UNIVERZITA KARLOVA V PRAZE

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Institut mezinárodních studií

Diplomová práce

2015 **Tomáš Martinec**

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The Issue of Race in the Jurisprudence of the Supreme Court of the United States: The Evolving Interpretation of the Equal Protection Clause

Diplomová práce

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Abstrakt

Diplomová práce nazvaná *The Issue of Race in the Jurisprudence of the Supreme Court of the United States: The Evolving Interpretation of the Equal Protection Clause* analyzuje judikaturu Nejvyššího soudu Spojených států amerických týkající se *Equal Protection Clause*, tedy ustanovení zakotvující rovnou ochranu práv, a to konkrétně rozsudky *Plessy v. Ferguson*, *Sweatt v. Painter*, *Brown v. Board of Education, Topeka*, *Regents of the University of California v. Bakke, Grutter v. Bollinger*, *Gratz v. Bollinger*, *Fisher v. University of Texas* a *Schuette v. Coalition to Defend Affirmative Action*. Na analýze výše zmíněných rozsudků práce ukazuje, jak se postupem času vyvíjelo filozofické zakotvení Nejvyššího soudu, kdy po druhé světové válce byl soud silně ovlivněn přirozeně-právním myšlením, které mírně převážilo do té doby dominující pozitivně-právní filozofii, což vedlo k ústavněprávnímu etablování tzv. *affirmative-action* názorem soudce Powella v případu *Bakke* a zejména pak rozsudkem ve věci *Grutter*. Přirozenoprávní myšlení se však nikdy tak dominantním, jako byl v devatenáctém století právní pozitivismus ve věcech *Gratz*, což byl sesterský případ k případu *Grutter*, a zejména pak poslední rozsudky ve věcech *Fisher* a *Schuette* ukazují, že pozitivněprávní proud začíná, i vlivem změn v obsazení Nejvyššího soudu převažovat.

Abstract

This thesis entitled *The Issue of Race in the Jurisprudence of the Supreme Court of the United States: The Evolving Interpretation of the Equal Protection Clause* analyses the jurisprudence of the Supreme Court of the United States concerning Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, in particular the following decisions: *Plessy v. Ferguson*, *Sweatt v. Painter*, *Brown v. Board of Education, Topeka*, *Regents of the University of California v. Bakke*, *Grutter v. Bollinger*, *Gratz v. Bollinger*, *Fisher v. University of Texas* and *Schuette v. Coalition to Defend Affirmative Action*. The analysis of the above-mentioned decisions illustrates the evolution of the philosophical background of the Supreme Court. After the Second World War, the natural-law legal philosophy began influencing the Justices and slightly overshadowed the positive-law current that was predominant in the pre-War era, in particular in the 19th century. This new philosophical background of the High Court help to constitutionally entrench the affirmative action policies by Justice Powell's opinion in *Bakke* and particularly by *Grutter*. However, the natural-law current has never become as dominant as the positive-law one in the 19th century, and as shown in *Grutter's* companion case of *Gratz* and most notably the recent cases of *Fisher* and *Schuette*, the positive-law philosophy is – also thanks to changes in the composition of the Supreme Court – regaining its position on the Court.

Klíčová slova

Zásada rovné ochrany práv, Nejvyšší soud USA, Čtrnáctý dodatek, afirmativní akce, pozitivní diskriminace, rasa

Keywords

Equal Protection Clause, Supreme Court of the US, Fourteenth Amendment, affirmative action, positive discrimination, race

Rozsah práce: 91 663 znaků

Prohlášení

1. Prohlašuji, že jsem předkládanou práci zpracoval samostatně a použil jen uvedené prameny a literaturu.
2. Prohlašuji, že práce nebyla využita k získání jiného titulu.
3. Souhlasím s tím, aby práce byla zpřístupněna pro studijní a výzkumné účely.

V Praze dne 5. 1. 2015 Tomáš Martinec

Acknowledgement

I would like to express my sincere gratitude to my advisor Prof. Stephen Simon from the Political Science Department of the University of Richmond for the continuous support of my research, for his patience, motivation and insightful comments that helped me in all the time of research and writing of this thesis.

