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From Brown to Grutter: The Legal Struggle for Racial Equality

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Speech by Theodore M. Shaw: “From *Brown* to *Grutter*: The Legal Struggle for Racial Equality”

MR. SHAW: Thank you and good morning. I want to thank Anwar for his remarks and also Dean Peter Wiedenbeck who’s been a really gracious host. I’ve really enjoyed the interaction I’ve had with students and faculty as well as the opportunity to see this wonderful facility. This is a wonderful and a beautiful facility that you have here.

I was caught a little off guard by Anwar’s mention that I played basketball in college, except that it gives me an opportunity to share a thought that I haven’t shared in the last few days—I watched as the President went to Atlanta on Monday for the Martin Luther King holiday and laid a wreath at the grave of Martin Luther King, Jr. As you know, there were some protesters, and then the next day he made a recess appointment of Judge Pickering to the Fifth Circuit, and Judge Pickering, as you know, has some civil rights issues. So the connection with this and basketball is that I have figured out what compassionate conservatism means, and—in language that only a gym rat would understand, it means fake left, go right.

So this is the fiftieth anniversary of *Brown v. Board of Education*, and I want to talk about *Brown* and I want to talk about the Michigan cases, and I want to do it in a way that is interspersed with some personal observations, if you would permit me to do that. I sometimes wonder whether that’s appropriate, and I usually don’t do it. On the other hand, I do think that there’s power in talking from our experiences, and so I want to do a little bit of that, and I want to do it as we talk about *Brown*, I was out with some students and faculty last night for dinner. And at about 10:00 my time, which is only about 9:00 your time, basically, you could stick a fork in me, I was done. And I was tired and sleepy, and somebody said to me you need to hang with some of the young people or get their energy or whatever, and I didn’t think to reveal my age to them, but I was born in the year of *Brown v. Board of Education*, so in late 2004 I will turn fifty. And it’s an opportunity for me to think about the fact that I’ve never

known what it was to live in the United States where the promise of equal protection under the laws was completely meaningless, but that was the world before *Brown v. Board of Education* for African-Americans, for people of color generally. I think about *Brown v. Board of Education* not only as one of the most important cases jurisprudentially, but I also think about it as a dividing line in time. A dividing line for the United States and certainly for African-Americans, but I think for the whole country, for everyone. It divides our history into kind of a BC and an AD. The BC being marked by slavery or de jure segregation and discrimination, and the AD being a time period in which the constitution finally was given some meaning with respect to the Fourteenth Amendment. And we are a very a historical society, more so, I think, than many other societies. Some of it is a forgetfulness.

I remember a movie that came out when I was in college some years ago, *The Way We Were*, and Barbara Streisand starred in the movie and sang the theme song—and it was a wonderful movie. There's a line in the song that says "what's too painful to remember we simply choose to forget," and I think that that's true with us collectively.

Last spring, President Bush went to Philadelphia for an appearance, and this was during the time of the debacle that followed Trent Lott's attendance at the birthday party for retiring Senator Strom Thurman, and the Republican Party was bleeding, but it was one of these moments in the media in which race was once again at the forefront and there was some open discussion about race race in a way that we see periodically. It was an honest moment, and that moment closed up and we've moved on, but President Bush made one of the most eloquent statements that any President has made with respect to race in Philadelphia, as far as I'm concerned. And that statement was that every day that we lived as a society in which we struggled with slavery and with segregation was a day in which the United States was untrue to its ideals. I thought that was a pretty eloquent, powerful statement. Well, I went back and tallied up the days and years, and I didn't bring with me that calculation, but if one goes back to 1776, approximately seventy percent of the days of our nation have been days lived under either slavery or de jure segregation and discrimination, and the remainder is the period of

post-*Brown*. And in fact, one could go back to the colonization of what is now the United States, and then we're talking about something like 95 percent of the days under slavery or segregation and we can't even stop in 1954 because, of course, *Brown*, in 1954, was followed by *Brown II* in 1955. *Brown II* announced the all-deliberate speed formulation, and as many people have observed there was a great deal of deliberation and little speed in implementing *Brown*. We did not see real desegregation of public schools until the early 1970s with the *Swann v. Charlotte-Mecklenburg Board of Education* decision. In the meantime, we had another seventeen years after *Brown* under de jure segregation.

