in classes that have a significant number of minority students, I can certify that the conversations in those classes vastly differ. Discussions of topics such as *affirmative action* or *policing and racial profiling* are vastly different when there are students in the classroom who have experienced it and can discuss what it's like to be stopped while "driving while black" or "driving while brown" compared to a classroom with students who have never had such experiences. Countless research studies indicate that the conversation in a classroom setting is

different if there is diversity. I, of course, do not defend *affirmative action* simply in terms of the educational benefit that it provides the white students or the Asian students who are in school, obviously it transcends that. Diversity matters in terms of the university's commitment and responsibility to advance equality. Studies show that the more education that someone has, the higher their income, those who go to college have higher incomes on average than those who just graduate from high school. Those who go to graduate school or professional school have higher incomes than those who go to college. If we do not have minorities attending college, graduate, and professional school in the same percentages as whites then we are limiting that equality. If ever American society will achieve greater equality, it will have to include much greater diversity in graduate and professional schools and ultimately elite professions.

The reason African Americans and Latinos are underrepresented in colleges, law schools, professional schools and graduate schools is the long history of discrimination. The legacy of discrimination in the United States is as old as the country itself. Slavery was written with the very fabric of the United States Constitution. Slaves were prohibited from being taught how to read or write. The *Jim Crow system* that followed the Civil War and that segregated schools for much of the 20th century was a result of slavery. Its legacy are the inequalities with regard to income and educational attainment that are familiar to us all. It was estimated by Harvard professor, Christopher Jencks that on average 20% less is spent on an African American child's elementary and secondary schooling than the average white child's elementary and secondary schooling. Jonathan Kozol and others show that there are the realities that we see across the country now. Given this disparity in educational funding, it's not surprising that the students who don't have the same expenditures in elementary and high schools won't be represented in the same numbers in colleges and universities, and ultimately in graduate and professional schools.

University systems have the obligation to advance social equality. If we as a society will ever achieve equality, it's going to be through the educational system. I believe that diversity matters as a way of enhancing the education for all students. Diversity matters in order to make sure that we advance towards a more equal society. These are things people have been talking about for decades, yet we find that diversity is still lacking today.

The third major topic that I want to talk about involves what the Constitution says with regard to the ability of colleges and universities to achieve diversity. The Fourteenth Amendment to the Constitution says that no state shall deny any person equal protection under the laws. In 1896, in *Plessy vs. Ferguson*, the Supreme Court said that laws mandating segregation did not violate the Constitution. Following *Plessy vs. Ferguson*, literally every aspect of life in Southern states, and many bordering states, came to be segregated. Schools especially became segregated. It wasn't until 1954, 58 years after *Plessy vs. Ferguson*, that the Supreme Court held that separate can never be equal in the realm of education. It took a very long time for anything to change following *Brown vs. Board of Education*. A decade after *Brown*, in 1964, not one black child was attending school with a white child in South Carolina, Mississippi, or Alabama. Even in North Carolina, though it prides itself for being a more progressive Southern state, in 1964, only $1/10^{th}$ of 1% of black children were attending school with white children.

It was only after the adoption of the 1964 *Civil Rights Act* that things began to change. Title VI of the 1964 *Civil Rights Act* provides that recipients of federal funds cannot discriminate on the basis of race. The then Department of Health, Education, and Welfare said that any school system that discriminated or segregated on the basis of race could no longer receive federal funds. Every school system depends on federal funds and this finally provided the stick that brought about desegregation. From 1968 to 1988, by every measure, American

public education became less segregated. Since 1988, by every measure, American public schools are more segregated and the segregation is increasing at an accelerating rate.

It was, interestingly, Richard Nixon as President in the early 1970s, who began the national effort towards *affirmative action*. The notion of *affirmative action* is that but for the legacy of discrimination, there would be more African-Americans and Latinos in higher education. It is the view that diversity matters. In order to prepare students for their careers and in order to enhance justice, *affirmative action* is essential. In the beginning of the 1970s, colleges and universities followed this and began to implement programs of *affirmative action*.

