

1-1-2003

## The Evolution of Equality in American Law

Gerald Torres

Follow this and additional works at: [https://repository.uchastings.edu/hastings\\_constitutional\\_law\\_quarterly](https://repository.uchastings.edu/hastings_constitutional_law_quarterly)



Part of the [Constitutional Law Commons](#)

---

### Recommended Citation

Gerald Torres, *The Evolution of Equality in American Law*, 31 HASTINGS CONST. L.Q. 613 (2003).  
Available at: [https://repository.uchastings.edu/hastings\\_constitutional\\_law\\_quarterly/vol31/iss1/4](https://repository.uchastings.edu/hastings_constitutional_law_quarterly/vol31/iss1/4)

This Comment is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Constitutional Law Quarterly by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact [wangangela@uchastings.edu](mailto:wangangela@uchastings.edu).

# The 2003 Tobriner Lecture

## The Evolution of Equality in American Law

by GERALD TORRES\*

I appreciate that the title of this lecture is somewhat grandiose. It was inspired by the prospect of having to comment on the *Grutter* and *Gratz* decisions<sup>1</sup> before I knew what the results would be. As should be obvious on a moment's reflection, there is no way that a single lecture or a single book could capture the evolution of equality in American law because, even in its presumption that there is a single phenomenon that is being surveyed or analyzed, it is wrong. What is more is that it was unlikely that the idea of equality would get other than a provisional accounting in whatever the Court did in the Michigan cases. Instead, the Justices would be responding to a congeries of impulses hemmed in by doctrine and pushed by the empirical reality of the American society and legal culture for which they claim to speak.

The dynamic forces that shape the law are internal to both the doctrinal and procedural structure of the law as well as external to the law. The forces are internal in the sense that they are relatively autonomous phenomena within the structure of legal analysis, and so to treat the topic of equality in that way would require careful attention to the doctrinal development across various substantive areas. Moreover, it would have to explain that development in terms of the logic that is implicit as well as explicit in the doctrine. Of course, while doctrinal development has a logic derived from rule and fact, it also has a logic derived from the structure and relationships

---

\* H.O. Head Centennial Professor of Real Property Law, University of Texas at Austin. Many of the themes in this lecture remain to be more fully developed.

1. *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Gratz v. Bollinger*, 539 U.S. 244 (2003).

that are constitutive of the particular area.

The forces are external to the extent that the law reflects, but does not determine, the normative commitments that animate our culture and society.<sup>2</sup> As society and culture evolve, so must the law. Thus any consideration of the evolution of the idea of equality in American law is obliged necessarily to engage the cross currents in American life to which the law has responded. Yet, because law is also a relatively autonomous discipline there is never a pure legal correlative to the changes in social life. The law is not some sort of device for the universal translation of present felt necessities into policy. Law contains the congealed imperatives of the past that live on as precedent or tradition.<sup>3</sup> This characteristic of law acts as a brake on precipitous social change either for good or for ill. Yet, slavish devotion to conceptual purity as a methodological imperative also enforces various kinds of blindness. The partiality of legal doctrine, both in the sense that it is incomplete and biased, is part of its definitional structure.<sup>4</sup>

Let's start with the basic idea of equality that seems to be the cornerstone of legal reasoning and the source of much confusion. It is simply stated: likes should be treated alike. This formal idea of equality is said to be traceable to Aristotle. By focusing on identity as the sine qua non of equality it shifts the discussion immediately to what it means to say X is like Y.<sup>5</sup> Once shifted to that ground, then the question of equality becomes the question that underlies all of

---

2. This is, of course, a paraphrase of Grant Gilmore (who was himself paraphrasing Holmes). "Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed." See, Gilmore, *The Ages of American Law* 110 (1977). I remember hearing those words at Professor Gilmore's Storr's Lectures on Jurisprudence when I was in my first semester of law school. They were, upon my hearing them, etched indelibly in my memory.

