

Reflections on Law and Society: Retrospect and Prospect

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As a returning World War II veteran who received special state and federal help for a wide choice of educational career opportunities, it is noteworthy to see that support continue for future generations. Veterans throughout the years have received preference in hiring, educational admissions, low-interest housing loans, as well as resources for small-business start-ups. This stage was set during Franklin D. Roosevelt's administrations. Such veterans programs provided the background for future aid programs to minorities and women as well as set the stage for affirmative efforts to address low-income, marginalized people's educational and employment needs.

Congressional legislation, executive, and Federal Court rulings have expanded civil rights and economic opportunities. These rulings and decisions continue to affect social and educational policy at all educational levels. Affirmative action did, does, and continues to provide assistance to minorities and women, and guide gender preferences in education and the workforce.

Historical Background

After World War II, in 1946, President Harry Truman appointed a committee on Civil Rights.¹ In 1948, acting on their recommendations, Truman signed executive orders implementing desegregation of the federal work force and the armed forces. His action set the stage for the *Brown* decision six years later. Civil rights acts in ensuing years have reaffirmed and expanded those 1948 initiatives.

In 1947, the *Truman Commission Report*² recommended expanding universal education through the community-college level, giving more citizens improved economic and employment opportunities. Today community colleges enjoy the largest student enrollments in all higher education, even during economic downturns. Furthermore, community colleges provide educational access and opportunity to more of the population through local facilities at minimal cost. Recently many community colleges have expanded their curricula, becoming four-year institutions; others have instituted graduate-level degree programs.

By 1954, in *Brown v. Board of Education*³ the Supreme Court ruled “separate but equal” facilities inherently unequal. Public school segregation, they opined, was a denial of equal protection of the laws and violation of the due process clause of the 14th Amendment. To achieve unanimity in the decision, Chief Justice Earl Warren, former governor of California, brilliantly divided the case into two parts. *Brown I* ruled for school integration while *Brown II* sought to desegregate schools with all deliberate speed. Implementation of the law for integrated schools forthwith was not accomplished without widespread resistance. In some instances, federal troops were required to overcome protests and escort students to classes. The *Brown* case led to a more activist Supreme Court. The court prior to *Brown* left educational issues and decisions to local-school-district administrators and officials. Since then, *The Educational Law Reporter* reflects a multitude of legal issues and decisions affecting all educational levels.

In the 60 years since *Brown* many efforts have addressed past historical injustices. Affirmative action was mentioned in John F. Kennedy’s executive order of March 1, 1961, ensuring the Federal government’s hiring and employment practices be free of discrimination. Lyndon Johnson first implemented policies for equal access, equality in education, and job opportunities for African Americans and other minorities. Through his legislative skills Johnson overcame persistent, ferocious opposition. *The Civil Rights Act of 1964* outlawed discrimination based on race, color, religion or national origin in public places engaged in interstate commerce. Title VI of the Act prevented discrimination in any government agency receiving federal funds. Johnson notes U.S. citizens seek not just freedom but opportunity and not simply legal equity but human ability—not just equality as a right and a theory, but equality as a fact and a result. His vision reflects the public policy of a great society.⁴ *The 1964 Civil Rights Act* was amended and expanded in 1991 to provide tort remedies to victims of racial and sexual discrimination.

Through the intervening years, affirmative action has been expanded to include Hispanics, women, Muslims and other minorities as well as African Americans. As our society has become more diverse through increases in immigration, educational and governmental policymakers’ decisions have come to reflect a multiethnic and multicultural society, but resistance to changing social structures is historically part of paradigm shifts. Such resistance is reflected in conflict and eventual reconciliation as societal adaptation to language-based, cultural, and racial diversity expands. That process continues as we reach the status of a majority minority nation. As the minority becomes the

majority by 2050, according to some demographers, investment in opportunities for all citizens will continue.

