Revista
Direitos Fundamentais
e Alteridade

AFFIRMATIVE ACTION IN THE UNITED STATES

AÇÃO AFIRMATIVA NOS ESTADOS UNIDOS

Kenneth Williams *

* *Juris Doctor*, University Of Virginia School Of Law, USA. Professor of Law, South Texas College of Law Houston, Houston, TX. e-mail: *kwilliams@stcl.edu*

1 INTRODUCTION

This article will address the current state of affirmative action in higher education in the United States. The article will begin with a brief history of discrimination and racism that African Americans have endured in the United States and how the Supreme Court of the U.S had failed to protect their rights. Following the discussion, the article will outline some of the improvements in African American life since official discrimination ended and has given the overall current socio-economic status of African Americans and Latinos in the United States and the continuing discrimination that these groups face. There is a continuing need for affirmative action in order for these groups to gain equality. The article will then discuss the use of affirmative action as a means of correcting some of the injustices visited upon African Americans and Latinos. Although affirmative action is used in many contexts, including by corporations and governmental entities, this article will focus on the use of affirmative action in higher education. The use of affirmative action in higher education has been controversial and has led to many legal challenges before the Supreme Court of the United States. This article will review these legal challenges and conclude with a discussion of the current state of affirmative action in higher education in the United States.

2 HISTORY OF DISCRIMINATION

Persons of African descent were brought to the United States as slaves. They were bought and sold as chattel. The U.S Supreme Court of legitimized slavery in the *Dred Scott v. Sanford*[1] case. Dred Scott was a slave in Missouri when his master brought him to Illinois which was a free state. Scott sued claiming that he was entitled to freedom since he was in the territory of a free state. The U.S. Supreme Court ruled against Scott, holding that he had no right to sue. In a famous passage, the Court held that persons of African descent "had no rights which the white man had to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit." This is considered the worse decision in United States history and many believe it led to the Civil War.

As a result of the Civil War, the slaves were freed and slavery was abolished. The Congress passed and the states ratified the Fourteenth Amendment to the United States Constitution. In pertinent part, it reads that "[a]ll persons born or naturalized in the United States... are citizens of the United States and of the state wherein they reside... nor shall any

[1] 60 U.S. 393 (1857).

state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[2] This is probably the most important amendment to the U.S. Constitution. The Fourteenth Amendment enshrined the notion of equality under the law. It also provided citizenship to the newly freed slaves and protected their rights. Today, as a result of this Amendment, anyone born in the United States is a citizen, even if their parents entered the United States illegally. The Amendment also guarantees due process of law to everyone, even the most vile criminal and even if the individual is not a U.S. citizen. However, the amendment only applies to government action. It does not protect against discriminatory conduct by individuals and entities such as private universities and corporations but the Amendment does empower Congress to address the problem of private discrimination by enacting civil rights statutes such as the Title VII of the Civil Rights Act which prohibits employment discrimination.

Despite the enactment of the Fourteenth Amendment, African Americans faced systemic discrimination following the Civil War. Many states, especially in the South, enacted "Jim Crow" laws. These laws mandated separate treatment of the races. Blacks were prohibited from among other things, using white restrooms, drinking from white water fountains, eating at white restaurants, attending white schools. Even though these laws were blatant violations of the Fourteenth Amendment, the U.S. Supreme Court failed in its duty to protect the rights of black people. In the landmark case of *Plessy v. Ferguson*,[3] the Court had to consider the constitutionality of separate but equal. Plessy was a black man who was forced to ride in the black section of a train. He refused to do so and was charged with a crime. He challenged the law on equal protection grounds. The Supreme Court rejected his claim and upheld the doctrine of "separate but equal." This doctrine remained the law of the land for the next fifty-eight years. During this time, separate was never equal. African Americans had to attend schools that were poorly funded, were provided inadequate public services, were systemically denied the right to vote, and were frequently the victims of lynchings. Even though slavery had been abolished, many African Americans were arrested for minor crimes and forced to work without compensation for plantation owners. Because the Supreme Court failed to enforce the Fourteenth Amendment and because they lacked the right to vote, African Americans had no protections against this gross mistreatment.