Indeed, I remember my earliest days hearing about these struggles. The civil rights movement was the great event of my youth and it shaped me and my generation and this nation in ways that are profound, were profound, and continue to be profound. The struggle against racial discrimination has become my life's work, and unfortunately, I suppose, in spite of all of the great progress we've made, it seems that there's enough work to do to last a lifetime, but the struggle has changed and I want to talk about that and talk about contemporary times. But first, in my youth I remember, as I said, the civil rights movement as the great factor.

My mother died in 1957 of pneumonia and tuberculosis, pregnant with what would have been her fourth child, and she died in October of '57. I sometimes have imagined her in the year in which I was born carrying me when *Brown* was decided or imagining her shortly before she died hearing the backdrop of what was going on in Little Rock, Arkansas that same fall. I seem to remember the news, even though I was only a few years old, of what was going on in Little Rock in '57 and '58 blaring on the radio in my maternal grandmother's Harlem brownstone. One of my earliest memories—and I thought for a long time that it was a dream—was a vision of people laying down in the street on the east end of 125th Street in Harlem blocking traffic. In my vision, they were laying down in the street with newspapers on top of them, and cars and busses pulled right up to them and were honking their horns and people were upset, and I didn't know what it meant. Many years later when I was doing some research on a thesis when I was in college, I was in the Boston Public Library and came across an article about a demonstration in

Harlem protesting against merchants on 125th Street who refused to hire African-Americans, and I think I probably witnessed that somehow when I was with my grandmother as we often traversed 125th Street.

I remember very clearly the day of the March on Washington. My paternal grandmother was a domestic worker, and she got on a bus earlier that morning. My father had remarried by that time and we lived in a public housing project in the Bronx, and my grandmother wanted me to accompany her, but my stepmother thought that there would be violence and wouldn't let me go. I've always regretted that, but I understand it. But my paternal grandmother got on the bus, went down, and joined 250,000 other people at the march, and I watched it on television from home. I remember that day very clearly. It was a very moving day.

About the closest personal experience I can remember with *de jure* segregation or something that approached it was when I accompanied my maternal grandmother in about 1960 on a bus ride to Charles City, Virginia, from where her family came. And I can remember it was a double-decker bus, a Greyhound bus—those of you who are old enough to remember those busses know what I'm talking about—and I was excited about being able to sit on the top level in the front seat and look out that little window, but if I remember correctly, we had no choice but to sit on the top deck when we passed the Mason-Dixon line. I think we had to move at that line, but that was a relatively mild experience, and I grew up in New York City and we didn't have the most brutal kinds of segregation and discrimination in New York City that you saw in the South. That's not to say that we didn't have segregation and discrimination in New York City, but it wasn't *de jure* segregation, of course.

I remember these events very well. Adam Clayton Powell, Jr., was the congressman and the pastor of Abyssinian Baptist Church, where my family's roots ran deep, and I remember hearing him preach fiery sermons about social justice. I remember crying when I heard him preach because I thought that—his fiery sermons were something else. I thought he was yelling at me personally, and so I was intimidated by him. I didn't understand what he was talking about or the tradition in which he was preaching. These were extraordinary times. Some people look back at these times and they talk about them

as times of great turmoil, which they were, and they talk about them as being times in which America lost its way. I think it was a time in which we began to find our way. It was the most extraordinary time, at least in my life, but I accept the fact that those times are those times and these times are these times, and we don't live in the past and we can't live in the past, but we should talk about where we've been, where we've come from, because it illuminates where we are and where we're going.

I remember much of the 1960s as being a time in which Black folks were awakening. The civil rights movement gave way to the Black consciousness movement. I became a student activist in high school. I joined clubs and associations primarily composed of African-Americans who were about the business of the improvement of the conditions of our people, and indeed when I was in high school, I was chosen to participate in a leadership project that was created after the assassination of Martin Luther King, Jr. by the Archdiocese of New York, then Cardinal Cooke, who was really interested in getting more young Black men into the priesthood. It turns out that after the first group was selected, most of these young men were not thinking about the priesthood. They were thinking about the whole consciousness movement, and to his credit—to the credit of the Archdiocese—they continued the program, and it made the difference in my life.