3. See, Carol J. Greenhouse, *Just in Time: Temporality and the Cultural Legitimation of Law*, 98 *Yale L. J.* 1631 (1989) ("temporality and legality are conceptually fused in the West through their mutual implication of a total order in relation to which social life acquires meaning.")

4. See, Catharine MacKinnon, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION*. (1979). (See, especially chapter one).

5. See, e.g. Peter Westen, *The Empty Idea of Equality*, 95 *Harv. L. Rev.* 537 (1982).

law: On what basis may we make the distinction between X and Y such that any difference in treatment is justified? How is any legal categorization justified? If X is like Y in all meaningful ways, it is logically unsupportable to maintain any disparity in treatment before the law.<sup>6</sup> It is just this point that prompted the criticism Herbert Wechsler launched at the Supreme Court's decisions in *Brown v. Bd. of Education*.<sup>7</sup> How, Wechsler asked, could the Court prefer the rights of association of African Americans over the rights of association of whites?<sup>8</sup> In this case, the rights of X were identical to Y and the constitutional command of equality required that they be treated alike. Thus, the segregation decisions were unlawful because they offended against that most basic idea in law. Worse, the unlawfulness of the decision risked the currency of the Court by undermining public faith in its neutrality.

In a towering rebuke to Professor Wechsler, Charles Black began with the observation that if the cases were wrongly decided, that is, if they were "unlawful," then dominant professional opinion would finally result in their undoing.<sup>9</sup> The institutions of law (and certainly the elites within them) could not permit a patently unlawful decision to stand because its illegitimacy would be too destabilizing. This would not be a question of the Court merely being out of step with popular opinion, but of their rejecting their fundamental obligations. With this background of faith in the institutions of law, but because he could not be blind to the limitations of law, Professor Black begins not in the abstract ether of "rights of association," but with a concrete question: "does segregation offend against equality?"<sup>10</sup> Professor Black admits that equality as a general concept presents some philosophical difficulties at the margins, but then suggests that the segregation decisions do not present that kind of difficulty. He observes:

---

6. In many ways this is the heart of the under-inclusive/over-inclusive dichotomy proposed in the seminal article by Joseph Tussman and Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341 (1949).

7. 347 U.S. 483 (1954)

8. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

9. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 Yale L. J. 421 (1960).

10. *Id.* 424.

But if a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated “equally,” I think we ought to exercise one of the sovereign prerogatives of philosophers – that of laughter. The only question remaining (after we get our laughter under control) is whether the segregation system answers to this description.

Here, I must confess to a tendency to start laughing all over again. I was raised in the South, in a Texas city where the pattern of segregation was firmly fixed. I am sure it never occurred to anyone, white or colored, to question its meaning. The fiction of “equality” is just about on the level with the fiction of “finding” in the action of trover.<sup>11</sup>

But what of the reading of the Fourteenth Amendment that the Supreme Court provided in *The Slaughterhouse Cases*?<sup>12</sup> Professor Black ably dispatches the crabbed and disingenuous mess that makes up that opinion.<sup>13</sup> He argues persuasively that the Justices have it almost exactly backwards and, like Professor Wechsler, turn a blind eye to the facts upon which the law is built. But if the law as expressed in opinions of the Supreme Court is not just the routine of some stylized ventriloquist’s dummy, aren’t we confined to the internal logic of precedent? Is Professor Black arguing that we can reject doctrine merely because it does not comport with what we, who are external to the case, think the facts are? Remember that at the time of Professor Wechsler’s article sound professional opinion was with him. Among a great number of the elite as well as the bar generally, Wechsler’s argument was not considered unreasonable or a mere apology for an inhumane system of racial subordination.

Fifteen years after the article was published, my classmates and I were called upon in Constitutional Law class to puzzle through the challenge posed by “Neutral Principles.” I remember being confounded because it seemed to me that the logic of Professor Black (though we were not assigned his essay, it was not unknown to us) had the better of the argument. If fact, only by being willfully blind could the arguments against *Brown* raised by Professor Wechsler be

---

11. *Id.* 424.

