

# Foreword: The Intersection of Race, Corporate Law, and Economic Development

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**FOREWORD**

**THE INTERSECTION OF RACE,  
CORPORATE LAW, AND ECONOMIC  
DEVELOPMENT**

LEONARD M. BAYNES<sup>†</sup>

*“Diversity is our strength, whether you came off a slave boat or  
came off of Ellis Island.”<sup>††</sup>*

From Thursday, April 3, 2003, to Saturday, April 6, 2003, St. John’s University School of Law hosted a joint conference sponsored by the St. John’s University School of Law Ronald H. Brown Center for Civil Rights and Economic Development (hereinafter “Ron Brown Center”) and the seventh Northeast People of Color Legal Scholarship Conference at the Manhattan campus of St. John’s University. “The Mission of the Ronald H. Brown Center is to engage in legal studies, research and projects focusing on issues that affect the lives of underrepresented people while simultaneously educating law students to be leaders on issues of racial, economic and social justice.”<sup>1</sup> This was the first Ron Brown Center conference.

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<sup>††</sup> Michael Lopez, *Minority- and Women-Owned Businesses Grow*, TIMES UNION, March 2, 1997, CL31 (Joan Parrott-Fonseca, Director of Federal Business Development Agency, quoting Ronald H. Brown).

<sup>1</sup> See Program for St. John’s University School of Law Ronald H. Brown Center for Civil Rights and Economic Development and Northeast People of Color (on file

The Northeast People of Color Legal Scholarship Conference is a group of law professors that organize annual conferences on race and social justice issues. The goal of these conferences is to highlight important legal and societal issues that affect people of color in the United States and throughout the world. The Northeast People of Color Legal Scholarship Conference has previously held conferences at the following law schools: Western New England College School of Law; New England School of Law; Touro College, Jacob D. Fuchsberg Law Center; University of Puerto Rico School of Law; City University of New York, School of Law at Queens College; the University of the West Indies School of Law; and St. John's University School of Law. This was the seventh Northeast People of Color Conference.

The 2003 conference was entitled "The Intersection of Race, Corporate Law, and Economic Development." There were opening welcomes made by St. John's University School of Law Dean Joseph W. Bellacosa and former Professor Philip Roache, who was instrumental in establishing the Ron Brown Center. Congressman Gregory W. Meeks delivered the Kellis E. Parker keynote speech, Queens Borough President Helen Marshall spoke on economic development, and Professor G. Mitu Gulati of Georgetown University gave a speech entitled: "The Economics of Workplace Homogeneity."

The conference consisted of four panels: (1) The Intersection of Race and Corporate Law; (2) "Making it" as an Academic of Color; (3) The Intersection of Race, Business, and Law in Practice; and (4) The Intersection of Race, Business, Government and Economic Development. Lastly, approximately ten scholars presented works-in-progress and received feedback from commentators. The Haywood Burns/Shanara Gilbert Awards were awarded to Professor Jon C. Dubin, the Alfred C. Clopp Public Service Scholar & Director of Clinical Programs at Rutgers University, State University of New Jersey for Law, and Justice and Professor Elizabeth M. Iglesias of the University of Miami Law School for their work as activist law professors and scholars. In addition, we gave the inaugural Ron Brown Trailblazer Awards to three individuals for their success in the business world: Carla Harris, Managing Director of Morgan

Stanley; Loida Nicolas Lewis, the CEO of Beatrice Foods, Ltd.; and Joseph Unanue, CEO of Goya Foods, Inc.

At the time of the conference, several anniversaries and events converged: (1) the United States was engaging in military operations in Iraq; (2) it was the thirty-sixth anniversary of Dr. Martin Luther King's speech opposing the Vietnam War; (3) it was the seventh anniversary of the death of former Commerce Secretary Ronald H. Brown, who died on a trade mission to Croatia; and (4) on April 1, 2003, the Supreme Court held oral arguments on the most important civil rights case in a generation dealing with the University of Michigan's undergraduate and law school affirmative action programs.

