As we await the Supreme Court’s decision on *Fisher v University of Texas*, the strikingly familiar affirmative action case involving yet another flagship public university, we have a sense, as Earl Lewis and I recently wrote and Yogi Berra famously stated, that it’s “déjà vu, all over again.”

As Justice Stephen Breyer observed even more recently, during oral arguments in Fisher on October 10, “Grutter said it would be good law for at least 25 years, and I know that time flies, but I think only nine of those years have passed.”

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1 Invited keynote address given at The Supreme Court and Affirmative Action in the 21st Century: Michigan, Texas and Beyond, a conference at the University of Michigan, October 18, 2012.
4 Official transcript of oral arguments in *Abigail Noel Fisher v University of Texas at Austin, et. al.*, U. S. Supreme Court (2012, October 10) (No. 11-345), 8
Déjà Vu All Over Again: The Compelling Interest of Diversity in Higher Education

A serious threat to the nation’s future—the risk of leaving behind an ever-growing proportion of the nation’s talent pool—has reappeared just as colleges and universities are working harder than ever to span our divisive and divided social landscape and train the next generation of citizens and leaders. If we are to ensure prosperity and social justice, our efforts to maintain and strengthen the “fabric of our society” must continue and must succeed.

Although Abigail Fisher’s lawyer Bert W. Rein told the court explicitly he did not want to overturn Grutter, many of us share the concern expressed by Justice Sonia Sotomayor, who told Rein, “So you don’t want to overrule Grutter, you just want to gut it.”

At the hearing, Justice Ruth Bader Ginsburg characterized the affirmative action program at Texas as “certainly no more aggressive than the one in Grutter; it’s more—in fact, more modest.” But the court’s conservative Justices seemed to focus on larger questions with deep implications for all of higher education: How much diversity is enough? How can a university tell it has achieved the “critical mass” described in Grutter? And how long will it take before universities can ignore considerations of race?

Earlier this year, responding to the challenges raised by Fisher, the Center for Institutional and Social Change at Columbia University Law School asked several of us to join with the National League of Cities, in an amicus brief to make the larger argument for affirmative action, one that was also emphasized by U.S. Solicitor General Donald B. Verrilli Jr. on behalf of the Obama administration during oral arguments. And the crux is this: that our nation simply cannot fix the tough public problems of our metropolitan communities—home to more than 80 percent of our population—without “a racially diverse leadership with the legitimacy and skills of the kind that the Grutter Court recognized as necessary.” Our task, according to Justice O’Connor, is to educate “a set of leaders with legitimacy in the eyes of the citizenry.”

And the urgency of this task could not have been drawn more starkly than by the distinguished retired military generals who reminded the Court of the bitter lessons of Vietnam, where a largely white officer corps attempted to lead an enlisted force composed mostly of

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5 Id., 81.
6 Id., 10.
7 Brief for Center for Institutional and Social Change at Columbia Law School on behalf of the National League of Cities, Campus Compact, Imagining America, Anchor Institutions Task Force, Transformative Leadership Working Group, Center for Democracy and Citizenship, Chancellor Nancy Cantor, Superintendent Sharon Contreras, President Freeman Hrabowski, President Scott Cowen, CEO Nolan Rollins, Chancellor James Dworkin, Superintendent Glade Montgomery, President Thomas Rochon, Superintendent Luvelle Brown, President James T. Harris, Superintendent Cheryl Cunningham as Amici Curiae Supporting Respondents, Abigail Noel Fisher v University of Texas at Austin, et. al., U. S. Supreme Court (2012) (No. 11-345).
soldiers of color, producing a vacuum in legitimacy that hampered the military and caused concern for our ongoing national security. The remedy, they said, was diverse leadership.  

This argument, as Earl and I noted in our opinion piece, was particularly compelling because it came less than two years after 9/11, in a nation “deeply drained by old wars in Iraq and new engagements in Afghanistan and fearful of global terrorism” at every turn. And it is just as compelling today, nearly a decade later, as we face not only the mounting toll of wars and terrorism, but the additional carnage of an economic war with all the social divisions and disparities it has wrought.