[2] U.S. Const. amend. XIV.
[3] 163 U.S. 537 (1896).

3 A NEW ERA

In 1948, for the first time, the Supreme Court indicated that it might be willing to enforce the Fourteenth Amendment in order to protect the rights of African Americans. In *Shelley v. Kramer,*[4] a black family purchased a house in a white neighborhood. The neighborhood association, however, had a provision in its contract with the residents known as a restrictive covenant. This restrictive covenant prohibited the neighbors from selling to anyone who was not a member of the white race. The white neighbors went to court in order to enforce the restriction on selling to non-whites. The Supreme Court held that courts could not enforce these restrictive covenants because doing so would be a denial of equal protection to blacks.

Six years later, the Supreme Court rendered the most important decision in its history. In *Brown v. Board of Education of Topeka*,[5] the Court considered whether separate but equal was consistent with the constitution, specifically the Equal Protection clause of the 14th Amendment. In *Brown*, students were not allowed to attend white schools and were forced instead to attend schools designated for African Americans. The Court held that separate but equal schools are inherently unequal and violate the equal protection clause of the Constitution. The Court also held that the segregation of public schools based on race instilled a sense of inferiority that had a hugely negative impact on the education and personal growth of African American children. After *Brown* and as a result of the civil rights movement and leaders such as Dr. Martin Luther King, official discrimination ended. The Supreme Court began to enforce more forcefully the Fourteenth Amendment and laws were enacted giving African Americans the right to vote and the right to be free from discrimination in employment, and which allowed them equal rights to use public facilities such as restaurants, restrooms, and water fountains.

4 CURRENT STATE OF AFRICAN AMERICANS

Obviously the conditions for African Americans have improved dramatically since the end of de jure segregation. The number of black professionals, such as lawyers, doctors, engineers and academics has increased dramatically. African Americans have also achieved electoral success. They have been elected to every major political office, including Governor, Senator, Congressmen and Mayor and of course U.S. President. The most

[4] 334 U.S. 1 (1948)
[5] 347 U.S. 483 (1954).

symbolic evidence of the improvement of conditions was the election of the first African American president, Barack Obama, in 2008.

Despite these achievements, the socio-economic status of blacks still lags far behind that of whites. The current population of the United States is approximately 77% white, 13% African American and 18% Latino. However, Blacks are 40% of the U.S. prison population. Black unemployment is almost twice as high as white unemployment. Blacks and Latinos are far less likely to earn a college degree than whites. Approximately 33% of the U.S. population consists of college graduates. About 36% of whites have college degrees, while only 22.5% of blacks and only 15.5% of latinos have college degrees. There's other evidence which indicates that blacks and others are still subject to widespread discrimination. For instance, videos of police killing unarmed African Americans have emerged in recent years. It is rare for the officers who have killed unarmed suspects to even be charged with a crime and even rarer for them to be convicted. In response to these shootings, the United States Department of Justice has issued reports documenting law enforcement's excessive force against, and harassment of, African Americans in Baltimore, Maryland, Ferguson, Missouri and Chicago, Illinois. There have been judicial findings of minority voter suppression by public officials. There is also widespread housing and education discrimination. Most distressing is the fact that a presidential candidate who was subsequently elected, openly courted white supremacists and used xenophobic targeting of American Muslims and Mexican Americans in order to advance his campaign.

5 AFFIRMATIVE ACTION AND LEGAL CHALLENGES

Because many university officials recognize that African Americans and others do not have equal opportunities and are still inhibited by so many years of unequal treatment, they have implemented affirmative action programs at their universities, beginning in the 1970's. These programs have led to complaints by some whites who believe that these programs harm them and they have sought to have these affirmative action programs discontinued through lawsuits and thorough the political process.