The United States Supreme Court first considered *affirmative action* in 1978 in *Regents of the University of California vs. Bakke*. It involved the University of California, Davis Medical School, which set aside sixteen slots for minority students in its entering class of a hundred. It disputes that this was a "quota" and said it would take more than sixteen minority students if there were more than 16 qualified students. Alternatively, it would take less than 16 if there were fewer than that that who were qualified. But the medical school set aside sixteen slots and the University of California, Davis showed the Supreme Court that absent affirmative action, they would average less than one African-American or Latino student a year in their medical school class. This is the contemporary effects of the law. The Supreme Court did not have a majority opinion in its decision of Bakke and, in fact, the justices split four to one to four. Four justices said the University of California of Davis could consider race as factor and it could set aside sixteen slots out of the entering class of a hundred. Four justices said that the University of California of Davis Medical School couldn't consider race at all and couldn't set aside sixteen slots. That left of course the one justice in the middle, Justice Lewis Powell. He said that the colleges and universities have a compelling interest in having a diverse student body. Colleges and universities thus may consider race as one factor in the admissions decisions to benefit

minorities and to enhance diversity. But he said that colleges and universities can't set aside slots for minority students. Since Justice Powell was the swing justice, even though he was speaking only just for himself, his was the opinion that was controlling. His opinion was followed by college universities across the country.

The Supreme Court didn't return to the issue of the Constitution and affirmative action in higher education until twenty-five years later on June 23, 2003 when the Supreme Court handled two cases both involving the University of Michigan. One was a case that involved the University of Michigan Law School, a case called *Grutter vs. Bollinger*. The University of Michigan Law School tried to implement what Justice Powell described in his opinion in Bakke. It would consider all factors in admission, but among those factors to be weighed was the race of students so as to achieve diversity. The Supreme Court in a five to four decision upheld the University of Michigan Law School program. Justice Sandra Day O'Connor wrote the opinion for the court, joined by Justices Stevens, Souter, Ginsburg, and Breyer. Justice O'Connor said that diversity in higher education is a compelling government interest. She talked about how diversity matters in terms of education of all students. If we really are going to prepare law students to deal with the clients that they'll serve, they have to interact with those of all races. If we are ever going to be a more just society, it has to be through education. As a result colleges and universities, here the law school, could consider race as one factor, among many in admissions decisions, to benefit minorities to enhance diversity. She said, though, that there has to be a stopping point at which we no longer consider race, and she said 25 years from now is that time. There was a great deal of discussion among the other justices over why 25 years. And after all why go back to 1978? Why not go back to 1954 when *Brown* was decided? Or why not go back to 1896 when *Plessy* was decided? Or why not go back to 1787 when the Constitution

was written, a moment that institutionalized slavery? She doesn't say but I think she chose 25 years because *Bakke* had been decided in 1978, 25 years earlier.

The other case decided that same day was *Gratz v. Bollinger*. It involved the University Of Michigan's undergraduate admissions office. The University of Michigan's undergraduate office tried to quantify factors with regards to the admission process. It assigned points in student's admissions profiles and additional points were added to those who were of minority races. Now law schools get thousands of applications, but colleges and universities especially state schools like the University of Michigan gets tens of thousands or more applications. It's hard to do a systematic review of every single application when this university got more than 60,000 applications just last year. It is easy to understand the impulse to want a quantified system and the University of Michigan added points for various characteristics of the student's profile.

The Supreme Court in a six to three decision declared this unconstitutional. Chief Justice Rehnquist wrote the opinion for the court and said that "colleges and universities cannot add points to applicant's admissions scores solely on the basis of race."

So what is the law as we speak today about the Fourteenth Amendment's Equal Protection clause and affirmative action in higher education? Colleges and universities have a compelling interest in a diverse student body. Colleges and universities can consider race as one factor in admissions decisions to benefit minorities to enhance diversity. Colleges and universities cannot set aside slots just for minorities. Colleges and universities cannot add points to applicants' admission scores solely on the basis of race. That is the law as of right now.