As 59 of the nation’s most powerful corporations said in an amicus brief supporting the University of Texas,¹⁰ we cannot lead in a global knowledge economy, one largely driven by entrepreneurship and innovation in science and technology, without the full participation of our increasingly diverse next generation of talent. Diversity means better science, more innovation, and healthier communities.¹¹ In higher education, it’s not something extra on the plate—diversity is the plate.¹² We must redouble our efforts to structure full participation because we’re losing the talent war by leaps and bounds, and it’s a battle our nation can’t afford to lose.

Today, I’ve been asked to outline the argument in our amicus brief in Fisher for the compelling interest of affirmative action in the 21st century. To do that, let me begin where we left off with Grutter, where the Court drew on prior decisions, including Justice Powell’s opinion in Bakke, that “nothing less than ‘the nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.”¹³ It also drew on powerful social science evidence showing the need to prepare students for “the skills needed in today’s increasingly global marketplace,” and the ability to work in racially and ethnically diverse settings.”¹⁴ All of us must be able to work across difference on the pressing challenges facing our metropolitan communities, with racially diverse leadership that has the legitimacy and skills the Grutter Court recognized as necessary.

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¹² Paraphrasing the framework that Professors Theoharris and Causton Theoharris use in describing inclusive Schools of Promise, Syracuse University, School of Education.
Addressing the Challenges of our Metros

Our metropolitan areas, with cities as their hubs, are key arenas for advancing civic and economic prosperity. Nearly 84 percent of our population lives in metropolitan areas, more than 85 percent of all jobs are there, and the vast majority of job growth in our new knowledge economy is taking place there.\(^\text{15}\) As a recent report from the Brookings Institution asserts, “Metropolitan regions are the engines of our economy—the sites of new technological breakthroughs, the export hubs that connect U.S. companies to the global economy, and the impetus for a necessary revolution in the use of energy nationwide.”\(^\text{16}\)

The cities that form the hubs of these metros contain institutions vital to their success: intellectual and institutional assets such as universities and hospitals, infrastructure assets such as transportation and communication, social assets such as tourism, entertainment, and culture, and core service assets in the fields of finance and law.\(^\text{17}\) At the same time, the dramatic changes in our economy, urban flight, and national shifts in our population have combined with the recession and the housing crisis\(^\text{18}\) to leave many metropolitan areas with some of the nation’s most difficult and important tasks, including turning around failing schools, rebuilding crumbling but crucial infrastructure, weaving together a strong and diverse social community and restoring faith in the legitimacy of public institutions at the very time public budgets are reduced and demands for public support are growing.\(^\text{19}\)


\(^{18}\) Since 1985, the U.S. has lost an average of 372,000 manufacturing jobs a year. In the last decade, the population of Detroit fell 25 percent, Cleveland 17 percent, and Toledo 10 percent. See Moretti (2012). *The new geography of jobs*, 22-23. Boston: Houghton Mifflin Harcourt.

Yet these same metropolitan areas are also home to the nation’s fast-growing talent pools, the human capital that can meet these challenges if given a chance. Our metros simply must produce from, attract to, and retain in, their midst, college graduates who can work together, pooling their experiences and skills, joining across their differences, to turn things around. As Enrico Moretti wrote recently, “The number and strength of a country’s brain hubs will determine whether it will prosper or decline. Physical factories will keep losing importance, but cities with a large percentage of interconnected, highly educated workers will become the new factories where ideas and knowledge are forged.”

Our cities already have children and youth with the abilities to meet these needs, if only they can get a college education. But that is a huge challenge. Too many of them live in areas of racial and economic isolation, walled off from opportunity in failing schools and growing up in neighborhoods where residents lack access to employment, political influence, and public amenities—in short, where all the avenues to prosperity and social well-being are blocked off.

For all the talk of “color-blindness,” our nation’s long history of racial segregation and structural inequality is still pernicious. Two-thirds of African-American children live in high-poverty communities, compared with only six percent of white children. Even in the nation’s 20 most multi-ethnic metropolitan areas, roughly half the black population and 40 percent of Latino/as reside in neighborhoods with no whites. As the housing gaps between rich and poor continue to grow, low-income black and Latino/a families have fared the worst. They’re much more isolated from middle-class black and Latino/a families than low-income white families are.

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from other whites. The recession and the mortgage foreclosure crisis have made these divisions worse.