This was a program aimed originally at Black men. Later it became coed, much after my time. But it was for Black people, period. Unapologetically, unabashedly, without any kind of reservation because of the perceived need to address the conditions that continued to stem from our history, to open up opportunities that otherwise were not open. It was a program that focused on study. We read Black history. We had speakers come in. Some of them were people who were controversial at the time. We went to the theater and cultural events. We had weekend retreats. It built a sense of comradery and pride within us and imbued within us a commitment to work for and give back to our communities. I think that it was an important program, and it was at this same time that that program was created with the aftermath of the assassination of Martin Luther King, Jr., that all kinds of programs were established around the country primarily directed at African-Americans. Some of them were

eventually directed at Latinos and other minority groups and were aimed at undoing the effects of segregation and discrimination that had occurred over a long period of time. Those programs were meaningful and effective. Let me be clear about this. At that time, those programs were not implemented because somebody woke up all of a sudden and said, “you know, diversity is a good thing and we need more of it and we all benefit from diversity.” These were programs that were clearly justified by what we now call remedial motivations, that is, the knowledge that we had a history that we had to work to undo, and that the inequality that we saw all around us was connected with that history.

I am conscious of the fact that many Americans think differently about these issues, and I am in a minority in more senses than one. But having said that, many of the people I grew up with had the potential to do all kinds of great things, but that potential was squashed very young. They experienced what the writer Jonathan Kozal has called “death at an early age”—intellectual death and many times, too often, a physical death at an early age. And I don’t talk about this a whole lot, but I carry them with me in a way. I believe that we waste millions of lives in this country, and I refuse to believe that these are people who are—or were never qualified to do the things that many of us take for granted that we’ve gone on to do. I think that the conditions in which people live in large part define the opportunities that are available to them. I’m not trying to excuse people and ignore our individual responsibility. I believe in that, but it’s a whole lot easier when you have a context around you in which you are expected to succeed and do well and somebody is making sure that you’re on the right path to do that, whether it’s your family, your community, or somebody.

I can’t convey to you adequately the richness of the experience I had during those years coming out of the Black consciousness and the civil rights movement and the richness in the organizations like the Leadership Project that I explained to you or described to you. These programs were not established based upon antipathy toward white Americans or anybody else. These are programs that were aimed and targeted at African-Americans because of the peculiar conditions of African-Americans, and they were worthwhile.

The Leadership Project in which I participated opened up the door to Wesleyan University. Wesleyan University in turn opened up the door to Columbia Law School. Somewhere along the way, probably in high school, I determined I wanted to be a civil rights lawyer. There were two jobs that would have been my dream jobs. One was the Justice Department Civil Rights Division, the other one was the NAACP Legal Defense & Educational Fund. Neither one seemed attainable to me at the time, and I've been blessed that those are the two jobs I've held other than teaching law school. I am a product, an embodiment, of affirmative action, and I stand here with no shame, no conflict, no doubt about whether I'm qualified to do what I've done or to be where I am. I don't suffer with the struggle of whether or not I've been tainted by affirmative action with a mark of inferiority or whether I've been stigmatized. I know some people have that struggle, and I don't mean to disrespect their right to articulate that struggle. It's not my struggle. I'm clear that to the extent that African-Americans have been tainted with a mark of inferiority, it's not been because of affirmative action. The mark of inferiority in the minds of many people in this country, it runs deep historically, and it's because of racism, and affirmative action is a remedy, and a fairly mild one for racism. So I don't have that struggle, and so I stand here unabashedly as a beneficiary of affirmative action. It seems to me that all affirmative action means at bottom is that you take some affirmative action to do something about inequality. Now, I'm not going to tell you that people can't disagree in good faith about affirmative action because they can, but I think that at bottom, when we talk about affirmative action, we should separate out its many manifestations because sometimes it's been implemented improperly, and you can cure that, as a matter of basic principle. I'll return to that momentarily.

I joined the Justice Department after law school, in the Civil Rights Division under the Carter administration, and did school desegregation cases in the South, and it was a wonderful experience. It was a great experience because the department had a comradery among the staff of the Civil Rights Division. It had a storied record, fairly short, but still impressive going back to the days of the Kennedy Justice Department. Those of you who know the story about John Doar and others in the division who went to the South, and with

great personal risk stood up against the mobs there in desegregated colleges and universities and elementary and secondary school systems. We still had a lot of hard work to do in the late 1970s.

