

2004

The Future of Affirmative Action

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Recommended Citation

Wendy B. Scott, 78 Tulane L. Rev. 2053 (2004).

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Panel Commentary Twenty-Five Years: The Future of Affirmative Action

Wendy B. Scott*

The author served as the moderator of a panel at the Symposium entitled Twenty-Five Years: The Future of Affirmative Action. In this Commentary, she reviews articles by Professors Kevin Brown, Leland Ware, and John Valery White appearing elsewhere in this Issue.

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I. INTRODUCTION

In a recent issue of Howard Law School's *The Jurist*, Richard Delgado suggested that a Nobel Prize should be awarded to the legal scholar or social scientist that discovers how "racial relations" in America consistently replicate to produce racial inequality like the genetic code that enables organisms to replicate.¹ Certainly Professors Kevin Brown, Leland Ware, and John Valery White are contenders for such a prize.² The panel presentations and articles by Professors Brown, Ware, and White support the outcome of *Grutter v. Bollinger*³ as consistent with the racial justice agenda set fifty years ago for the judiciary in *Brown v. Board of Education*.⁴ Yet all three raise several

* Professor of Law, Tulane University School of Law School. Professor Scott served as the panel moderator.

1. *Remarks by Richard Delgado and Jean Stephanic*, THE JURIST, Fall 2003, at 26, 27 [hereinafter *Remarks*]. For example, the indignities of Jim Crow replicated many of the deprivations of slavery. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), represented a break in the chain and what many thought was the final achievement of equal protection under the law for African-Americans. Today, however, racially segregated public schools are replicas of the public school systems that predated *Brown*.

2. See Kevin Brown, *The Racial Gap in Ability: From the Fifteenth Century to Grutter and Gratz*, 78 TUL. L. REV. 2061 (2004); Leland Ware, *Strict Scrutiny, Affirmative Action, and Academic Freedom: The University of Michigan Cases*, 78 TUL. L. REV. 2097 (2004); John Valery White, *What Is Affirmative Action?*, 78 TUL. L. REV. 2117 (2004).

3. 123 S. Ct. 2325 (2003).

4. 347 U.S. 483 (1954). Curt A. Levey also participated on this panel. His remarks were based on his editorial, *Colleges Should Take No Comfort in the Supreme Court's Reprieve*, CHRONICLE OF HIGHER EDUCATION, B11 (July 18, 2003). Levey reads the Court's

intriguing questions about affirmative action and critiques of the Court's decisionmaking methodology.

A. *The Occasion*

The following language in the majority opinion in *Grutter*, authored by Justice Sandra Day O'Connor, inspired the title of the panel *Twenty Five Years: The Future of Affirmative Action*.

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.⁵

So one issue considered by Professors Brown, Ware, and White is whether the effects of slavery and subsequent policies of racial injustice, in practice in America for at least sixteen generations (400 years), can be removed in one generation (twenty-five years), or even two generations,⁶ as a barrier to entry into higher education.

Each author provides a relevant social history of affirmative action as a remedy for past discrimination and a litigation review from *Plessy v. Ferguson*⁷ to *Brown*, from *Brown* to *Regents of the University of California v. Bakke*,⁸ from *Bakke* to *Adarand v. Peña*,⁹ and from *Adarand* to *Grutter*. Their work reaffirms that history is important in assessing the relevance of a generation, or twenty-five years, as a benchmark for reevaluating the need for affirmative action.

The authors take us back to 1619, when the first twenty Africans arrived in the colony of Virginia. Captured from a Spanish slave ship

reference to "25 years" as a "limited reprieve" on considering race as a diversity factor and upon the holding that diversity is a compelling government interest. He reads Justice O'Connor's language as a positive mandate to the government to work towards ending the consideration of race in admissions over the next twenty-five years. "The bottom line is that any higher education institution still using race-based admissions 25 years from now will be doing so without the Supreme Court's sanction." *Id.* Levey proposes that Congress enact a mandatory timetable for phasing out race-based admissions, "in order to put more teeth into the Court's 25-year limit and sunset-provision requirement." *Id.* He calls for colleges and universities to pursue race-neutral alternatives to achieve diversity, and to broaden the definition of diversity. Levey predicts further litigation by affirmative action opponents and continued public and political opposition to race-based college admission.