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V čem se oproti původními zadání změnil cíl práce?
Nijak.

Jaké změny nastaly v časovém, teritoriálním a věcném vymezení tématu?
Změna ve věcném zaměření tématu

Jak se proměnila struktura práce (vyjádřete stručným obsahem)?
Introduction

- **Question of race relations emerged out of civil war as one of the most important societal issue**
- **14th amendment used to uphold and overrule segregation and it is now being used to argue for both upholding and overruling affirmative action**
- **The race-related decisions of the supreme court show that the Court tends to produce rulings that are seen as desirable and appropriate by the majority of the population**
- **They also show the evolution in conceptual understanding of equality and progressive division of the justices (and society) into two distinct groups**
  - **Bakke and Michigan shows the two different philosophical backgrounds of the respective justices – the more liberal ones are more into natural law and see the justice more in terms of John Rawls veil of ignorance and interpret the constitution in more conceptual way defined by principles, general ideas, while the more conservative ones are more into positive law, textual interpretation worshiping the original intent of the founding fathers and see justice as the same starting position in terms of institutional framework, but tend to overlook that the equal framework does not produce equal starting position, because even though U.S. is quite a young country, it has quite a lot historical baggage, especially in the area of race relations**
- **Plessy, Sweatt and Brown were nearly consensual decisions as they dealt with questions as they dealt with the simpler question – "should/are Blacks and Whites equal?" contrary to that the underlying question in all the affirmative**

action cases (Bakke, Michigan cases) is more complex and philosophical – "what is equality?"

- **o Over the course of time, the court tends to move from the severely positive-law stand in Plessy towards more moderate stand in Sweatt (acknowledging the importance of immaterial goods when assessing equality of institutions) to the natural law principles of veil of ignorance in Grutter**
- **o When the majority of the court started to move from moderate to "progressive" viewpoint, a vocal minority having a different approach to equality began to oppose this shift embracing the initially progressive argument of the colorblind constitution**
- **Evolution up to Plessy**
- **o Abolition of slavery, 14th amendment and nothing else, former slaves got nothing but freedom**
- **o Supreme court began curtailing the scope of the protection – slaughterhouse cases and civil right cases**
- **Description of the structure**

Plessy

- **Plessy is the starting point in interpreting the Equal Protection Clause.**
- **Court held that the 14th amendment was not passed in order to promote social equality and that separation does not imply inferiority.**
- **The society was racist, the justices as well. On the other hand, considering that the previous opinion of the court on the issue of race was Dred Scott (overruled by the 14th amendment), the court made a substantial progress.**
- **The court relied on equal application of the law, however, did not assess whether the law itself is unequal. Or in other words, the court rejected "social engineering" by claiming that social equality can only be achieved by voluntary changes in the society. This is the positive-law viewpoint of equality as a seemingly impartial framework, not taking into account anything else than the present situation.**
- **the court distinguished equality before law and social equality and held that separation does not imply inferiority – this argument is not logical, the law that was in question in Plessy was passed because of the white majority did not feel comfortable traveling with Blacks, i.e. exactly for the reason that Blacks are not equal to whites and cannot use the same facilities as whites --- this is even more visible when considering that the doctrine of separate but equal was soon replaced by separate and unequal**
- **the ruling betrayed the purpose of the amendment – it assumes inferiority of black race and supposes that the social equality of blacks is predetermined by consent of the majority**
- **the ruling did not provoke any attention of the media – it was not controversial**

Sweatt

- **the court denied to overrule Plessy, however the real world result was integration of professional education, since not integrate in a way that comply with Sweatt was impossible**
- **substantial equality of the facilities is required, mere superficial creation of a segregated facilities is not sufficient – "intangible" values count as well**
- **one step ahead from Brown, shift from strictly positive-law view**