On March 19, 2003, the United States started military operations in Iraq.<sup>2</sup> It sent 151,000 troops ostensibly to prevent imminent threat from weapons of mass destruction.<sup>3</sup> We were told that the Saddam Hussein regime had biological and nuclear weapons.<sup>4</sup> President Bush declared that it was important to rid the world of this threat.<sup>5</sup> He also obliquely asserted that the Saddam Hussein regime was in cahoots with Osama bin Laden and al Qaeda.<sup>6</sup> As of today, the United States has failed to find any weapons of mass destruction in Iraq. In addition, since President Bush declared major hostilities over on May 1, 2003,<sup>7</sup> there have been more American combat deaths than before.<sup>8</sup>

During the conference, I worried about the relevance of a conference on race, corporate law, and economic development in the midst of a war. Interestingly, the conference also fell on the thirty-sixth anniversary of Martin Luther King's speech opposing the Vietnam War. On April 4, 1967, Dr. King gave a speech at Riverside Church where he declared that the Vietnam

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<sup>2</sup> See David E. Sanger & John F. Burns, *Threats and Responses: The White House; Bush Orders Start of War on Iraq; Missiles Apparently Miss Hussein*, N.Y. TIMES, Mar. 20, 2003, at A1.

<sup>3</sup> See Thom Shanker, *Rumsfeld Doubles Estimates for Cost of the Troops in Iraq*, N.Y. Times, July 10, 2003, at A1.

<sup>4</sup> See Steven R. Weisman, *Powell, in U.N. Speech, Presents Case to Show Iraq Has Not Disarmed*, N.Y. TIMES, Feb. 6, 2003, at A1.

<sup>5</sup> See *Bush's Speech on Iraq: 'Saddam Hussein and His Sons Must Leave'*, N.Y. TIMES, Mar. 18, 2003, at A14.

<sup>6</sup> See *id.*

<sup>7</sup> See David E. Sanger, *Bush Declares 'One Victory in a War on Terror'*, N.Y. TIMES, May 2, 2003, at A1.

<sup>8</sup> See John Tierney, *Postwar G.I. Deaths Now Exceed Toll From War*, N.Y. TIMES, Aug. 27, 2003, at A10.

War was "an enemy of the poor" inuring to the detriment of the nation's ability to fight poverty "like some demonic destructive suction tube."<sup>9</sup> In his speech, he stated that a nation spending more on the military than on social programs moves toward a "spiritual death."<sup>10</sup> He asked individuals to peacefully coexist rather than fight: "We still have a choice today; nonviolent coexistence or violent co-annihilation."<sup>11</sup>

Dr. King's warnings about the Vietnam War appear to be just as true about the current Iraq war. Recent reports indicate that the United States is spending approximately \$1 billion a week to station our troops in Iraq.<sup>12</sup> In addition, the American Iraqi Administrator Paul Bremer has suggested that "several tens of billions' of dollars" would be needed to rebuild the Iraqi infrastructure.<sup>13</sup> Moreover, the United States will also have to spend an estimated \$5 billion on humanitarian aid, \$8 billion on Iraqi government salaries, and \$7 billion on repairs to Iraqi public utilities.<sup>14</sup> President Bush has requested over \$87 billion for emergency spending for operations in Iraq and Afghanistan.<sup>15</sup> This amount is in addition to the \$79 billion that Congress approved to pay for the costs of the war.<sup>16</sup> The supposed oil revenues that were going to pay for Iraq's rebuilding are currently unavailable due to sabotage of Iraq's oil infrastructure.<sup>17</sup> Meanwhile the Bush administration passed record tax cuts to help stimulate the economy, which at the moment have led to a record budget deficit of \$480 billion.<sup>18</sup>

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<sup>9</sup> Rev. Martin Luther King, Jr., *Beyond Vietnam: A Time to Break Silence* (Apr. 4, 1967), available at <http://www.hartford-hwp.com/archives/45a/058.html> (last visited Oct. 1, 2003).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See Douglas Jehl, *High Cost of Occupation: U.S. Weighs a U.N. Role*, N.Y. TIMES, Aug. 29, 2003, A10 (estimating the military costs of occupation of \$4 billion a month). But see Richard W. Stevenson with Felicity Barringer, *Bush Urging U.N. to Lift Sanctions Imposed on Iraq*, N.Y. TIMES, April 17, 2003, at A1 (noting that early estimates indicate the cost of military occupation was \$2 billion per month).

<sup>13</sup> Peter Slevin & Vernon Loeb, *Bremer: Iraq Efforts to Costs Tens of Billions*, WASH. POST, Aug. 27, 2003, at A1.