5. *Grutter*, 123 S. Ct. at 2347.

6. *Brown* was decided one generation prior to *Bakke* and two generations prior to *Grutter*.

7. 163 U.S. 537 (1896).

8. 438 U.S. 265 (1978).

9. 515 U.S. 200 (1995).

by the English they were not at first slaves. But within less than fifty years, many colonial legislatures had enshrined slavery into their laws.¹⁰ The Constitution insulated the institution of slavery from significant government interference. In 1863, President Lincoln issued the Emancipation Proclamation. So for ten generations, the conscious consideration of race determined one's status as slave or free person.

Between 1863 and 1954, America experienced a civil war, three constitutional amendments to end slavery and confer citizenship on former slaves, a short-lived "reconstruction" of the South and the lives of former slaves, World War I, World War II, and United States Supreme Court-sanctioned segregation based on race.¹¹ So for four more generations, the conscious consideration of race continued to determine socioeconomic, political, and even military status: separate but equal.

From 1954 to 2004, we experienced the civil rights movement and affirmative action. During that period we have seen challenges to affirmative action, yet today we still celebrate *Brown* fifty years later. So for only two of the sixteen generations of black people's presence in America as both slave and citizen, did race become relevant for providing a remedy for past discrimination and for consideration as one of many factors that constitute "diversity."

Not only are time and history relevant in assessing affirmative action, but each prize contender also takes a holistic approach to understanding the replication process under study.

B. The Response: Replicating Racial Injustice

Professor Kevin Brown shows that Grutter did not end the war against racial injustice. Specifically, he focuses on the racial gap in standardized test scores and whether any thing can be done to close it and improve education at the K-12 grade levels over the next twenty-five years.¹² Professor Brown claims that the racial gap in standardized test scores replicates racial injustice by perpetuating the stereotypes of racial inferiority that supported slavery and segregation. He states: "The existence of the academic racial gaps may simply be the latest chapter in the sad, sordid, and prolonged history of presumably objective, neutral, and non-biased justifications for racism that have plagued Western societies. . . ."¹³

10. See *Brown*, *supra* note 2, at 2074-75.

11. *Plessy*, 163 U.S. at 551-52.

12. See *Brown*, *supra* note 2, at 2092-95.

13. *Id.* at 2072.

Professor Brown reviews the history of social science- and natural science-based explanations for racial difference that bolstered the institutional barriers against racial integration.¹⁴ He demonstrates that even cases like *Brown* and *Grutter* are based on the belief that black people are inferior to white people and need to assimilate into white culture in order to improve.¹⁵ The gap in test scores is therefore a product of the psychological harm done to whites and blacks by the racial hierarchy message.¹⁶ Professor Brown concludes that experts cannot develop “culturally neutral” standardized tests “because of the existence of the history of racial and ethnic oppression in our country.”¹⁷

Professor Leland Ware characterizes *Grutter* as a testament to the civil rights movement style of organizing a litigation campaign.¹⁸ Professor Ware sees the twenty-five-year language as settling the legitimacy of affirmative action in higher education.¹⁹ However, he is also of the opinion that *Grutter* did not directly address racial inequality because it gave a broad amorphous definition to “diversity.”²⁰

He also highlights how the Court applied strict scrutiny deferentially in the academic setting in light of academic freedom principles.²¹ Professor Ware disagrees with those who have argued that Justice O’Connor’s formulation of the strict scrutiny standard makes *Grutter* inconsistent with *Croson* or *Adarand*. He places *Grutter* in the evolution of heightened scrutiny from *United States v. Carolene Products*.²² Professor Ware contends that what he calls the “academic deference principle” is analogous to the “arbitrary and capricious” standard of judicial review.²³ He concludes that because the strict scrutiny standard applied by the majority in *Grutter* was much more “relaxed and flexible” than in the past, “[t]his is a significant

14. *Id.* at 2084-89.

15. *Id.* at 2090-91. I address this underlying fallacy in affirmative action jurisprudence in Wendy Brown-Scott, *Unpacking the Affirmative Action Rhetoric*, 30 WAKE FOREST L. REV. 801, 806 (1995). “This persistent belief that African Americans are inferior, not affirmative action, perpetuates the stereotype of the unworthy black recipient of preferential treatment.” *Id.* at 806-07.