Well this brings me to the fourth thing I want to talk about, and that is, what is the law here in California? What is the effect of Proposition 209? In 1996, California voters approved an initiative that was then called the *California Civil Rights Initiative,* also known as Proposition 209. It is an amendment to the California state constitution. It is important to remember that

states can always through their constitutions provide more rights than exist through the United States Constitution, they just can't provide less rights. Let me give you an example of this that we can all relate to. The United States Supreme Court has said that there is no right, under the First Amendment, to use privately owned shopping centers for speech purposes. But the California Supreme Court has said, under the California Constitution, there is a right to use privately owned shopping centers for speech purposes. Whether it is the strip mall across the street or the other large malls, here in California there is a right to use them for speech purposes because of the California Constitution, not because of the U.S. Constitution. A state can always protect more rights, not less.

The California Civil Rights Initiative says that even in instances where under the United States Constitution there can be affirmative action, under the California Constitution it will not be allowed. The specific language of Proposition 209 is important to know. It applies in regard to contracting, education, and employment. It applies to state and local governments here in California. Proposition 209 says there cannot be "discrimination" or "preference" on the basis of race or gender. Before we talk about what it means, and think about all the myths and realities surrounding it, it is important to just focus on what it says.

The first and most obvious thing it means is that there cannot be discrimination or preferences in admission or hiring by state universities here in California. We saw an immediate effect of this after Proposition 209 was adopted. If you look at five years immediately following Proposition 209, in 2001, and compare two leading private law schools in the state, University of Southern California and Stanford, the two leading public law schools in the state, UCLA and Berkeley, you see the real effect of Proposition 209. In 2001, five years after Proposition 209 was adopted, what you find is that at USC Law School over 11% of the law students were African American and at Stanford Law School you find that over 9% of law students were

African American. At Berkeley, though, only 3% of law students were African American and at UCLA Law School only about 2% of the law students were African American. It is a dramatic difference entirely tied to the effects of Proposition 209.

While I was teaching at USC, I would often fill in and teach a class at UCLA. I did this in the Spring of 2001. I was teaching an upper level course called Federal Courts and I had about a hundred second or third year students. When I would teach at UCLA the students would always say to me, "What's the difference between USC and UCLA?" My answer was, "There are almost no minority students here. We have a hundred students in this class and there are no black students and there are only a couple of students who are Latino." When I said that, a woman answered in response and said, "I've been in law school now three years and I'm about to graduate. I've yet to be in any class in my three years of law school with a black student in the room." This was UCLA Law School in 2001, in what we think of as the most diverse city in the country. You can look at statistics concerning graduate programs and see the effect of Proposition 209 in that regard.

A second thing that Proposition 209 means is that there cannot be specific programs available only for students of color. Likewise, there cannot be programs that would be available just on the basis of gender. For example, a university in California could not create a scholarship program just for African American students or a scholarship program just for women. There is no doubt that there would be a preference on the basis of race or gender, which would violate Proposition 209.

A third thing that Proposition 209 means is less obvious. There cannot be targeted outreach directed just on the basis of race or just on the basis of gender. A decade ago the California Supreme Court, which has decided very few cases concerning Proposition 209, decided *High Tech Voltage v. The City of San Jose*. It involved the city of San Jose requiring

that a certain number of positions, or subcontracts, went to minority-owned businesses and women-owned businesses. If they did not meet specified targets they had to show that they were making efforts such as targeted outreach for minority-owned business and women-owned businesses to contract with the city. The California Supreme Court, in an opinion by Justice Janice Rogers Brown, declared this to violate Proposition 209. She stated that if the outreach is targeted solely to racial minorities and women-owned businesses then it violates Proposition209, this should be regarded as a preference.

There is no doubt that proposition 209 has significant effects and imposes important limits on governance. But I also think that there is a lot of myths surrounding Proposition 209. People often exaggerate what it says.

First, I think, it is a myth to say that Proposition 209 precludes all consideration of race or gender as a factor. Proposition 209 does not require that colleges, in their hiring and their admissions, be completely race and gender blind. Proposition 209 could have been written that way. There are Justices on the Supreme Court who believe that equal protection requires that the government always be race- blind or always be gender-blind. But that is not what Proposition 209 says. I think it is obvious why it does not say that. There are certainly instances when the government has to take into account race and gender. Imagine that the local police force wants to infiltrate a gang that is defined on the basis of gender rather than the basis of race. Imagine it is an African-American gang or a Latino gang. Surely the police are going to be able to use race as factor in choosing the undercover agent that they send into that apartment. We would not want the government to be completely race blind. Imagine that the medical school is trying to do tests with regard to the effect of certain prescription drugs on different races. Obviously, we would not want to say that state medical school cannot consider race in that regard. There cannot be preferences or discrimination based on race or gender. But it does not say that this university

in its admissions decisions or this university in its hiring decisions has to be race or gender blind. A holistic approach to files is certainly permissible where all relevant considerations are examined so long as there is no preference on the basis of race or gender.