<sup>14</sup> See Donald Hepburn, *Nice War. Here's the Bill*, N.Y. TIMES, Sept. 3, 2003, at A19.

<sup>15</sup> See Elisabeth Bumiller, *Bush Seeks \$87 Billion and U.N. Aid for War Effort*, N.Y. TIMES, Sept. 8, 2003, at A1.

<sup>16</sup> See *id.*

<sup>17</sup> See Slevin & Loeb, *supra* note 13.

<sup>18</sup> See *id.*

On the home front, economists have marveled that we are having a jobless recovery.<sup>19</sup> The number of people who live below the poverty line has increased by more than \$1.3 million since last year.<sup>20</sup> In our rich nation, over 34.8 million people now live in poverty.<sup>21</sup> Due to the bad economy, many state governments are also experiencing large budget deficits precipitating state tax increases.<sup>22</sup> Meanwhile, many American school children attend inferior schools lacking books and computers in school buildings with crumbling infrastructure.<sup>23</sup> Dr. King's words are particularly prescient today because, given the cost of rebuilding and occupying Iraq and the federal and state budget deficits, little will be left for social programs.

Often as a result of the lack of opportunities in the private sector, many people of color voluntarily join the armed forces. In fact, people of color comprise approximately 34.4% of the armed forces<sup>24</sup> when these groups only comprise approximately 30% of the population of the United States; however, some, often more dangerous, segments of the armed services are comprised of even larger percentages of people of color. For example, approximately 40.8% of the army and 44.6% of the enlisted are of color.<sup>25</sup> Women of color also disproportionately comprise approximately 43% of the women in the armed forces,<sup>26</sup> and African American women comprise approximately 50% of enlisted women in the army.<sup>27</sup> In fact, it has been estimated that nearly 40,000 American troops who are fighting the war in Iraq are not citizens

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<sup>19</sup> See Louis Uchitelle, *Faster 2nd-Quarter Growth Fuels Optimism*, N.Y. TIMES, Aug. 1, 2003, at C1.

<sup>20</sup> See Lynette Clemetson, *Census Shows Ranks of Poor Rose by 1.3 Million*, N.Y. TIMES, Sept. 3, 2003, at A16.

<sup>21</sup> See *id.*

<sup>22</sup> See Jodi Wilgoren, *New Governors Discover the Ink Is Turning Redder*, N.Y. TIMES, Jan. 14, 2003, at A24.

<sup>23</sup> See generally GARY ORFIELD ET AL., DISMANTLING DESEGREGATION, THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION (1996); Campaign for Fiscal Equity, Inc. v. New York, 2003 WL 21468502 (N.Y.Ct. App. Jun. 26, 2003).

<sup>24</sup> See Minorities in Uniform (as of 9/5/00), at <http://www.defenselink.mil/pubs/almanac/almanac/people/minorities.html> (last visited Oct. 2, 2003).

<sup>25</sup> See *id.*

<sup>26</sup> See generally Active Duty Workforce Profile, DMDC Data Request Archive (March 31, 1997), at [https://www.dmdc.osd.mil/ids/archive/act\\_prof2.htm](https://www.dmdc.osd.mil/ids/archive/act_prof2.htm) (last visited Oct. 2, 2003).

<sup>27</sup> See David M. Halbfinger & Steven A. Holmes, *Military Mirrors a Working-Class America*, N.Y. TIMES, March 30, 2003, at A1.

of the United States.<sup>28</sup> Congressman Charles Rangel highlighted these racial disparities when he proposed a bill bringing back the draft.<sup>29</sup> Congressman Rangel specifically stated:

I have no problem in saying that America must respond when we're in danger . . . . I have no problem in saying that just because the president screwed up in Iraq, that we don't have an obligation to protect our troops. But I'll be damned to say I'll accept the fact that (certain) people will take the entire burden and the sacrifice won't be shared by anyone else. That's morally wrong.<sup>30</sup>

In essence, the United States is asking American service men and women to make the ultimate sacrifice but is unable to provide them with good jobs when they are discharged. Moreover, the families of soldiers who die in combat are provided miniscule benefits when compared to their loss. The families of the dead soldiers receive \$6,000 to cover immediate expenses, one-half of which is taxable.<sup>31</sup> Service members can also purchase insurance up to \$250,000 from the military.<sup>32</sup> In contrast, the average tax-free award for the families of the World Trade Center victims is "\$1.6 million, after all deductions for insurance and other awards."<sup>33</sup> Moreover, there is some concern that some families of the World Trade Center victims may bypass the fund and sue, apparently believing the award is insufficient.<sup>34</sup>