12. 83 U.S. (16 Wall.) 36 (1873).

13. Charles Black, *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* (1997).

understood as principled.

If Professor Black's article was not enough to convince the reader that Professor Wechsler's essay was, perhaps, well suited for the armchair in a private club if not the hot streets of the American South, Professor Deutsch persuasively demonstrated this in his article, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*.<sup>14</sup> There he shows that the goals that Wechsler was trying to achieve with his appeal to neutrality were doomed to failure because of the institutional function of the Supreme Court. Context mattered. I remember thinking as I sat there in Constitutional Law class that the puzzle posed by Professor Wechsler could not be that difficult. The problem was that he was asking the wrong question. What Professors Black and Deutsch demonstrated was that the institutional task of constitutional adjudication was not reducible to a single abstract question. As the philosopher G. E. Moore put it in a different context, "they (philosophers) are constantly endeavoring to prove that 'Yes' or 'No' will answer the question, to which *neither* answer is correct, owing to the fact that what they have before their minds is not one question, but several, to some of which the true answer is 'No,' to others, 'Yes.'"<sup>15</sup> Professor Wechsler could be right only if we were to concede that his single abstract characterization of the issue at stake represented the whole of the dispute to be settled by the Supreme Court. But judges commonly know what Monday morning quarterbacks do not, that the issues are often more complex, that an issue or the composite of them is composed of more parts involving more dynamics than the dry legal statement of them.<sup>16</sup> One of the successes of common law judging (even in constitutional cases) is that the flexibility to construct law that comports with reason requires an exquisite sensitivity to the ways in which life and law interact. This implies an acute understanding of the ways that institutions evolve and function to structure social life, even as the law runs after them plaintively asserting its priority.

Here I want to turn away from the large questions of equality in constitutional adjudication and focus for a bit on the question of

---

14. 20 Stan. L. Rev. 169 (1969).

15. G. E. Moore, *Principia Ethica* vii (1903).

16. See discussion of rules and precedent in Gerald Torres and Kathryn Milun, *Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case*, 1990 Duke L. J. 625 (1990).

adjudication itself.<sup>17</sup> The mischaracterization of the task before judges was as much at the heart of Professor Black and Professor Deutsch's criticism as was their substantive disagreement with Professor Wechsler's reading of the segregation decisions. It is in this process of lawmaking, that is, reconciling law and life within the argumentative constraints of legal reasoning, that the talent of judging is most evident. A classic example of this that every first-year law student encounters (assuming the case is not too savagely edited) is *Javins v. First National Realty Corporation*.<sup>18</sup> There are many other examples that teach the skills of legal reasoning that is at the heart of our common law system.<sup>19</sup> The jurist in whose honor this lecture is named was also one of those masters of the legal reasoning that was rooted in producing a system of justice that took law on its own terms and saw freedom rather than limitations.

The genius of Justice Tobriner was his skill at using the techniques of common law judging to move the law in a way that permitted it to be consonant with the underlying facts of social life. As the arc of the law bent towards equality he recognized that this would have an impact on all of the law. Contracts were no exception. Justice, fairness, and equality before the law were all of a piece. So we get *Steven v. Fidelity & Cas. Co. of New York*.<sup>20</sup> Here the question was relatively straightforward: should the beneficiary of a flight insurance contract be able to collect on the policy when the facts that led to the accidental death of the policyholder were, arguably, excluded by the contract? The flight insurance was purchased at a vending machine in the airport and covered travel on regularly scheduled flights. Before the Mr. Steven's trip could be completed he encountered flight difficulty and a leg of his return flight was cancelled. Because he was eager to make a connecting flight in order to return home, the airline arranged an air-taxi to take Mr. Steven and two others to Chicago where they could make their connections.

