JURIST

Friday, May 18, 2012

The Unsure Fate of Affirmative Action

JURIST Associate Editor James Craig, University of Pittsburgh School of Law Class of 2014, discusses the history of affirmative action and argues that recent studies and case law have left affirmative action with an uncertain future...*(His opinions are not intended to represent those of JURIST)*

In February 2012, the US Supreme Court granted *certiorari* to once again decide the constitutionality of affirmative action in higher education. Next term, the Court will hear the case of **Fisher v. University of Texas at Austin**, which arises from a complaint made by Abigail Noel Fisher alleging that she was denied admission to the University of Texas while minority students with lower grade point averages and standardized test scores were admitted. In its April 2012 decision, the US Court of Appeals for the Fifth Circuit upheld the university's affirmative action program by finding that it passed **strict scrutiny**. The Supreme Court will be called on to address whether the University's program, which gives minority students an advantage on undergraduate college applications, violates the **Due Process Clause** of the **Fourteenth Amendment**.

The issue of affirmative action stems from the divisive period of the Civil Rights Movement during the 1950s and 1960s. In the midst of civil strife and tense race relations, the US Congress, with the encouragement of President Lyndon B. Johnson, passed a series of laws which would are popularly known as the **Civil Rights Act of 1964**. One section of that document has particular bearing on the issue of affirmative action — **Title VII**.

Title VII prohibits discrimination by covered employers on the basis of race, color, religion, sex or national origin and at its heart held the **Equal Protection Clause** of the Fourteenth Amendment, which

states that "no state shall ... deny to any person within its jurisdiction the equal protection of the laws." However, the law alone did not end the inequality. Supplementing Title VII, Johnson declared that all federal contractors be required to take affirmative action in hiring practices towards minorities in his **Executive Order 11246**. Subsequently, the practice became integrated into higher education in public universities.

The first true challenge to the policy in regards to college admissions came in 1978 in the decision in **Bakke v. Regents of the University of California**. In *Bakke*, an applicant to the University of California Davis School of Medicine was denied admission while other, less academically qualified minority candidates were granted admission. The Supreme Court decided that the University's quota system for admitting minorities was far too rigid and thus violated the Equal Protection Clause of the Fourteenth Amendment. However, Justice Powell went further to state that despite their ruling, diversity in higher education was, in fact, a compelling interest to continue affirmative action.

Many years and much debate later, two cases changed the standard of review for affirmative action cases. The cases of **Freeman v. Pitts** and **Adarand Constructors, Inc. v. Pena**, falling within three years of one another, illustrated the court's renewed interest in the policy. In *Freeman*, the court found that not only was diversity a compelling interest in pursuing affirmative action in higher education, but remedying past racial injustice also met this benchmark. Then, in *Adarand*, the court found that the standard of review for federal race and ethnicity based programs would be strict scrutiny, requiring:

- (1) a compelling governmental interest in promoting or restraining a certain action, and
- (2) that the action be narrowly tailored to that end.

The decision in *Adarand* reaffirmed the 1989 case of **City of Richmond v. Croson**, which applied the standard to state-based challenges.

The next cases of importance came a decade later in **Gratz v. Bollinger** and **Grutter v. Bollinger** in 2003, collectively known as the Michigan cases. In *Gratz*, the two petitioners Jennifer Gratz and Patrick Hamacher — both white residents of the state of Michigan — were denied admission to the University of Michigan's undergraduate program. The petitioners filed suit against the university in 1997

claiming that their Fourteenth Amendment rights to equal protection were infringed upon. They sought declaratory and injunctive relief. The Court heard the case in conjunction with another case that had been brought against the University's law school, *Grutter v. Bollinger*. In *Grutter*, the petitioner Barbara Grutter was similarly denied admission to the University's law school based on the school's affirmative action policy that gave minorities an advantage in admissions. The Court split their decision on the two cases. In *Gratz*, the Court held that Michigan's point-based admissions system was too rigid and gave too much weight to race. However, the Court diverged from this opinion in *Grutter* where they held that the more holistic approach to admissions utilized by the university's law school was constitutionally valid and that there was still a necessity of promoting diversity in higher education. Justice O'Conner, writing the opinion of the court stated:

The Court takes the Law School at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its use of racial preferences as soon as practicable. The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.
While the decision in *Grutter* held that affirmative action in higher education was still supported by a legitimate governmental interest, only four years later a fractured Court dealt a blow to the legal rationale underpinning their decision. In the case of **Parents Involved in Community Schools v. Seattle School District No. 1**, the Court found in its plurality opinion that remedying past racial diversity was no longer a sufficiently compelling governmental interest. Additionally, the Court held that denying a student admission to the school of their choice based on a pursuit of racial diversity violated that student's equal protection rights. However, Justice Kennedy writing in concurrence stated that "diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue." Further, while this case represented a changing view on the program, the Court has long held that affirmative action in higher education is uniquely privileged.