In 1980, however, there was a presidential election, and President Reagan took office. There were new appointments to the division, and it was clear that there was going to be a change of direction. When the new appointees came in, I had a lot of interaction with the Assistant Attorney General for Civil Rights at the time, William Bradford Reynolds, who had a clear agenda, stop bussing—that is, turn around school desegregation cases—and stop affirmative action in employment, and it became clear, given all of the conflict that we were having, that somebody was going to go, and it wasn't going to be William Bradford Reynolds because he was the Assistant Attorney General for Civil Rights, and I was a mere line attorney. So it was a pretty miserable time.

I got a call one day from Jack Greenberg just as I was announcing that I was leaving the Justice Department, resigning. It was in the aftermath of the Bob Jones case. I assume that as students you probably have read the Bob Jones case. Those of you who don't remember it firsthand, well, that was the case in which the Reagan Justice Department decided that it was going to abandon the policy of denying tax-exempt status to institutions that practice racial discrimination, which Bob Jones University did openly and notoriously. That wasn't a problem for the Reagan administration. So we had a revolution within the Department, a small revolution in the Civil Rights Division, but it made staying untenable, and I got a call from Jack Greenberg who had been one of my professors, clinical professors, in law school, and he asked me whether I was interested in talking to him about working at the Legal Defense Fund, and it was like manna from heaven. The one job I would have given my right arm for. And I joined the Legal Defense Fund in March of '82 and began litigating school desegregation cases, eventually ran the school desegregation docket for a number of years for the Legal Defense Fund.

By this time, we were in a retrenchment era. Many school districts had been under court-ordered desegregation and were about to be released from supervision. In many instances these districts turned around and re-segregated. On a personal note, had I lived in the deep

South, I would have attended segregated schools that had never been desegregated for at least eleven of my twelve years. I might have received one year of integrated education my senior year, but most school districts were not desegregated until the Supreme Court's *Swann v. Charlotte-Mecklenburg Board of Education* decision, and go back to the point I was making earlier—that *Brown*, while it marks the date in which de jure segregation was ended as a matter of law, did not end the practice of segregation, even the practice of de jure segregation. So we have to add another seventeen more years after *Brown*, at least until 1971. And during those years, think about what else happened. We didn't get the Civil Rights Act of 1964 until after John Kennedy was assassinated. We didn't get the Voting Rights Act of 1965 until the bloody confrontation at the Edmund Pettis Bridge. We didn't get the 1968 Fair Housing Act until Martin Luther King was assassinated. Every piece of major civil rights legislation of that era, was bought and paid for in blood. Even in the late '60s we were still struggling with not only the legacy but the reality of segregation and discrimination, so I don't think we can begin to think of the era of affirmative action until the late '60s and early '70s. And in the scheme of things, that's not too long a time. It's not that long ago. The Supreme Court decided *Loving v. Virginia* in 1967 which, of course, struck down bans on interracial marriage. Not that long ago. And so I think it's important to have perspective.

At the time that I began to do school desegregation cases at the Justice Department, we had really been in the business of serious school desegregation for less than ten years, and at that point the Department began to turn school desegregation around and the Reagan administration began to appoint judges to the bench who were committed to that reversal—very conservative judges. The Supreme Court in 1968 decided a case called *Green v. County School Board of Newkent County*. The Court said that the duty of a school district that once operated a racially dual system was to eliminate the effects of that discrimination and that segregation “root and branch.” Eloquent language, but I don't think the Court knew or understood how deeply the roots of segregation and discrimination ran and how broadly the branches had grown. The Court signaled that it had some inkling about it in the *Swann* decision in 1971 when the Court recognized the inextricable link between school and housing

segregation. School segregation causes housing segregation. Housing segregation, in turn, causes school segregation, but the court refused to hold that the non-school actions of governmental actors that caused school segregation could be a basis independently for a school desegregation order. So for example, even if the government intentionally segregated housing and then the housing patterns gave way to neighborhood schools, the Court refused to hold that that segregative governmental action could be a basis for a school desegregation order. So it has always been a rather restrained approach to school desegregation. It has never been all-out school desegregation. And then almost immediately in the aftermath of serious school desegregation, we began to see those efforts undone. The Court, in *Green*, talked about the duty of these school districts to convert to, “unitary status,” which means one school system in which the effects of the discrimination had been eliminated. That was perhaps the high point, that and *Swann* of school desegregation.