---

17. Of course, the short hand description that I have given here does not begin to be adequate to even outline the modalities of constitutional interpretation within constitutional adjudication. For a brilliant and elegant discussion see, Philip Chase Bobbitt, *CONSTITUTIONAL INTERPRETATION* (1991).

18. 428 F.2d 1071 (C.A.D.C. 1970) (Establishing an implied warranty of habitability as a defense to an action for rent.)

19. Legal historian Morton Horwitz demonstrates this point in his seminal book, *The Transformation of American Law, 1780-1860* (1977).

20. *Steven v. Fidelity & Cas. Co. of New York*, 58 Cal.2d 862, 377 P.2d 284, 27 Cal.Rptr. 172 (Cal. 1962).

Fate intervened, the plane crashed and Mr. Steven was killed. The insurance company refused to pay on the contract because the crash occurred on a substituted segment that was not part of a regularly scheduled flight. The rote application of contract principle might have led Justice Tobriner to resolve the case simply in favor of the insurance company.

Instead, Justice Tobriner asked whether the contract contemplated covering substituted transportation. The language of the contract on this point was unclear, but it seemed to be covered by the language excluding coverage for non-scheduled flights. That would seem to have settled the matter, but instead Justice Tobriner began with an assessment of what the reasonable expectations of the parties might have been. Because the principles he was being asked to apply covered a different category of transactions, they might not be and could not be reasonably applied to the purchasing of a machine- issued flight insurance policy. The key to his analysis was his willingness to see beyond the abstract categories of the parties and instead to look to the fundamental nature of the transaction. The expectations that ought to be enforced should be those that comport with the social positions occupied by the parties, which were reflected in the context within which the transaction occurred.

Once Justice Tobriner made that critical move it became clear that the insurance company could not disclaim liability merely by taking shelter in a doctrine confected out of language that would be literally invisible to the purchaser.<sup>21</sup> Yet even if Mr. Steven had the opportunity to read and digest the policy, Justice Tobriner reasoned that the exclusion would not apply to this case. Even admitting that the substituted transportation was not part of a “regularly scheduled” flight, it was, by virtue of arrangements made by the airline, part of a regularly scheduled flight. At a minimum it represented an accommodation that might reasonably be made by the airline in satisfaction of their obligation to provide a round trip.

Since there was nothing out of the ordinary, except perhaps an extraordinary expression of a commitment to customer service, the substituted transportation would have to be understood as part of the trip that was covered by the vending-machine insurance policy. This was perhaps especially true because the substituted transportation did

---

21. The clause limiting liability was still in the machine and thus could not have been read by Mr. Steven even if he had wanted to and if he had been able to understand the import of the language. *Steven v. Fidelity & Cas. Co. of New York*, 58 Cal.2d 862, 877; 377 P.2d 284 294; 27 Cal.Rptr. 172, 182 (Cal. 1962).

not increase the risk borne by the insurance company. Thus, in solving the puzzle of the applicability of one verbal formulation or another, Justice Tobriner resisted resorting to easy conclusions and focused on the underlying policy for which the formulations acted as mere synecdoche. This is most plainly seen in Justice Tobriner's own words. Thus you might excuse the lengthy quotation:

The rule of resolving ambiguities against the insurer does not serve as a mere tie-breaker; it rests upon fundamental considerations of policy. In view of the somewhat fictional nature of intent in standardized contracts, the considerations which support the rule that ambiguities in the policy are to be interpreted against the insurer are more compelling than those which prompt the application of the mechanical *expressio unius maxim*. We do not believe the maxim should serve to defeat the basic rule that the insurance contract should be interpreted against the draftsman.