Students of color are much more likely than white students to attend low performing, under-resourced, high-poverty schools where many fail even to graduate, much less prepare for college. In Syracuse, the city high schools graduate only 50 to 60 percent of their students, while those in the suburban ring graduate more than 90 percent. As Gary Orfield and Chung Mei Lee have found, more than 60 percent of black and Latino/a students attend schools where more than 50 percent of the students are poor. Research shows that this greatly hurts their chances for academic success. A study of more than 60,000 schools reported by Nancy McArkle, Theresa Osypuk, and Dolores Acevedo-García shows that schools with only a few poor students are “22 times more likely to reach consistently high academic achievement,” than are those with high concentrations of poverty.

A consequence of isolation and exclusion is stereotyping, which can and does limit and kill educational opportunity for all who get swept into its indiscriminate net. And the effects of stereotyping and stereotype threat reach far and wide. To cite one example from our amicus brief in Fisher, a recent study showed that, even at a high-achieving and racially diverse high school in Los Angeles, Latino and Latina students often found themselves having to debate with school staff about their intellectual potential. According to one student, an administrator told her “I wasn’t going to college, and it was basically based on my race, that since I was a Latina, I wasn’t going to be able to succeed in college.” At another racially diverse, high-achieving high school in Evanston Illinois, the school leadership has worked diligently to counter what they identify as inadvertent racial tracking, as the concentration of white students in the Advanced Placement classes well out-stripped their representation in the school as a whole.

During the oral arguments in Fisher, Justice Samuel A. Alito objected to considering the race of any applicant who comes from an affluent family, saying: “I thought that the whole purpose of affirmative action was to help students who come

29 Discussion at a convening held at Northwestern University with administrators of Evanston Township High School (2012, September 12) Evanston, Illinois.
from underprivileged backgrounds,“30 As Elise Boddie, the acting litigation director of the NAACP Legal Defense and Education Fund wrote the next day, “UT’s pursuit of the broadest forms of diversity, including diversity within, as well as among, racial groups, shows that its commitment is genuine and not driven simply by “racial balancing.””31

Clearly, race matters, and it matters beyond class. As Earl and I wrote, “It’s noted when we’re born, and it’s registered when we die. Race is observed in close human interactions. Its characteristics are collected by the state for a range of reasons. It could be that the only time race won’t be considered is when an admissions counselor makes a decision about how to shape a given college class, even though race has been a huge factor every step of the way.”32 We can’t pretend we’re color-blind, certainly not if we are to turn around our economy, and use all the talent we have to cement our collective well-being.

Leaving Talent Behind Won’t Work

Our nation must have the talent, knowledge, participation, and leadership of students of color of all means. By the year 2020, they will make up the majority of our youth. But in that same year, if they have remained isolated in communities with high poverty and low educational attainment,33 and/or subjected to the burden of generically low expectations, the share of adults with some advanced education is projected to drop in all but six states. The Educational Testing Service has called this a “‘perfect storm’ of demographic, labor market, and educational trends that threatens the American dream.”34 Any improvement in overall educational outcomes, as Henry Levin has written, “will require a substantial improvement in the equity of educational opportunities and outcomes for ethnic and racial minorities and the poor.”35

30 Id., Fisher. 42-43.
32 Lewis & Cantor (2012).
We must build “civic capacity” if we are to bridge our racial divides and solve the critical challenges of revitalizing our metropolitan economies. As the amicus brief in Fisher asserts, “We can do this only if we develop diverse leaders across the community who can engage in collective action.” This calls for the kind of leadership training and legitimacy that Grutter recognized as vital to the role of higher education. As the Court held, “Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.” Three points are key here: We cannot leave our nation’s talent behind. We must have a leadership that is recognized as legitimate. And we need diverse perspectives and experiences, and the ability and proclivity to work collectively, if we are to solve our public problems.