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<sup>28</sup> See James Gooder, *US Attacked Over Green Card Soldiers* (Aug. 31, 2003) (estimating that approximately 40,000 U.S. battlefield soldiers are not United States citizens), available at <http://www.informationclearinghouse.info/article4584.htm> (last visited Oct. 6, 2003); *The Death of Lance Cpl. Gutierrez*, 60 Minutes II, CBSNEWS.com (last visited Oct. 2, 2003) available at <http://www.cbsnews.com/stories/2003/04/23/60II/main550779.shtml> (last visited Oct. 2, 2003) (estimating that 38,000 U.S. troops are not American citizens).

<sup>29</sup> See *Call to Restart Military Draft*, CBSNEWS.com (Dec. 31, 2002), available at <http://www.cbsnews.com/stories/2003/01/07/politics/main535532.shtml> (last visited Oct. 2, 2003).

<sup>30</sup> Sean Kirst, *Bill Would Require Everyone to Serve Their Nation*, POST-STANDARD, Sept. 24, 2003, at B1, available at [www.syracuse.com](http://www.syracuse.com) (last visited Oct. 6, 2003).

<sup>31</sup> See Jacqueline L. Salmon, *Military Families Bemoan Loss of Bill on Death Benefits*, WASH. POST, Mar. 16, 2003, at C7.

<sup>32</sup> See *id.*; Jerry Adler, *The Lives Left Behind*, NEWSWEEK, Sept. 15, 2003, at 32.

<sup>33</sup> Diana B. Henriques, *Concern Growing as Families Bypass 9/11 Victims' Fund*, N.Y. TIMES, Aug. 31, 2003, at A1.

<sup>34</sup> See *id.*; Winnie Hu, *Families of Uniformed Victims Are Urged to File 9/11 Claims*, N.Y. TIMES, Sept. 3, 2003, at B2.

The Conference also took place on the seventh anniversary of Ronald H. Brown's death.<sup>35</sup> His name ranks among St. John's most distinguished alumni. During his life, he continually broke color barriers. For example, at Middlebury College, he was the first African American to join the Sigma Phi Epsilon fraternity;<sup>36</sup> in 1989 he became the first African American partner at the Washington, D.C. firm of Patton, Boggs and Blow.<sup>37</sup> In 1989, he was the first African American to be the chair of a major national political party,<sup>38</sup> and in 1993, he became the first African American to serve as chair of a major political campaign for the presidency and the first African American Secretary of Commerce.<sup>39</sup> We at St. John's are very proud of Ron Brown's accomplishments, and that is why we have dedicated this center to his memory.

Lastly, the Conference took place a few days after the April 1, 2003, oral argument before the Supreme Court of the United States to decide the constitutionality of the University of Michigan's affirmative action programs. Ultimately, the Supreme Court in *Grutter v. Bollinger*<sup>40</sup> upheld the University of Michigan School of Law's affirmative action program and found that diversity was indeed a compelling governmental interest.<sup>41</sup> In the companion case, *Gratz v. Bollinger*,<sup>42</sup> the Supreme Court invalidated the University of Michigan's affirmative action program, reasoning that it was not narrowly tailored because it automatically awarded twenty points to African American and Latino students.<sup>43</sup> The Supreme Court found diversity a compelling governmental interest because it was persuaded by the *amicus* briefs submitted by the corporate community and military officers. Approximately seventy Fortune 500 companies submitted *amicus curie* briefs in support of the University of Michigan's affirmative action program because they believe that diversity is important and well-trained people of color increase

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<sup>35</sup> See TRACEY L. BROWN, THE LIFE AND TIMES OF RON BROWN 1-28 (1998).

<sup>36</sup> *Id.* at 57.

<sup>37</sup> *Id.* at 155.

<sup>38</sup> *Id.* at 188.

<sup>39</sup> *Id.* at 237-39.

<sup>40</sup> 123 S.Ct. 2325 (2003).

<sup>41</sup> See *id.* at 2347.