Brown

- **unanimous decision, reached by political bargaining about the actual wording of the ruling**
- **the decision was unanimous thanks to Chief Justice Warren's effort, dear political consequences of a split ruling in terms of enforcing the decision, especially considering the context of the cold war and the beginning of the "battle for hearts and minds" of third world**
- **the court quoted sweatt, recognized the immense importance of education, declared the segregation inherently unequal and therefore violating Equal Protection Clause**
- **almost no legal reasoning, the court could have condemn the segregation as immoral with a reference to core "American values" expressed as early as in the Declaration of Independence, a fundamental law of the land, could have tackled the reasoning in Plessy about the badge of inferiority, but the court did neither, lack of positive-law arguments to overrule Plessy was recognized even by Justices when deliberating**
- **however, compelling, persuasive argumentation would not produce an unanimous ruling that was deemed far more important, also, the decision was aimed at the nation, not at the lawyers, that's why it is short, without legal jargon**
- **In Brown, the Court decided to go ahead a substantial part of the society on the question of race. The decision thus must have been at the same time acceptable for all the justices (in order to avoid dissent) and compelling and understandable enough for an average citizen.**

Bakke

- **court was deeply divided, did not produce majority – essentially, opinion of one Justice shape the law for the next 25 years**
- **Justice Powell offered a compromise position – strict scrutiny and no quota in exchange for some consideration of race, especially at the universities, which should be able to make bona fide decisions on selection of their student body**
- **Strict scrutiny = highest level of scrutiny, narrowly tailored means to serve a compelling state interest**
- **Compelling state interest may be remedying past discrimination at the particular institution or diverse student body, however, the court did not allow to remedy societal discrimination, because of the possibility of undue harm on the part of "innocent" individual members of the majority population**

o **However, the race-conscious programs allowed under the diversity rationale, have exactly the same outcomes. It might "unduly" harm some majority applicants and it at the larger sense remedied the past societal discrimination by enhancing the social status of minorities by allowing them to attend colleges in greater proportions than they would do if the admission was decided by traditional basis of knowledge/merit.**

- **the court recognized that there might be some special circumstances when race may be considered as a factor – the same argument was in Korematsu which was cited in Bakke, but in different context, in Korematsu, ironically, the special circumstances entitled the government to discriminate against one minority group, rather than to promote their rights at the "expense" of the majority.**
- **When defining the diversity rationale, Powell also used the argument of academic freedom guaranteed by the first amendment that comprises also the freedom to decide who is going to be admitted to study**
- **The court used strict scrutiny test to assess racially-sensitive programs merely 25 years after it outlawed segregation. This however was too early in order**

to achieve "substantial" (i.e. de facto, not only de iure) equality. The highest level of scrutiny was the result of the division in the court as well as the dichotomy of Justice Powell's opinion on the issue of meaning of equality. Justice Powell sided with the more progressive part, but only in terms of higher education, and allowed universities to freely consider race in order to achieve diverse student body and thus de facto remedy past societal discrimination.

Michigan Cases

- **First majority opinion upholding affirmative action, race conscious programs are not per se unconstitutional**
- **Although strict scrutiny must be used, it cannot bury the program, it is not necessary to use all alternatives, just the workable ones**
- **Quotas include not only set asides, but also some quota-like mechanical measures**
- **Even though the court did not allow to remedy past societal discrimination, the results of "diversity excuse" are the same, it is the same measure, differently labelled**
- **The court held that the right to equal protection of the laws applies only to individuals. However the reasoning of Justice O'Connor uses a lot of references to minority groups and their role in the society – legitimacy of government, necessity of participation of all racial groups in civic life, the need for members of any minority to see the possibility to become a national leader (i.e. to see a fighting chance for a relatively talented member of the minority to be admitted to the most prestigious universities).**
  - **This argumentation even more shows the shift in the majority's views on equality that requires the not merely an impartial legal framework, but this framework must take into account a historical facts, the differences in starting positions of different parts of society**
- **The particular definition of diversity depends on the university, it decides what traits shall be promoted, what is the "critical mass", the only requirement is good faith**
- **Doctrine of equality before laws as an individual right, but the decision focuses on the group**
- **The court as in Plessy allowed for race based distinctions, again as in Plessy, there was a dissent based on the "colorblind argument", however, a century too late**
- **The court acknowledges a problematic character of the ruling – defensive languages, all the opinion could be read as "Yes, it is not 100% constitutional in the positive-law scope, but, you know, [Opinion]", another evidence of that is the sunset provision**