A second myth about Proposition 209 is that it precludes all surrogate factors from being considered. There are surrogates that can be used for race. Some have tried to use socioeconomic status as a surrogate for race. Whether diversity based on socioeconomic status is going to lead to racial diversity is going to depend very much on context. UCLA Law School tried very much to use socioeconomic status instead of race in admissions and found it did not achieve racial diversity. The percentage of African Americans who are poor is greater than the percentage of whites who are poor, but there are more in number of poor whites than poor African Americans. Just using socioeconomic status did not engender racial diversity. There are other programs that use surrogates to achieve diversity. For example, the University of Texas-Austin takes the top 10% of high schools throughout the state with the goal of achieving racial diversity. It's not perfect, but it certainly does provide a surrogate, geography, that achieves some diversity. The law schools here in California have improved in the last decade with regards to diversity. In part it is because they look at files holistically. They don't exclude consideration of race and have found surrogate factors that can work. There is nothing in Proposition 209 that prevents that.

A third myth is that Proposition 209 precludes aggressive recruitment of women and minorities. That is not the case. The *High Tech Voltage* case says there can't be recruitment directed just towards women and minorities. It doesn't mean that there cannot be aggressive recruitment that includes women and minorities. For example, it is completely acceptable for graduate programs and professional programs, here in California, to reach out to the historically black colleges or local state colleges with a significant number of Latino students and

aggressively recruit there. If this was the only recruitment, that would be a problem. But as long as it is part of an aggressive recruiting program that is not designed entirely on the basis of race, there is nothing in Proposition 209 that prevents that.

A fourth myth is that Proposition 209 limits what private actors can do. Proposition 209 applies only to the State of California, its agencies, and local governments. Nothing in Proposition 209 limits what private actors can do. Let me give you an example in terms of scholarship programs. The University of California cannot create a scholarship program just for African-American students or just for Latino students. There is nothing to prevent a private donor from creating a scholarship program that is just for African American students or just for Latino students. So long as it is the private donor that is awarding the money, it is clearly permissible.

A fifth and final myth that I will identify with regard to Proposition 209 is that there is a great likelihood that there will be lawsuits for violation of Proposition 209. I went on to Westlaw®, which is a leading computerized legal research service and I decided to look for every appellate case here in California and California Supreme Court about Proposition 209. Proposition 209 is now 15 years old and I can count on less than the fingers of one hand the number of decisions that have come down finding things unconstitutional and violating Proposition 209. I, of course, am not saying this to encourage anyone to violate the law. But I think there's been enormous premature capitulation as people have refrained from diversity activities that very well may be permissible or at worse questionable until the courts say otherwise. And so as this university decides to recruit to graduate programs and professional schools, it's important to remember how unlikely it is they'll get sued. I've always said to my assistant dean of admissions, "I expect that there will be a lawsuit against the University of California, Irvine , School of Law, with regard to Proposition 209." I was a very outspoken

advocate against Proposition 209, so I am sure that those who support it would target our law school in particular. On the other hand I think so long as we do not discriminate or use racial preference, we can continue to pursue diversity