The first lawsuit challenging the use of affirmative action in higher education was the case of *De Funis v. Odegard.*[6] After he was denied admission to the University of Washington Law School, De Funis sued claiming that the law school's affirmative action

[6] 416 U.S. 312 (1974).

program discriminated against him and therefore denied him equal protection. However, before the case reached the U.S. Supreme Court, De Funis was permitted to enroll in the University of Washington Law School. Because he suffered no legal injury, the Supreme Court dismissed his case on the grounds that it was moot. Shortly thereafter another legal challenge to an affirmative action program reached the Supreme Court. The University of California medical school had 50 spaces in its medical school. Because there was such a dearth of minority doctors the University reserved 16 of the 50 spaces solely for minority students. Both minority and white students could compete for the other 34 spaces. Alan Bakke was a white student who applied for but was denied admission to the University of California, Davis medical school. He alleged that he was discriminated against based on his race since he could not compete for the 16 seats that were reserved for minorities whereas minorities could compete for all 5o seats. In *Regents of the University of California v. Bakke,*[7] the U.S. Supreme Court held that the University could not use racial quotas and that it was unconstitutional for the university to reserve 16 spaces solely for minority students. However, the Supreme Court held that a university or professional school could use the race of an applicant as a positive factor, along with other factors, such as poverty and geography, when deciding which students to admit to its university. The Court upheld the use of race as a positive factor since it was important to remedy the effects of past societal discrimination.

The next challenge to higher education affirmative action programs to reach the U.S. Supreme Court was the case of *Grutter v. Bolinger.*[8] Gruter sued the University of Michigan after she was denied admission to the law school because of the law school's affirmative action program. The Supreme Court again upheld the use of affirmative action but changed its rationale for upholding these programs. In *Bakke,* the university upheld the use of race because of past discrimination. However, in *Grutter,* affirmative action was upheld by the Court in order to promote diversity in the student body. The Court also held that it believed that affirmative action programs would be unnecessary in 25 years.

The most recent case challenging the use of affirmative action in higher education to be decided by the U.S. Supreme Court is *Fisher v. University of Texas.*[9] More than half the population of the state of Texas is minority. However, at its leading University, the University of Texas, only 3.5% of the student body was black and only 11% of the student body was latino. In order to boost the minority enrollment, the University of Texas adopted

[7] 438 U.S. 265 (1978).
[8] 539 U.S. 306 (2003).
[9] 136 S. Ct. 2198 (2016).

an affirmative action policy which considered the race of an applicant along with other factors such as the family background of the applicant, the applicant family's income, the language spoken in the applicant's home and geography. After this program was implemented, the minority student population at the University substantially increased: from 3.5% to 6.8% black and from 11% latino to 17% latino. A white student who was denied admission to the University sued claiming that this program discriminated against her. The Supreme Court again upheld the University's affirmative action program on the need for a diverse student body. The Court held that a diverse student body serves several purposes: 1) promotes cross racial understanding; 2) helps to breakdown racial stereotypes; 3) enables students to better understand persons of different races; 4) better prepares students for an increasingly diverse workforce and society and 5) creates leaders from diverse backgrounds.

6 CONCLUSION

Universities in the United States cannot use racial quotas in their admissions policies. However, they are currently permitted to consider race in order to achieve a diverse student body. Race can be considered along with other factors in deciding whom to admit to a student body. The use of affirmative action, however, is completely voluntary. No institution is required to adopt an affirmative action program. In fact, in a few states, the voters have prohibited the use of affirmative action at their state universities. In California, Michigan and the state of Washington, the public voted to prohibited the use of affirmative action and the U.S. Supreme Court has upheld their right to do so.[10] The future of affirmative action in the United States is uncertain, given the 25 year timetable the Court set in *Grutter* and the election of Donald Trump and the likelihood that he would appoint judges to the U.S. Supreme Court who are not likely to be receptive to affirmative action.

[10] See *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623 (2014).