Fisher and Schuette

- **conservatism regaining its position**
- **Kennedy authored the opinions**
-

Conclusion

- **The court follows the majority opinion in the society**
- **Bakke and Michigan shows the two different philosophical backgrounds of the respective justices – the more liberal ones are more into natural law and see the justice more in terms of John Rawls veil of ignorance and interpret the constitution in more conceptual way defined by principles, general ideas, while the**

more conservative ones are more into positive law, textual interpretation worshiping the original intent of the founding fathers and see justice as the same starting position in terms of institutional framework, but tend to overlook that the equal framework does not produce equal starting position, because even though U.S. is quite a young country, it has quite a lot historical baggage, especially in the area of race relations

- Comparing Plessy and grutter, the reasoning of the court evolved from the division between supremacist and non-supremacist arguments into the debate on justice

Jakým vývojem prošla metodologická koncepce práce?
žádným, jedná se o analýzu judikatury NS USA

Které nové prameny a sekundární literatura byly zpracovány a jak tato skutečnost ovlivnila celek práce?
Nová sekundární literatura analyzující předmětné rozsudky.

Charakterizujte základní proměny práce v době od zadání projektu do odevzdání tezí a pokuste se vyhodnotit, jaký pokrok na práci jste během semestru zaznamenali (v bodech):
Změna tématu, rozpracování struktury práce

Podpis studenta a datum:

Schváleno:	**Datum**	**Podpis**
Vedoucí práce		
Vedoucí diplomového semináře		

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Introduction

When studying the Fourteenth Amendment to the Constitution of the United States, or more broadly speaking the history of race relations in the United States from the legal standpoint, we usually focus on how has the rules and their application changed over time. The doctrine of *separate but equal*, and the establishment and abolishment of segregation by the *Plessy* and *Brown* decisions, respectively, form a part of general knowledge. However, by focusing only on the textual side of the decisions concerning the Equal Protection Clause, and on the evolution of the rule itself, we are missing a remarkable conceptual change in the overall philosophical approach of the Supreme Court Justices to the questions of justice and equality.

This thesis is divided into two chapters. The first one provides an analysis of the selected rulings of the Supreme Court of the United States. This chapter is structured chronologically, in order to demonstrate the aforementioned developments in the approach of the Supreme Court to the issue of race and race relations within the American society. The particular decisions – *Plessy*, *Sweatt*, *Brown*, *Bakke*, the so-called Michigan Cases consisting of *Grutter* and *Gratz* – were selected as every one of them represents a landmark decision that shifted the understanding of the Equal Protection Clause of the Fourteenth Amendment, last two of the selected decision – *Fisher v. University of Texas* and *Schuette v. Coalition to Defend Affirmative Action* – were selected, even though they did not necessarily (yet) meet the significance of the previous rulings, as they represent last indication of the Court's jurisprudence with respect to the Equal Protection Clause. The second chapter summarizes the implication of the developments shown in the first chapter for the current state of law. It shows the current state of jurisprudence with respect to equal protection, while using the example of university admissions, i.e. how the universities are allowed to consider race as a plus factor in their admissions policies.

The Fourteenth Amendment, one of the so-called "Civil War Amendments"[1] was ratified in 1868. Consisting of five sections, it defines citizenship, establishes guarantees for civil rights, and redefines the congressional apportionment principle by which effectively repeals the three fifths clause. Moreover the amendment prevents

those having breached the oath of allegiance to the Union during the Civil War from holding office under the United States and invalidates the debt of the Confederation. The Fourteenth Amendment was passed in order to secure rights of Black Americans who faced de facto segregation by the initial phases of Jim Crow laws that made their newly acquired freedom virtually meaningless.[2] By passing the amendment, Congress intended to make the Bill of Rights binding upon the states, to provide the Civil Rights Act of 1866 with a constitutional validity and to define citizens of the United States.[3] Before its ratification, the relations between the races followed the profoundly racist interpretation of the U.S. Constitution reached by Chief Justice Roger B. Taney in *Dred Scott v. Sanford*. There, the majority ruled that neither slaves nor their American-born descendants may be citizens of the United States and thus may not enjoy any of the respective rights.[4] However, the ratification of the Fourteenth Amendment could hardly change the mentality and popular beliefs in the South, in particular, considering the way the amendment was passed. During the era of radical reconstruction the Fourteenth Amendment was forced upon the southern states by the federal government.