16. *Brown*, *supra* note 2, at 2095.

17. *Id.*

18. Ware, *supra* note 2, at 2098.

19. *Id.* at 2112.

20. *Id.* at 2114.

21. *Id.* at 2108-12.

22. 304 U.S. 144, 152 n.4 (1938).

23. Ware, *supra* note 2, at 2110.

development in the Court's Equal Protection jurisprudence," that will make future challenges to affirmative action predicted by Justice Scalia difficult.²⁴

Professor John Valery White sees the level of scrutiny as relevant for different reasons. Professor White asks the fundamental question: "What is affirmative action?" He posits the need for a definition in order to know how to judge challenges to affirmative action as constitutionally distinct from cases involving individual or class discrimination claims.²⁵ Professor White traces the equating of affirmative action with facially invidious discrimination to *Bakke*, which in turn rests on language in *Korematsu v. United States*²⁶ and *Hirabayashi v. United States*.²⁷ Professor White sees several consequences flowing from this equation: the rejection of the benign/invidious distinction, the level of scrutiny chosen as a reflection of the Court's view of affirmative action, and the innocent victim factor.²⁸

Professor White challenges the unexamined assumption in the Court's jurisprudence that affirmative action constitutes discrimination akin to the facial racial discrimination challenged in cases such as *Loving v. Virginia*²⁹ and *Gomillion v. Lightfoot*.³⁰ He rejects the theory flowing from *Bakke* that the act of racial classification itself is discriminatory.³¹ He looks at the academic, political, moral, and judicial meanings of affirmative action to challenge Justice Powell's characterization of racial classification as discrimination.³² Instead, Professor White argues that affirmative action is consistent with the equality principle.

Professor White defines affirmative action as "disputes over discrimination in contexts where discrimination itself is difficult to prove" because of the difficulty in showing causation and damage.³³ The paradox created by the proof problem is that plaintiffs in discrimination cases must meet a relatively stringent proof standard, while opponents of affirmative action plans need only show a

24. *Id.* at 2099.

25. White, *supra* note 2, at 2183-84.

26. 323 U.S. 214 (1944).

27. 320 U.S. 81 (1943).

28. White, *supra* note 2, at 2129-30.

29. 388 U.S. 1 (1967).

30. 364 U.S. 339 (1960).

31. White, *supra* note 2, at 2162-68.

32. *Id.* at 2127-80.

33. *Id.* at 2127.

classification exists based on race to create a presumption of discrimination.³⁴ This definition distinguishes affirmative action from antidiscrimination law and the policy-focused concepts of affirmative action.³⁵

However, Professor White sees *Grutter* as a case positing that the affirmative action practiced by the law school was not intentional discrimination, but holding on to the assumption that affirmative action is discrimination. In fact, an affirmative action plan is presumed discriminatory unless the government can offer a compelling reason why it is not. Professor White suggests that instead of the presumption, courts should require proof of discrimination caused "because of not in spite of"³⁶ affirmative action as a way of distinguishing the evidentiary standard from that in facial discrimination case law. He concludes that unless the Court defines affirmative action as he proposes, affirmative action to promote diversity will continue to lose support because it is viewed as analogous to intentional discrimination.

Professor White's point is that to view affirmative action as discrimination analogous to Jim Crow-era practices is legally wrong and morally indefensible. His Article is also part of the larger debate pitting individual, negative equality against positive, group-based equality. Most positive rights countries (for example, the European Union, Canada, and India) view positive or affirmative action as a group remedy for past discrimination, not itself a form of discrimination, and evaluate its application under a proportionality standard closer to rational basis than heightened scrutiny. Perhaps the deferential strict scrutiny standard employed by the *Grutter* majority has moved the Court away from the facial discrimination model and closer to the proportionality standard.³⁷

II. CONCLUSION

The psychological and social effects of "racial relations" are deeply embedded in the individual psyche of all Americans.³⁸ African-

34. *Id.* at 2178.

35. *Id.* at 2179.

36. *Personnel Administrators v. Feeney*, 442 U.S. 256 (1979).