Finally, what is the future likely to bring? Let me give you one glimmer of hope and one great ominous cloud on the horizon. The glimmer of hope is that earlier this year the United States Court of Appeals for the Sixth Circuit declared unconstitutional the State of Michigan's version of Proposition 209. A few years ago the voters in Michigan adopted an initiative with almost identical language of our California Proposition 209. It shouldn't be surprising that it is almost identical language. Afterall, Ward Connerly, who was a key supporter of Proposition 209 has tried to export that language to a number of states. In some states, such as Michigan, initiatives have passed, and in others, they have been rejected. As soon as Michigan passed its version of 209, a lawsuit was filed claiming that it was unconstitutional. The argument was that it discriminates against minorities. The argument is that it is inherently discriminatory to allow consideration of all factors in somebody's application, with the exception of race. This argument was tried in a challenge to Proposition 209 that failed in the federal court of appeals here, but it succeeded in the federal court of appeals that covers Michigan. About two weeks ago, the Sixth Circuit decided to re-hear the issue and even if it survives the Sixth Circuit it will have to go on to the Supreme Court. The fact that one federal court of appeals has declared an initiative identical to Proposition 209 unconstitutional provides a glimmer of hope. If this can survive the Supreme Court, then Proposition 209 could be struck down, as well.

The ominous cloud on the horizon is a matter pending right now on the Supreme Court's docket. The court has not yet granted a review, but seems almost sure to do so. It's a case called *Fisher v. The Univeristy of Texas at Austin*. It involves the University of Texas at Austin considering race as one factor in admissions decisions as a way to benefit minorities, but it also

considers the Texas plan of taking that top ten percent of high schools as a way of achieving diversity. In January 2011, the United States Court of Appeals for the Fifth Circuit upheld this as constitutional. Two of the three judges on the panel said that they believe that the Supreme Court should take the case and use it as a vehicle for overturning *Grutter v. Bollinger*. In June 2011, the entire set of judges on that court, by a nine to seven vote, refused to hear the case. One of the most conservative judges in the country, Judge Edith Jones dissented and said that the Supreme Court should take this case and overrule *Grutter v. Bollinger*.

I previously pointed out that *Grutter*, in June of 2003, was 5-4 with Justice Sandra Day O'Connor writing for the Court. Justice O'Connor is no longer on the Supreme Court. She was replaced by Justice Samuel Alito. There is absolutely no doubt that he will view this issue differently. In fact, in June of 2007, in a case called *Parents Involved in Community Schools v. Seattle Schools Number 1*, Justice Alito joined an opinion joined by Chief Justice Roberts and joined by Justices Scalia and Thomas saying that the Constitution requires that the government be color blind. Obviously if the government has to be color blind, that goes even much further than Proposition 209. The Supreme Court has a petition for review pending on this case right now. If the Supreme Court grants review, and I feel confident they will, there are four votes to overturn *Grutter v. Bollinger* and say that color blindness is a requirement of the United States Constitution. That would be Roberts, Scalia, Thomas, and Alito. That then pins all hope for the survival of affirmative action on Anthony Kennedy. Anthony Kennedy joined the Supreme Court in 1987. In the 24 years he has been a justice, he has never once voted to uphold any affirmative action program. In fact in *Grutter v. Bollinger*, he was among the dissenters. It is possible then that there will be five votes to overrule *Grutter*. I think that the best we can hope for is that there will be five votes to keep it, but limit the ways that colleges and universities use race as a factor, but not completely eliminate their ability to do so.

I think we will know soon whether the Supreme Court in going to take *Fisher.* You might think this only applies to public colleges and universities, such as UC Irvine. However, the Supreme Court there stated that Title VI of the 1964 *Civil Rights Act* applies to all institutions that receive federal funds and the same standards that apply to private colleges and universities applied through Title VI are applied to government institutions under the Constitution. The Supreme Court reiterated that in *Gratz V. Bollinger* in 2003. Whatever the United States Supreme Court decides, if it takes *Fisher v. the University of Texas Austin,* the decision will apply not to just to public colleges and universities, but private ones as well. If the Supreme Court goes so far as to say that the Constitution requires color blindness, that really will be the end of all efforts of diversity in the United States by colleges and universities. The only hope is that Justice Kennedy won't go that far and will still allow race to be considered at least as one factor among many in admissions decisions.

You might have seen yesterday in the *Washington* that they dedicated a new monument to Dr. Martin Luther King, Jr. It is stunning that we stand here today in 2011, so many years after his assassination, on April 4, 1968, and still have the reality of tremendous underrepresentation, particularly of African Americans and Latinos in colleges and universities, and graduate and professional programs. As I said in my introduction, it is truly a "*shanda"*.