Building Trust, Legitimacy, and Capacity

As we consider, then, what our metros and our nation need from higher education today, the urgency of producing racially diverse leaders, professionals and citizens capable of working together to pool talents and experiences couldn’t be clearer. We need a good old-fashioned barn-raising in our metros, as I noted in a recent piece in the Huffington Post. For we are living in what the National Task Force on Civic Learning and Democratic Engagement has called a “crucible moment,” much like another critical juncture in the history of our nation, 150 years ago, when the Morrill Land Grant Act was passed in 1862. At that time, Lincoln knew that, in the midst of the most divisive war in American history, the nation needed a monumental commitment to a new and deeply democratic vision of colleges and universities as sites of collaboration in community and educational opportunity for all Americans, including the 80 percent of the nation’s population who at that time lived and worked on the farm.

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36 Grutter, 539 U.S. 306, 332
Well, we find ourselves now, 150 years later, with another war — a social and economic war – that threatens our unity and prosperity. Now that an even larger majority lives and works in metropolitan areas, institutions of higher education, privates and publics alike, must again reach out in ways that nurture democracy. As the National Task Force commissioned by the Department of Education and led by AACU has urged so eloquently, this process must be “hands-on, face-to-face, active engagement in the midst of differing perspectives about how to address common problems that affect the well-being of our nation and the world.”

It is fortunate that many institutions of higher education are anchor institutions, tied geographically to their locations with a “strong economic stake in the health of surrounding communities,” as well as “the resources to make a genuine difference.” To educate their students for the world in the world, colleges and universities are called upon to create practices, activities and structures so diverse students can learn and develop the skills to problem-solve across difference. Such an environment promotes good scholarship and benefits everyone involved.

As anchor institutions, universities have also found it crucial to build trust with their surrounding communities, many of which must overcome histories of tension and mistrust overlaid with racial divisions. Universities, as well as cities, need diverse leadership that can bridge these divides. This imperative underscores the significance of Grutter’s insight that “All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.”

It begins with dialogue, among ourselves and with our communities. This might happen during a single event—such as the experience of seeing the recent theatrical production of Cry for Peace: Voices from the Congo in which Congolese refugees living in Syracuse share their personal experiences of genocide as a vehicle for reconciliation. But university-community collaborations also require dialogues that are deep, broad, sustained, and systemic. As John Kuo Wei Tchen once told a conference of Imagining America, the national consortium of universities started here at Michigan and now located at SU, authentic dialogue “must be a

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mutual meaning-making process that feeds the soul and clarifies choices we must make. It must be short-term, long-term, and medium term.”

To practice what the social legal theorist Susan Sturm calls “institutional citizenship,” our agenda as anchor institutions requires that we cultivate transformative leaders and transformative practices, both within the community, across generations, and throughout the university. Moreover, the vision, problem-setting, and implementation have to be both top-down and bottom-up, drawing in many generations and many sectors. We must engage full participation, and our leaders must have certain capacities. They need to know firsthand about the experience of race and ethnicity in different contexts, and they must know how systems and barriers affect racially isolated communities. Everyone around the table must reflect on experiences of stereotyping and stereotype threat – for we all have some – and consider their outsized prevalence for some more than others.

On many campuses, including Michigan and SU, we deliberately leverage diversity in the service of building this kind of understanding and the capacity for leadership that it spurs. Not surprisingly, the diversity of a college campus does not in and of itself ensure that students will care about overcoming the inter-racial and inter-ethnic fractures of the communities in which they grew up. Yet, as the longitudinal study in nine institutions by Pat Gurin and other colleagues has demonstrated, genuine intergroup experience such as those that occur in a

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48 Indeed, a recent study by Rude, Wolniak, & Pascarella, reported at AERA (and in Inside Higher Education, 4/10/12) suggests that students become less committed to promoting racial understanding over the four year (liberal arts) experience, just as they (by the way) become less inclined to a host of behaviors (exercise, community service). The authors of the study suggest, by contrast, that college experiences that directly promote inter-racial interaction, friendships and dialogue, result in students leaving college more (not less) committed to promoting racial understanding. The same phenomenon has been analyzed in national survey data from communities with varying levels of diversity by Putnam (2007) who found negative relationships between the diverse composition of a community and the levels of inter-group trust and cohesion in US communities, as compared to British sociologists, Sturgis et al (2011), who found that the direction of the relationship depended largely on how much actual inter-group interaction occurred within British communities with varying compositional diversity, such that the more actual intergroup interaction the more trust, even in very diverse communities.
structured intergroup dialogue curriculum have sustained and positive effects on students’ interest in and commitment to promoting social understanding and community prosperity.49

Facilitated intergroup dialogues have the power to cross racial, ethnic, and class divisions. They help cultivate respect and acceptance and help participants develop skills to make other discussions and collaborations happen. By addressing racial tensions and dynamics, they have the power to dispel the stereotypes that undermine efforts to address public problems through collaboration.50 But to have these mutually beneficial conversations, everyone needs to be at the table. Institutions of higher education must maintain their ability, upheld by Grutter, to select students based on a full assessment of their leadership potential and their ability to contribute to learning through civic engagement and partnership activities, including experiences connected to their racial background and identity.