Federal District Courts, Courts of Appeals and the U.S. Supreme Court have issued rulings and decisions affecting education. These affirmative action decisions are often the result of students seeking and being denied admission to their institutional choices.

In *Regents of the University of California v. Bakke* (1978),⁵ the U.S. Supreme Court rejected the University's quota system for Blacks while ruling the use of race as one criteria among many acceptable. This case was one of the first dealing with reverse discrimination. Although Bakke graduated and so the court case made moot, the courts found utilizing quotas to achieve racial diversity unconstitutional, while using race in university admissions as one factor among many was ruled constitutional.

Major Michigan cases in 2003 continued to define the legal parameters of affirmative action. *Gratz v. Bollinger*⁶ dealt with an undergraduate, Jennifer Gratz, denied admission to the University of Michigan despite reporting higher test scores than admitted minorities. Gratz, who graduated from another university, brought suit claiming racial preferences in admissions violated the 14th Amendment's equal protection clause. The U.S. Supreme Court agreed and ruled the use of race in admissions not narrowly tailored to achieve diversity, requiring individualized consideration of each applicant for admissions. The same year at University of Michigan, in *Grutter v. Bollinger*⁷ the court upheld the Law School's race-conscious admissions process that might favor underrepresented minorities but took into account many other factors on an individualized basis for every applicant. Justice Sandra Day O'Connor opined affirmative action might not be necessary in 25 years. She also notes the court was influenced by a massive outpouring of support for affirmative action by the military and corporate sectors since the officer's corps and the higher echelon of corporate leadership seek more diversity in their management teams.

A public school case, *Parents Involved in Community Schools v. Seattle School District No. 1*,⁸ regards students' right to apply to any district high school. In this district, some schools were oversubscribed, so if a student body deviated from an approximately 41% white and 59% non-white division, race was used as a tiebreaker. No distinction was made among "non-whites," whether Asian Americans, Latinos, Native Americans, or African Americans. The U.S. Supreme Court ruling struck down the district's plan as not narrowly tailored to meet a compelling state interest in diversity and to avoid racial isolation.

*Fisher v. University of Texas, Austin*⁹ was brought by a white applicant, Abigail Fisher, whose grades were alleged to be higher and extracurricular activities more comprehensive than minority applicants', yet she was not admitted to UT. Formerly, to achieve student diversity the university admitted applicants from the top 10% (now 8%) of graduates from the state's high schools. Not enough minorities enrolled through that process, so university admissions gave extra preference to applicants' racial minority status. The high court imposed strict scrutiny on the university, ruling that before turning to racial classification there must be assurance that available, workable, race-neutral alternatives do not suffice. The Court remanded the case back to the lower court to reexamine if strict scrutiny was followed to assure there was no race-neutral solution available. The ruling left intact the use of race as one factor in admissions. Attempts to limit the role and function of affirmative action continue in *Schuetz*.

The U.S. Supreme Court agreed to hear *Schuetz v. Coalition to Defend Affirmation Action* to determine whether voters can amend a state's constitution to ban racial preferences by referendum. In 2006, Gratz and others got a referendum passed by Michigan voters (58%–42%) to ban racial preferences for university admissions. The district court upheld the Michigan referendum as constitutional, but the Sixth Circuit Court of Appeals struck down the referendum (8–7), arguing such an amendment would create extra hurdles for minorities, and such burdens undermine the Equal Protection Clause guaranteeing all citizens equal access to tools of political change.¹⁰ The *Schuetz* decision would determine whether voters could vote to ban racial preferences. As in past affirmative action cases, U.S. Supreme Court Justices are divided between liberal and conservative positions on the 14th Amendment's equal protection guarantee. As in all affirmative action cases, there are advocates pro and con gathering supporters in an attempt to influence the U.S. Supreme Court's decision. On April 22, 2014 the high court, by a 6–2 ruling, supported Michigan's ban on affirmative action in admissions to state universities.