In any event, the maxim of *expressio unius*, which is surely a legalistic concept, hardly enters into the thinking of the reasonable layman. As we have stated, we interpret an insurance contract in the light of that understanding. We could not logically conclude that when Mr. Steven, unversed in legal abstractions, boarded the Turner plane at Terre Haute, he invoked this maxim of interpretation.<sup>22</sup>

\*\*\*\*

In standardized contracts, such as the instant one, which are made by parties of unequal bargaining strength, the California courts have long been disinclined to effectuate clauses of limitation of liability which are unclear, unexpected, inconspicuous or unconscionable. The attitude of the courts has been manifested in many areas of contract.<sup>23</sup>

\*\*\*\*

The task of the judiciary is to administer the spirit as well as the letter of the law. On issues such as the present one, part of that burden is to protect the ordinary man against the loss of important rights through what, in effect, is the unilateral act of the manufacturer. \* \* \* From the standpoint of the purchaser, there can be no arms length negotiating on the subject. Because his capacity for bargaining is too grossly unequal, the

---

22 *Steven v. Fidelity & Cas. Co. of New York*, 58 Cal.2d 862, 871; 377 P.2d 284, 290; 27 Cal.Rptr. 172 178 (Cal. 1962).

23. *Steven v. Fidelity & Cas. Co. of New York*, 58 Cal.2d 862, 879; 377 P.2d 284, 295; 27 Cal.Rptr. 172 183 (Cal. 1962).

inexorable conclusion which follows is that he is not permitted to bargain at all. \* \* \* 'Basically, the reason a contracting party offering services of a public or quasi-public nature has been held to the requirements of fair dealing, and, when it attempts to limit its liability, of securing the understanding consent of the patron or consumer, is because members of the public generally have no other means of fulfilling the specific need represented by the contract. \* \* \*'<sup>24</sup>

This opinion was a signal event in the evolution of mass commercial relations in California. Yet it was Justice Tobriner doing no more than was suggested by Professor Black in his evaluation of the segregation opinions and in his critique of *The Slaughterhouse Cases*. Justice Tobriner did for contracts what Judge Wright did for urban residential landlord-tenant relations. But what about other issues of the day? I began by suggesting that the impending decisions in *Grutter* and *Gratz* were the reason for the topic of this lecture.<sup>25</sup> But before these cases there was *Bakke*.<sup>26</sup>

Virtually everyone remembers this tortured Supreme Court case and the diversity rationale proposed by Justice Powell that was ultimately upheld by the Court in the Michigan cases. In his critical and decisive opinion Justice Powell was persuaded that "the atmosphere of 'speculation, experiment, and creation' – so essential to the quality of higher education – is widely believed to be promoted by a diverse student body."<sup>27</sup> Almost none of the commentators, however, reflect on the dissent by Justice Tobriner in the preceding California Supreme Court decision.<sup>28</sup> All of the virtues that were on display in the *Steven* case were also evident in this dissent. More than just an expression of technical virtuosity, however, the dissent was also an example of Justice Tobriner's profound breadth of historical vision and moral courage. I want to be clear here that what I mean by moral courage is not the simple and cheap sentiment that confuses

---

24. *Steven v. Fidelity & Cas. Co. of New York*, 58 Cal.2d 862, 883; 377 P.2d 284, 297; 27 Cal.Rptr. 172 185 (Cal. 1962). (Internal quotations omitted.)

25. *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Gratz v. Bollinger*, 539 U.S. 244 (2003).

26. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

27. *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978).

28. *Bakke v. Regents of the University of California*, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (Ca. 1976) (Tobriner, J. dissenting at 18 Cal. 3d 34, 64, 553 P.2d 1152, 1172, 132 Cal. Rptr. 680, 700 (Ca. 1976)).

moral argument with legal argument, and I am not attributing to his dissent virtues that are born out of my agreement with the preferences that Justice Tobriner would write into the text of the Constitution. Professor Bobbitt makes this point this way: “there is no warrant to read the moral preferences of judges – or anyone else – into the constitutional decisions of governments no matter how pleasing this might sometimes be.”<sup>29</sup> By moral courage, I am suggesting that what Justice Tobriner did in his dissent was to ask what the constitution permitted (and perhaps required in some instances) and whether there was constitutional justification for the governmental decision that the Regents took. Finding that there was justification, he could have ended his inquiry there. He extends his dissent because he challenges the majority, and asserts through legal argument that they are doing exactly what Professor Bobbitt suggests they have no warrant to do.