In recent years, strongly competing opinions have emerged on the rationale underlying affirmative action in higher education. Former presidents of Princeton and Harvard, William G. Bowen and Derek Bok, respectively, are strong proponents of the policy. In their 1998 book, *The Shape of the River*, they offer empirical evidence showing the benefits of the policy on minorities. They cite reasons including increased college access to minorities, increased earning power of

graduates and popular support for affirmative action as the basis for the continued necessity of the policy.

Opponents of the program, including Marie Gryphon of the CATO Institute, have called their statistics into question and systematically undercut their arguments. Ms. Gryphon argued that not only were their conclusions based on flawed representative samples but contended that the policy is actually detrimental to minority students. According to Gryphon, affirmative action produces no concrete benefits to minority groups but instead produces several significant harms. First, a phenomenon called the "ratchet effect" occurs when the preferences at a handful of top schools, including state flagship institutions, worsen racial disparities in academic preparation at all other American colleges and universities. This occurs due to the fact that top schools are able to create a class that is both racially diverse and academically equivalent while less selective schools are forced to make greater concessions in order to create a racially diverse student body. Here, the schools are forced to accept less academically prepared minority candidates in order to achieve racial diversity due to the dwindling pool of applicants.

This gap in preparation combines with other negative factors to create disparate graduation rates between minority and non-minority groups. Ms. Gryphon cites recent sociological research concluding that admission preferences hurt campus race relationships. According to the studies, this in turn harms minority students' performance by activating fears of confirming negative group stereotypes, lowering grades and reducing college completion rates among minority students.

Finally, Gryphon argues that the benefit of affirmative action programs may not be as great as previously thought. She states that recent research shows that skills, not credentials, can narrow socioeconomic gaps between white and minority families. Therefore, policymakers should end the harmful practice of racial preferences in college admissions. Instead, they should work to close the critical skills gap by implementing school choice reforms and setting higher academic expectations for students of all backgrounds

Further complicating the issue is the recent accidental release of the academic information of students at Baylor Law School, including their GPA and LSAT scores. However, even with hard data, there is still disagreement over how significant of an advantage was given to those students. Some sources view the advantage as miniscule while others view it as significant. Despite disagreement over the impact of the

program, the incident has brought the subject of affirmative action to the forefront of the minds of the legal community once again and will likely play some role in the upcoming case.

Ultimately, the issue of the continued implementation of affirmative action is going to come down to the decision of a Court bearing little resemblance to the one that upheld the program in *Grutter*. Two justices who signed on to the opinion, Justices Stevens and Souter, have been replaced with ideologically comparable successors in Justices Sotomayor and Kagan. However, Kagan has recused herself due to her role in the case as former US solicitor general. Likewise, Chief Justice Rehnquist has been replaced with conservative Chief Justice John Roberts. However, O'Conner, the opinion writer for *Grutter*, has since retired and has been replaced by the more conservative Justice Samuel Alito. Remaining on the Court are Justices Thomas, Scalia and Kennedy who dissented in *Grutter* and Justices Breyer and Ginsburg who wrote concurrences. The 5-4*Grutter* majority seems to have dwindled to a 5-3 split in the other direction.

The fate of affirmative action, the policy that Justice O'Conner predicted would stand for 25 years from her opinion in *Grutter*, will likely face tough opposition in the upcoming term. With the changing membership of the Court, the recent case law and the recent research and events it is not inconceivable that the decades old practice could come to an end.

James Craig earned his B.A. in political science and history from the University of Pittsburgh in May 2011. He is currently an associate editor of JURIST's Social Media service.

The opinions expressed herein are solely those of the author and do not necessarily represent those of JURIST or any other organization.