37. *See Ware*, *supra* note 2, at 2110-11.

38. For an exploration of the social and psychological effects of racial relations, see Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to Black Americans*, 67 TUL. L. REV. 597, 633-634 (1995) (discussing spiritual injuries such as the presumption of inferiority and the devaluation of self esteem); Wendy Brown Scott, *Transformative*

Americans even remain largely invisible to many white Americans, as so eloquently explored by the late Ralph Ellison in *The Invisible Man*.³⁹ Courts and lawmakers confront a society that remains massively shaped by the consequences of the racial construction of white superiority/black inferiority.⁴⁰ *Grutter* represents yet another chapter in the continuing story of dismantling this construct. Professors Kevin Brown, Leland Ware, and John Valery White would agree that the story cannot end until black Americans have achieved full acceptance by white Americans as equal.

I can personally attest to the reality of the inferior/superior race relations construct. My life has been a series of decisions to persevere, despite the belief of some that I was not qualified, or deserving. Of course I know I am. But for the God I serve, the family He placed me in, and my desire to learn and know the history of my people in America and Africa, my life might have been no different than the many African-American men, women, and children who cannot read, write, or hold a decent job in the richest nation on earth. What is most frightening is that many young black children have no desire to go beyond their circumstances. On the other hand, white Americans seemingly have no desire to have their minds desegregated.

In an essay entitled *The Miseducation of White America*,⁴¹ I suggest that one reason some white Americans hold a distorted view of black people and our ability is that they know very little about us. As Professor Bryan Fair stated during comments at the Symposium, "it is as if our story—the African American story—never happened." However, the miseducation of white America is rarely acknowledged as a consequence of a perpetual racial hierarchy. Professor Brown effectively resurrects Justice Douglas's dissent in *Defunis v. Odegaard*⁴² to make this point.⁴³ The rationale in *Grutter* that creating diversity in the classroom promotes "cross-racial understanding"⁴⁴ is an

Desegregation: Liberating Hearts and Minds, 2 IOWA J. GENDER, RACE & JUSTICE 316, 325-25 (1999) (exploring the role of curriculum in perpetuating a system of racial hierarchy).

39. RALPH ELLISON, *THE INVISIBLE MAN* (1952).

40. Roger M. Smith, *Black and White After Brown: Constructions of Race in Modern Supreme Court Decisions*, 5 U. PA. J. CONST. L. 709, 715 (2003).

41. Wendy Brown Scott, *The Miseducation of White America*, 9 WIDENER L. SYMP. J. 73 (2002).

42. 416 U.S. 312 (1974).

43. See Brown, *supra* note 2, at 2093-95. Justice Douglas notes the psychological harm done to whites by "encouraging the growth of the fiction of a superior race." *Defunis*, 416 U.S. at 336 (Douglas, J., dissenting).

44. *Grutter*, 123 S. Ct. 2325, 2339-40 (2003).

acknowledgment of the need for what I call intellectual, or “transformative[,] desegregation.”⁴⁵

Grutter has not resolved the question of how to define and manage race relations in America. Professors Brown, Ware, and White stress that the larger questions of racial equality and economic security for Americans of color remain. All of the panelists made it clear that, for better or worse, race still matters. I hope that during the next twenty-five years all Americans will learn more about the culture, thought, and history of blacks and other people of color, and not rely solely on their own experience as the measure of life for others. We should interpret Justice O’Connor’s aspirational statement as a call to finally end the replication of racial injustice. Several things need attention, especially the improvement of public K-12 education. The Court should relax the limitations placed on voluntary desegregation plans in *Missouri v. Jenkins*.⁴⁶ School systems should address the educational decline of black men.⁴⁷ In sum, we should value diversity outside the higher education context and encourage government to continue efforts to remedy the remaining effects of past discrimination.

45. In the context of school desegregation litigation, I use the idea of transformative desegregation to justify calling curriculum vestiges of *de jure* segregation. Scott, *supra* note 38, at 319-20. Transformative desegregation requires that we unlearn the white racial superiority/black racial inferiority model. *Id.* at 321.

46. 515 U.S. 70 (1995).

47. See *Grutter*, 123 S. Ct. at 2362 n.11 (Thomas, J., dissenting).