<sup>42</sup> 123 S.Ct. 2411 (2003).

<sup>43</sup> *Id.* at 2427-28.



the bottom line.<sup>44</sup> The military realized the importance of diversity by the fact that several retired army generals also submitted an *amicus curie* brief in favor of the University of Michigan's affirmative action program.<sup>45</sup> Even though the Court ruled favorably in favor of affirmative action, certain neo-conservative forces are still working very hard to limit its applicability.<sup>46</sup>

The confluence of events and anniversaries is an augury for people of color to choose another path besides the traditional civil rights agenda. Given the budget deficit and the government's deregulatory mindset, government assistance and the traditional civil rights agenda may be less available to our community. With more economic opportunity, young men and women of color may not have to join the armed services in numbers greater than their percentage of the population. The participants in this Symposium have studied how race affects and influences corporate law and economic development. They have sought out corporate remedies to remedy race discrimination and inequity. These remedies may in fact be more efficacious than the traditional civil rights remedies.<sup>47</sup>

Even though we are at war, examining the intersection of race, corporate law, and economic development is very relevant. Like other Americans, the government is asking people of color to make certain sacrifices during the war effort; however, as Dr. King reminds us just, because we are at war, we cannot lose sight of our overall objectives: to be free from discrimination and to share in a fair proportion of the American economy. The scholars participating in this Symposium are social engineers taking the sleepy and sometimes dry areas of Sarbanes-Oxley,

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<sup>44</sup> See generally Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, *Grutter v. Bollinger*, 123 S.Ct 2325 (2003) (Nos. 02-241, 02-516).

<sup>45</sup> See generally Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al., *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (Nos.12-241, 02-516).

<sup>46</sup> See Karen W. Arenson, *Ballot Measure Seen in Wake of Court Ruling*, N.Y. TIMES, Jul. 10, 2003, at A17.

<sup>47</sup> See, e.g., John E. Nowak, *The Rise and Fall of Supreme Court Concern for Racial Minorities*, 36 WM. & MARY L. REV. 345, 347 (1995) (positing that the shifting membership of the Court has had profound effects on the Court's approach to protecting racial minorities); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 206 (1993) (discussing use of summary judgments in employment discrimination cases disadvantaging minority plaintiffs).

the duty of care, and proxy voting and bringing them alive to reflect the interests and needs of people of color.

The authors participating in this Symposium have written a number of articles on race, corporate law, and economic development that are worthy of discussion. They often take a different view or slant on some corporate law issues or bring novel insights into these issues. For instance, Professor Larry Cata Backer, in his article, "The Duty to Monitor: Emerging Obligations of Outside Lawyers and Auditors to Detect and Report Corporate Wrongdoing Beyond the Federal Securities Laws," analyzes how the Sarbanes-Oxley Act may require lawyers and auditors to report racial discrimination cases to the board. Professor Steven Ramirez also focuses on board diversity and highlights the efforts in foreign countries to make their boards more representative and diverse. Professor Cheryl Wade in her article entitled "Attempting to Talk About Race in Business and Corporate Law Courses and Seminars" examines the difficulty of teaching issues of race in courses dealing with business issues when the students expect to learn solely about profit maximization. Professor David Brennen, in his article "Race Conscious Affirmative Action by Tax Exempt 501(c)(3) Corporations After *Grutter* and *Gratz*" examines how private universities who have § 501(c)(3) status are affected by the tax code's public policy limitation against discrimination. In "Tactical Self-Funded ERISA Employers Unnecessarily Threaten Employees Right to an Independent Review of an HMO's Medical Necessity Determination with Preemption," Professor L. Darnell Weeden discusses how a state requirement of independent medical review of certain HMO decisions is not preempted under ERISA. In "Living in Lockers: Online Profiling, Data Surveillance, and Powerlessness," Professor Marcy Peek details the risk of the online world in which information can be used to racially profile users perhaps leading to adverse market and other outcomes. In my article entitled "Falling Through the Cracks: Race and Corporate Law Firms," I suggest that the concepts of good faith, fair dealing, and fiduciary duty be used as an alternative means of rectifying discrimination claims by minority associates and partners. Lastly, Congressman Gregory Meeks, the Kellis E. Parker Keynote speaker at the conference, highlighted the intersection of race, corporate law, and economic development.