Affirmative action has advocates in higher education as most universities are committed to student, faculty, and staff diversity as a compelling state interest. Bollinger, former president of the University of Michigan during the *Gratz* and *Grutter* cases, and now president of Columbia University, argues it vital to enroll minority, low-income, and marginalized students in higher education institutions. In each recent U.S. Supreme Court case on affirmative action there has been strong support from professional education associations as well as business and industry. In the *Fisher* case, for example, over 59 companies including Microsoft, Wal-Mart, Gap, General Electric, Pfizer, Shell Oil and

Viacom filed a brief noting they rely on universities to prepare a racially diverse workforce.¹¹

The composition of the court will affect future decisions. The two newest appointees, liberal Justices Sonia Sotomayor and Elena Kagan are firm supporters of activism on behalf of minorities and marginalized peoples. Sotomayor often refers to the important role affirmative action played in her Ivy League educational career.¹²

Supreme Court Justices in the 2003 *Gratz*, *Grutter*, and *Fisher* cases raised questions about “critical mass” used by university lawyers for maintaining affirmative action programs. How many minorities comprise “critical mass?” What is the definition of “critical mass?” University lawyers could not give a number since that would involve invoking a quota, so answers included the number of minority admissions that would make them feel comfortable. Again the question arises: “what is the definition of comfortable?” Ambiguity is introduced across responses. Other questions raised by Justices include: “will there be a limit to protected classes?; are there important groups of individuals that desire and deserve protected classes?; how can we define a compelling state interest in diversity?; and how can that interest be determined?” Social science research on the effects of student, faculty, staff, and administration with the compelling state requirements for diversity are mixed. What if a person can claim several minority classifications not in protected classes? These are some of the questions that will become the basis for future litigation. Harvard Law School professor Randall Kennedy’s recent book *For Discrimination*¹³ raises additional issues. He questions whether it is good for the country to perpetuate preferences for privileging relatively well-off Hispanics and African Americans over better-qualified and often less-affluent Asians and Caucasians. Randall believes affirmative action will remain a substantial presence in U.S. life for the foreseeable future regardless of what the U.S. Supreme Court decides. Many universities use race-neutral policies in admissions. Socioeconomic factors, first generation students, academic potential, and violence-threatened neighborhoods, are a few alternative-admissions criteria. The Cato Institute and other organizations continue to push for the elimination of affirmative action and for race-neutral admissions policies.¹⁴

Each presidential administration seeks to leave a legacy for future generations, yet all are prisoners of the age in which they live. Harry S. Truman, criticized for not going far enough with his civil rights agenda, provided the background for further advances including *Brown v. Board of Education* (1954). When Congress blocked his civil rights efforts, Truman used executive order. Franklin Roosevelt signed the Servicemen’s Readjustment Act (G.I. Bill) into law June 22, 1944, and Truman

implemented the law after Roosevelt's death. Besides the expansion of community colleges, Truman made major contributions to education.¹⁵ Materials housed in the Harry S. Truman Library in Independence, Missouri reveal his commitment to economic and social justice. A personal letter to Mr. William E. Cotter, April 7, 1948, argues the role of education in extending equal educational opportunity for all persons, to the maximum of their individual abilities without regard to economic status, race, creed, color, sex, national origin, or ancestry.¹⁶ Truman notes in a letter, August 28, 1946, to the chairman of the American Veterans Committee discrimination, like a disease, must be attacked wherever it appears. This applies to the opportunity to vote, to hold and retain a job, and to secure adequate shelter and medical care no less than to gain an education compatible with the needs and ability of the individual.¹⁷ John F. Kennedy set the groundwork for major civil rights legislation. On Kennedy's death, Lyndon Johnson's legislative skills led to the landmark *Civil Rights Act of 1964*,¹⁸ amended and expanded in 1991. Like Truman, Johnson was faced with major resistance to his civil rights agenda. He pushed Congress to honor Kennedy's legacy by passing the *Civil Rights Act*. Critics wanted him to push harder and implement more governmental pressures to eliminate discrimination in education and employment. Both Presidents Truman and Johnson made major steps toward a more compassionate and just society at great risk to their own political careers.