And as we leverage diversity on campus, it will be important to do this work in high schools, too. There are growing indications that this work will not only help prepare students to work and live in a diverse world, but it may also give specific voice to students of color as they try to navigate successful pathways to educational success within their high schools and in our institutions that historically have been predominately white.51 Gretchen Lopez, a faculty member at Syracuse, and leader of our intergroup dialogue program (a participating member of the nine institution study), co-created with a 10th grade English teacher a curriculum on “Cultural Voices” and an after-school club—“Spotlighting Justice,” in one of Syracuse’s low performing predominantly minority high schools. The curriculum was built around inter-group dialogue and youth participatory action research methods, that energized all students’ voices, especially those who felt the weight of low expectations and a precarious sense of belonging in school. These kinds of collaborative programs are precisely what we need as we try to strengthen the “fabric of society,” building collective will and the trust needed to take on our community challenges.

In this context, it’s urgent that higher education and public school districts develop deep and broad collaborations that boost educational opportunities whether for the increasingly majority minority population of our under-resourced and often failing urban schools or in schools that are high performing but where students of color are not experiencing as clear or

unfettered avenues for achievement as their white peers. We must work to empower all students with the skills of collaborating, learning, and working across difference and the interest in civic engagement and democratic practice before they get to college and/or enter the workforce. We can’t just leave things as they are.

*We Can’t Go Forward by Hiding from Race*

We also can’t go forward by hiding from race and how it has mattered and still matters in our nation’s consciousness, habits, and practices, and how it should matter to our civic conscience. As the essays in the recent volume on “Doing Race,” edited by Hazel Markus and Paula Moya, suggest there is a power and a reality to race and ethnicity, every day, on the ground, in our census categories, our governmental policies, our politics, our scientific research, our marketing, our allocation of resources, and who we punish, that must be taken account of if we are to achieve a just society.\(^{52}\) Certainly the *amici* in our brief believe that we can’t turn around our ailing metros, communities with so many human capital assets waiting to come together in a 21\(^{st}\) century barn-raising, unless higher education plays its part. And to play our part, we must produce a diverse cadre of transformative leaders, professionals, and civic-minded citizens, ready and able to get to work together. Some would say that we can do this by only embracing affirmative action for class, not race and ethnicity.\(^{53}\) But as my fellow speaker here today, Gary Orfield aptly noted, “re-creating race indirectly would be clunky and time-consuming, and ultimately not get to the same point.” “We have things that are beyond class, that are about race,” he said. Yes, part of the signature of our metros that needs to be reversed are the barriers to educational opportunity (and social mobility more generally) that adhere to class, as is also true in our rural communities, and that must be recognized in composing a college class. But the experiences and expertise and talents that are part of how race and ethnicity are lived in this country do not stop with entrance into the middle class, or beyond. And we need those contributions too, as we re-build a strong “fabric of society,” in our otherwise divisive, zero-sum world that pits rather than unites us.

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When higher education is allowed to use its best informed judgment to make an holistic assessment of potential, taking many factors into account, but importantly not hiding from race or ethnicity or class, then we all have the best shot of emerging as a prosperous and just society going forward. As the farmers knew 150 years ago, despite the myth of American individualism, barn-raisings take a lot of hands, and higher education is a barn-raiser par excellence. When Martin Luther King Jr. urged collective action by intoning, “We may have all come on different ships, but we’re in the same boat now,” he surely must have thought that the Court wouldn’t revisit the compelling interest of diversity again and again, even as he urged us all not to become complacent with progress, to keep at the hard work. Well, it is déjà vu, all over again, and we are ready to fight for justice.