I remember in the early 1980s, after I joined the Legal Defense Fund, the Norfolk Virginia School District came to us expressing its intention to return to neighborhood schools by abandoning its desegregation plan after a declaration of unitary status. After Norfolk, it was Oklahoma City. We litigated both of those cases. The theory, of course, was that the school district should be returned to local control, and local control would yield to neighborhood schools. The problem is that those neighborhood schools were segregated schools, so what it did was turn the desegregation process into one in which all that had to happen was that school districts arrived at a point in which a judicial snapshot could be taken which revealed a desegregated district, and then the judges would declare judicial absolution and return the school district to its own devices. The problem is that bussing orders, transporting students, never really eliminated all of the effects of school segregation. It neutralized them. It went around them. And when you “undid” the plan, it reactivated school segregation, but the theory is that we had broken the link between present segregated conditions and past segregative action. Well, that turned *Brown* and its whole process of implementation into kind of a shell game, in my view, and it’s a shell game that we’ve been playing ever since.

Let me be clear as we come up on May 17, 2004. We did desegregate many school districts throughout the South and even in the North, and in the Midwest. Some school districts were never desegregated. The desegregation process was imperfect. It was difficult. When you talk about school districts like the St. Louis School District or Kansas City, which I litigated,—it's been an imperfect process. There's no question about it. And today, it's not only white folks who have problems with school desegregation, many Black folks, brown folks, Asian-Americans are opposed to school desegregation efforts. People want, they say, neighborhood schools. Actually, we're in a kind of a post-neighborhood school era in which under No Child Left Behind we have, at least in theory, the right of students to transfer out of the neighborhood to schools that are better schools. My experience was always this: parents will put their children on schools and send them to west hell if at the other end of that trip was quality education. Bussing was never the issue. I remember at one point when I was doing school desegregation cases, it came to my attention that approximately fifty-seven percent of all of the students in the country were bussed to school, and about five percent of that bussing was for desegregation purposes. Nobody had a problem with putting their children on busses to get them to school. It has always been about what's at the other end of the trip, and majority Black or significantly Black schools have been perceived as undesirable by many people, and we've not only had white flight from poor, segregated school districts, but we've also had Black middle class flight from those school districts. All of this adds up to this sad reality: the days of school desegregation are all but over. At least school desegregation that comes about as a consequence of deliberate actions. And in fact, we're in a perverted era in which it is almost illegal to pursue school desegregation even on a voluntary basis.

In May, and in the months leading up to May there will be a lot of celebration around this country about *Brown v. Board of Education* and all that we accomplished, and all that we accomplished is significant. We ought to celebrate a great deal. This is not the country that it was before 1954, but we at the Legal Defense Fund think that it's more appropriate to have a critical commemoration of *Brown v. Board of Education* than a kind of mindless celebration of it, because

one of the things we know is that we tend to take these issues and define them to turn, for example, a Martin Luther King, now that he's safely dead, into an idle dreamer and to completely forget about his radical challenge of—and his message of social change in America. The same thing is going to be true with *Brown v. Board of Education* and its commemoration to some degree. I think we should be asking whether we still believe in the principles and the promise of *Brown*. If school segregation was invidious in 1954 and problematic, given everything we know about the way our society operates and the way it's structured, why is it not problematic today in 2004?

I said a moment ago that even voluntary efforts to desegregate are perhaps, in the minds of some, illegal. What am I talking about? Well, this is where I would like to bring in *Grutter* and Michigan. Time doesn't permit me to have a full discussion about the Michigan case and my involvement in it, but my involvement was twofold. One, I left the Legal Defense Fund in 1990 and joined the faculty of Michigan Law School. And after I got to Michigan, I went in to see the then dean who hired me, Lee Bollinger, and told Lee that I thought there was a problem with the admissions process. I didn't think that it was structured in a way that was consistent with the Supreme Court's precedent in *Bakke*. We had a discussion about that, and as a consequence, Lee eventually appointed a committee to revisit admissions. Its mandate was broader than simply to look at the race issues, but that was what the origin of the committee was, and I served on that committee, and we structured a plan that was consistent with *Bakke*, the only Supreme Court precedent we had about affirmative action in admissions, and that was the plan that the Supreme Court upheld last June. Because of that, the Legal Defense Fund did not intervene on behalf of Black and Latino students in the law school case because I had a lawyer/witness problem. I was deposed as one of the people who drafted the plan. But we did represent Black and Latino individuals in the undergraduate case as parties and this is what I want to talk about and leave you with.