While he would, undoubtedly, have gone further than the Court did in the Michigan cases, Justice Tobriner anticipated much of the analysis. In evaluating the use of predictors, he presciently notes that concern with admission criteria occasioned by race-conscious affirmative action is likely to raise deeper concerns about the use of such predictors generally.

Indeed, the medical school's decision to deemphasize MCAT scores and grade point averages for minorities is especially reasonable and invulnerable to constitutional challenge in light of numerous empirical studies which reveal that, among qualified applicants, such academic credentials bear no significant correlation to an individual's eventual achievement in the medical profession. The finding of these studies are not surprising when one considers all of the nonacademic qualities – energy, compassion, empathy, dedication, dexterity, and the like – which make for a 'successful' physician. As medical school admissions officials themselves acknowledge, these studies raise questions of the most serious order as to the propriety of the continuing use of traditional admission criteria.

While such empirical data might well have justified a revamping of the school's admission policies for *all* applicants, the medical school cannot be said to have acted unreasonably or unconstitutionally in deciding, perhaps as a first step, to decrease its

---

29. Philip Bobbitt, Foreword to Charles Black, *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* xiv (1997).

reliance on the traditional criteria with respect to applications from disadvantaged minorities, who as a group had been so disproportionately excluded by such criteria.<sup>30</sup>

In this he suggests that the majority was asking the wrong question and making the same mistake that Professor Wechsler made in his criticism of the *Brown* opinion. The majority mistakes abstract categories for the history of race relations in California. This mistake leads them to ask the wrong question. It is impossible to get the right answer if there is confusion about what the question to be answered is.

In any event, however, limitations on the government's authority to compel the use of benign racial classification are entirely beside the point. Our question here is not whether the Davis medical school can constitutionally be compelled to establish benign racial classifications to remedy the exclusionary result of its past admission policies, but rather whether the Constitution forbids the medical school from taking such remedial action on its own.<sup>31</sup>

Once again Justice Tobriner illustrated the imaginative capacity is integral to the process of adjudication. This is perhaps especially true in constitutional adjudication. There, legal reasoning is best characterized by creative attention to text, structure and history. In this way, evolving doctrinal categories can be the places where we square deep conflicts over the social contract that binds us together and begin to heal the ragged edges of fundamental disagreements. The important thing about Justice Tobriner's dissent is that he did not mistake racial inequality as a "residual individual problem." Moreover, he knew that a failure to confront its continuing manifestations would prevent systemic injustices from being addressed and would cripple the capacity for constitutional democratic institutions to permit the kind of action that would build on the best in our traditions that are rooted, despite all, in an

---

30. *Bakke v. Regents of the University of California*, 18 Cal. 3d 34, 84-85, 553 P.2d 1152, 1187, 132 Cal. Rptr. 680, 715 (Ca. 1976) (Tobriner, J. dissenting, footnotes omitted, emphasis added).

31. *Bakke v. Regents of the University of California*, 18 Cal. 3d 34, 78, 553 P.2d 1152, 1182, 132 Cal. Rptr. 680, 710 (Ca. 1976) (Tobriner, J. dissenting).