The issue of social justice through affirmative action continues to be litigated. There are few countries in the world where college students can have their cases reach and pique the interest of Justices in the land's highest court. Barbara Grutter, Jennifer Gratz, Abigail Fisher, and Allan Bakke were students whose admissions concerns led to U.S. Supreme Court rulings.

While each new case builds on preceding cases, the trend has been toward limiting affirmative action's reach. Affirmative action cases have addressed issues of equality and access for opportunity and employment in education, business, government, and industry for over half a century. Current and future presidents and their administrations continue and will continue efforts for economic and social justice, often in the face of determined critics. After the U.S. Supreme Court upheld Michigan's affirmative action ban, California and other states that eliminated race preference affirmative action will reexamine their policies. The *Schuetz* case will examine whether the political restructuring process is applicable.¹⁹ Under political restructuring, state action is unconstitutional where it meets both elements of a two-prong test: first, if it has a racial focus, targeting a policy or program that primarily benefits the minority group's interest; second, if it reallocates political power or reorders a decision-making process in a way that places special

burdens on a minority group's ability to achieve goals through the process.

The U.S. Supreme Court's ruling in *Schutte* may not weaken affirmative action, but, together with past decisions, it may lead to other-than-race-based factors in assuring diversity as a compelling state interest. Examples include economic, first generation, challenging living environments, and marginalized individuals. The continuing effort toward a more civil, humane society, with expanded educational and economic opportunities remains a work in progress in U.S. democratic society.

Endnotes

- 1 Public Law 88-352.
- 2 John Pulliam and James Van Patten, *The History and Social Foundations of American Education* (New York: Pearson, 2013), 219.
- 3 *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).
- 4 Brad Knickerbocker, "Race in Admissions Revised," *The Christian Science Monitor* (12 June 2003), 1, 12.
- 5 *Regents of the University of California v. Bakke*, 438, U.S.265, 98 S. Ct. 2733 (1978).
- 6 *Gratz v. Bollinger*, 539 U.S. 244 (2003).
- 7 *Grutter v. Bollinger*, 539 U.S. 306 (2003).
- 8 *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).
- 9 *Fisher v. University of Texas, Austin*, No. 11-345 (2013).
- 10 Richard D. Kahlenberg, "A Fresh Chance to Rein in Racial Preferences," *Wall Street Journal* (14 October 2013), A 15.
- 11 Greg Stohr, "Justices Reaffirm Race as College-Admission Factor," *Arkansas Democrat Gazette* (25 June 2013), 1A, 5A.
- 12 Mark Walsh, "Appeal Argued on Affirmative-Action Ban," *Education Week*. (23 October 2013), 15.
- 13 Stuart Taylor, Jr., "Is the Constitution Colorblind?," *Wall Street Journal* (31 August–1 September 2013), C7.
- 14 Ilya Shapiro, "More on Racial Preferences at UT-Austin," *Cato at Liberty* (14 October 2013, October), <http://www.cato.org/blog/more-racial-preferences-ut-austin>

- ¹⁵ James Van Patten, “Harry S. Truman—Educator,” *Educational Forum* 34, no. 3 (1970): 379–381.
- ¹⁶ Letter to Mr. William E. Cotter from President Harry S. Truman (7 April 1948).
- ¹⁷ Letter to Mr. Charles G. Bolte, Chairman of the American Veterans Committee, from President Harry S. Truman (28 August 1946).
- ¹⁸ *Civil Rights Act of 1964*, <http://www.ourdocuments.gov/doc>
- ¹⁹ American Bar Association, *Bill Schuette, Michigan Attorney General v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN) in the Supreme Court of the United States*, www.supremecourtpreview.org