The arguments that we made were arguments that the university was not going to make. I believe in diversity, as I said. I believe that diversity is important. I believe that it's a principle that justifies consideration of race in a limited way. At the same time, I remember the day that *Bakke* was decided. I happened to be at the Supreme

Court and got into the Court when the *Bakke* decision was read. *Bakke* was a loss for African-Americans. It was a loss because, one, the Court completely ignored the history of the Fourteenth Amendment and refused to acknowledge that its original purpose was to bring the former slaves into all of the benefits of full citizenship.

Two, the Court refused to draw a distinction between invidious discrimination and what it called “benign discrimination,” that is, affirmative action. So it equated the two legally and subjected affirmative action to strict scrutiny which, of course, is very difficult to pass.

Three, the Court developed a doctrine—or announced a doctrine in *Bakke* called “societal discrimination.” It’s discrimination for which nobody is responsible and for which there is no remedy, and the Court then began to shove more and more discrimination into that category. So the doctrine says that institutions cannot remedy “societal discrimination,” that is, discrimination that they themselves did not cause. They could only remedy discrimination that they caused. Now, of course, that requires institutions to fall on their sword, admit liability, and you know, they don’t want to do that for obvious reasons.

Fourthly, the Court, decided the case on the grounds that Justice Powell’s opinion articulated: diversity as a compelling state interest, which as I say, I support, but it’s a second best interest, and in some ways it’s historically inaccurate and dishonest. As I said before, institutions like Michigan, institutions like the ones that I have been affiliated with, didn’t wake up in 1968 or ’69 and say “diversity!” They were trying to remedy a history of segregation and discrimination that was ubiquitous, that was societal, and the Court shut all of that off in the *Bakke* case. The Court instead rested affirmative action not in the interest of African-American or Latino students or students of color in getting access to education, but rather in the institution’s First Amendment grounded interest in academic freedom and diversity. I’ll take it as second best, and it’s that narrow thread that held affirmative action for twenty-five years, but it was second best and it was problematic in some ways, and that’s relevant to where we are today.

You know, some of you may remember the movie *Mississippi Burning* or the movie *Cry Freedom*. Both of them were problematic

in my view, and I went and saw both of them. I had to see them, but I remember seeing *Cry Freedom*, and halfway through the movie Stephen Biko—the great South African activist, anti-apartheid warrior—Stephen Biko is dead halfway through the movie. So I'm saying "what's the rest of the movie about." Well, it's about this white reporter who wrote the book about him. It's a compelling story, but it's about him trying to get out of South Africa. Interesting, but not what I came to see.

Mississippi Burning portrayed the FBI as the heroes of the civil rights movement. Now, when I was at the Justice Department we had the FBI—they were our investigators. It was hard to get them to investigate civil rights cases, but if you know anything about the role that the FBI played during the 1960s—at best, it was a mixed role, but the *Mississippi Burning* movie portrayed Black folks as fairly timid, and not as the central actors in their struggle for their own freedom. And in truth, that's exactly what they were. They were the central players in the struggle for their own freedom. I'm saying that *Mississippi Burning* & *Cry Freedom* have something in common with the *Bakke* opinion. What am I talking about? The stories were told through the eyes of white Americans, their interests, interpreted through their eyes. Now, with all due respect to all the people of good will that were portrayed in those stories, it's too limited a view, too shallow a view. I'm not saying that the struggle for civil rights is only a Black struggle. It's not. The struggle belongs to all of us, and we don't even live in a bi-racial society. We live in a multi-racial society and always have. But *Bakke* is deficient—was deficient, was too narrow, was not the right ground on which to rest affirmative action or the only ground.