optimistic vision of the future.<sup>32</sup>

That optimism is, of course, part of the American character, but it should not be mistaken for uncritical belief in progress. Instead, it is a belief in the capacity for democratic institutions to provide the structure and space for a more just future to be built, and for real conflicts about the nature of the good to be fought out in ways that preserve the capacity for social cohesion. So where does this leave us with *Grutter* and *Gratz*? In Texas our response to the blow that was *Hopwood*<sup>33</sup> was to fashion what came to be called the 10-percent plan. *Hopwood*, you will recall, banned all race-conscious affirmative action in university admissions and flatly rejected Powell's opinion in *Bakke*. We are grateful that the Supreme Court repudiated the crabbed reading of the commands of the equal protection clause adopted by the 5<sup>th</sup> Circuit, yet the bracing effect of the ruling while it remained the law led us to examine our goals and the means we had adopted to achieve those ends. The 10-percent plan guaranteed admission to the flagship state university campuses to all high school graduates who graduated in the top 10 percent of their class. While we were conscious that over-reliance on any single admissions indicator was probably not a good idea, the house was on fire and we grabbed a bucket. Yet despite its limitations it gave us insight into how we had gotten lazy by an over-reliance on other predictors. We had failed to see those students who could take advantage of a university level education because of our reliance on a limited set of tools that only gave us a particular kind of knowledge. This is the insight Justice Tobriner noted a generation ago.

The knowledge we gained during our time in the wilderness has proven useful even as we now contemplate reincorporating the kind of race-consciousness permitted by the Michigan decisions. We have learned that predictors of success are complex and the kind of individualized admission process contemplated by the Court in *Grutter* and *Gratz* will yield a truly diverse class.<sup>34</sup> Yet the challenge

---

32. See the discussion of colorblindness in Lani Guinier and Gerald Torres, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 32-66 (2002).

33. *Hopwood v. University of Texas*, 78 F.3d 932 (5<sup>th</sup> Cir. 1996).

34. For an example of what we have learned go to the University of Texas website and look at the research undertaken by the admissions office. We were blessed to have been led by a President who remained committed to serving the entire state even during the immense pressure of the *Hopwood* years and by having Bruce Walker in charge of the Admissions Office.

of the Michigan cases was revealed in a recent study undertaken by the Admission Office at the University of Texas. In a study of classroom diversity the investigators discovered that the bulk of classes offered each semester at the University of Texas had one or fewer minority students.<sup>35</sup> If claims for diversity are rooted in its contribution to the educational process, then critical mass becomes the central idea in the Michigan cases. Viewed through the lens of educational goals we have much more to do to ensure a diverse learning environment. The struggle over that idea has yet to be joined. In many ways, it has yet to be understood as the grounds on which educational reform will be contested. Professor Guinier reminds us that there is no public sphere that is free from politics. Law can mediate or pacify, but it does not eliminate the need to understand the structure of the politics that surround resource decisions, whether those decisions are public or private. Reading race will help us understand what is at stake and what within our institutions is dysfunctional. Importantly, learning to use the diagnostic insights that race provides allow us to see where we are all at risk. As Professor Guinier notes:

Race, \*\*\* reveals rather than produces the stress on institutional resources that undermines the connection between education and democracy, a connection that the Court in *Grutter* and *Gratz* recognized as essential. Because race is inextricably intertwined with every period in American history, from our founding as a constitutional democracy to current patterns of private wealth formation, it is a formidable diagnostic and sociological tool. Used as a lens to peer beyond the pretense of the debate, race helps detect the deeper issues confronting public institutions of higher education.

\*\*\*

Race is the thin but highly visible edge of the wedge at the intersection of the value and scarcity of educational opportunity. \*\*\* Flawed formulations of merit have failed to allocate scarce educational opportunities in a manner that is consistent with democratic values.<sup>36</sup>

By understanding the complex role that race has played in

---

35. <http://www.utexas.edu/student/admissions/research/ClassroomDiversity96-03.pdf>

36 Lani Guinier, *Admission Rituals as Political Acts*, 117 Harv. L. Rev. 113, 120-121 (2003). (footnotes omitted)

allowing us to see how our vision of equality has evolved, we can better trace how our political and legal institutions function to serve the complex goal of equality. By retreating from a simplistic idea of equality as identity, we can begin to appreciate its complex nature and ask the right questions about its connection to our ideas of justice and the connection of our ideas of justice to our ideas of democracy. We will see that the evolution of our idea of equality traces the evolution of our idea of who we are.