Well, what we got when we won in Michigan was a significant, huge victory. But what we got was *Bakke*, and *Bakke* was a loss. It was important to win the Michigan case because if we didn't, we would have been pushed back even further, but the fact that we perceive that as a great victory in this time is more of a reflection of how far to the right we've been pushed as a nation than it is about the progress that we've been making on the issues of race. Now, why am I not completely happy with the Michigan victory even though we fought so hard for it? Well, first I invite you in your spare time to read the amicus brief we filed in the law school case, *Grutter*, and

you can visit our website at www.naacpldf.org and find the brief. We tell the Supreme Court that “you’ve been making a mess, with all due respect, out of Fourteenth Amendment jurisprudence for the last twenty-five years.” We didn’t think they would decide the case based on the argument that we made, and they didn’t. It’s not a surprise, but we thought it was necessary to say it. But here’s where we are, in the aftermath of *Grutter*. In the aftermath of *Grutter*, these folks on the far right are not going away. They have been running around and identifying all of the programs that they could identify, searching websites, going through catalogs and identifying any programs that are targeted toward minorities. They’re writing to the U.S. Department of Education, they’re threatening suit, they’re filing complaints, but not only that, they are not going to accept the Michigan decision. There’s the attempt in Michigan right now by Ward Connerly to bring Proposition 209 into Michigan, and a lot of people who think their programs have been safe-scholarship programs, mentoring programs, pipeline programs, programs that get minorities involved in the sciences and math, on and on—all the kind of programs like the Leadership Program I was involved in, they’re ubiquitous. They’re in the crosshairs.

The question comes down to this, is it going to be illegal in the United States in 2004, as we come up on the fiftieth anniversary of *Brown*, to voluntarily and consciously do anything about racial inequality? That’s the question. Because for our adversaries, to do so is to be race conscious. To be race conscious is to be racist, and to be racist against White folks is, of course, wrong, but they—they perceive that that’s what it is.

As important as Michigan was, there’s a bigger storm that’s brewing right now, and sooner or later one of these issues is going to come to the Court, and it’s important if I leave here today with any sense of accomplishment, it requires me to make sure that I’ve articulated this in a way that has been adequate enough to convey what the nature of the stakes today are. I said that even voluntary school desegregation efforts are in the crosshairs. We’ve had cases in which based on the same ideological belief that animated the attack on affirmative action that culminated in the Michigan cases, plaintiffs have sued school districts in the South because they have voluntary transfer plans available for those who want to take advantage of

them, because they're race-conscious. In another school district in Rock Hill, South Carolina, White plaintiffs challenged the school district's right to take race into account—or rather to take the segregative effect into account when it was building a new school. If it located it in one place, it could be integrated. If it located it in another place, it could be segregated. And the parents said that you couldn't consider that because it was consideration of race. Fact and history stood on their heads, all context removed, that's where we are.

Let me close by saying this. I am not discouraged. It's been a blessing to do the work that I've done. I've been so fortunate to do this work. I think that we need to think about race differently. Nobody thinks that we could give the environment ten, fifteen, twenty years of attention, and then we have to let it go. You know, are we going to be environment blind? I don't understand given our national experience, given human nature, how we can think that we could get to the point where a mere thirty years after we began affirmative action seriously and desegregation seriously we can drop this issue and be color blind. I think it's the wrong paradigm. I am not interested in color blindness: it is not by my paradigm. Color blindness was a shorthand way of civil rights advocates saying we want a world in which race doesn't matter. They were not saying we wanted a world in which people would be blind to the significance of race as long as race continues to be significant. How can it be that all of the inequality that anybody with eyes to see or ears to hear, knows is all around us, in spite of the progress we've made, is unconnected historically, factually, and legally to three hundred years of slavery and segregation? How could that be? There's still a lot of work to be done, and we shouldn't shrink from it. I think that we are better as a country than we were Fifty years ago. We're better not only with respect to race, we're better with respect to religious tolerance, although there's still work to be done there. We're better with respect to gender equality, although there's still work to be done there. And we're better when it comes to sexual orientation, although there's still work to be done there. And we're better when it comes to race. We certainly are. I think Martin Luther King was right: "the arc of the moral universe is long, but it bends towards justice," and it's a wonderful concept when you think about it. Incrementally we're

better. All history is a march towards progress, but it doesn't happen serendipitously. It requires work, and sooner or later—and really sooner—those of you who are students in this room—some of you, if not all of you—will have to take the baton and run with it as far and as hard as you can, and then pass it on to someone else. Thank you.