The Equal Protection Clause is part of the first section of the Fourteenth Amendment and provides that "*No State shall (...) deny to any person within its jurisdiction the equal protection of the laws.*" This clause intended to prohibit all class legislation in the United States and was aimed at outlawing so-called Black Codes the southern states began to enact right after the Civil War.[5] Despite these original intentions of legislators, the interpretation of the amendment varied strikingly over the course of time. Within a century, the Supreme Court used the Equal Protection Clause of the Fourteenth Amendment to constitutionalize segregation (*Plessy v. Ferguson*[6]) and to outlaw the same practice as "inherently unequal" (*Brown v. Board of Education, Topeka*[7]). Following that the Supreme Court Justices used the amendment to both defend and tackle affirmative action programs (*Regents of University of California v.*

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[1] The Civil War Amendments are: the Thirteenth abolishing slavery, the Fourteenth namely defining citizenship and fundamental citizens' rights and the Fifteenth securing the right to vote for all citizens.
[2] William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine,* (Cambridge: Harvard University Press, 1988), 40-45.
[3] Horace E. Flack, *The Adoption of the Fourteenth Amendment*, (Glouchester: Peter Smith, 1965), 94-96.
[4] *Scott v. Sanford*, 60 U.S. 404 (1856).
[5] Flack, 75-87.
[6] *Plessy v. Ferguson*, 163 U.S. 537 (1896).
[7] *Brown v. Board of Education*, 347 U.S. 483 (1954).

Bakke,[8] *Grutter v. Bollinger*,[9] *Gratz v. Bollinger*,[10] *Fisher v. University of Texas*[11] and *Schuette v. Coalition to Defend Affirmative Action*[12]).

It is important to point out that *Plessy* was not the first decision of the Supreme Court regarding the newly ratified Fourteenth Amendment. Right from the initial interpretation of the Fourteenth Amendment, the Court took a stand that was suspicious of the extended role of the federal government in securing the civil rights of citizens. The Fourteenth Amendment was first construed by the Supreme Court in the *Slaughterhouse Cases*[13] of 1873 that focused on the Privileges and Immunities Clause. The interpretation embraced by the Court essentially voided the clause which became impotent in protecting the rights of U.S. citizens. Justice Samuel Miller writing for the Court made strict distinction between the citizenship of the United States and the citizenship of a State, which were deemed to be mutually independent from the other. The Court held that fundamental rights are conferred upon individuals by state citizenship. And since the Fourteenth Amendment prevents states from abridging privileges and immunities of citizens of the United States, it does not apply to rights based in the citizenship of a State. By providing such interpretation, the Court – similarly to *Plessy* – contradicted the purpose of the Fourteenth Amendment.[14] The courts intention to limit the influence of the first section of the amendment manifested itself also in the *Civil Rights Cases*[15]. Outlawing the Civil Rights Act of 1875, Justice Joseph P. Bradley writing for a majority held that the Fourteenth Amendment outlawed only "direct state impairment of individual rights." Under the state-action doctrine established in the *Civil Rights Cases*, racial discrimination conducted by private individuals was proclaimed constitutional. Therefore, even before *Plessy* reached the Supreme Court, the impact of the Fourteenth Amendment on the civil rights was substantially curtailed.[16]

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[8] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).
[9] *Grutter v. Bollinger*, 539 U.S. 306 (2003).
[10] *Gratz v. Bollinger*, 539 U.S. 244 (2003).
[11] *Fisher v. University of Texas*, 570 U.S. ___ (2013).
[12] *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. ___ (2014).
[13] *Slaughter-House Cases*, 83 U.S. 36 (1873).
[14] Robert J. Kaczorowski, The Nationalization of Civil Rights: Constitutional Theory and Practice in a Racist Society 1866-1883, (New York: Garland Publishing, Inc., 1987), 253-267.
[15] The *Civil Rights Cases*, 109 U.S. 3 (1883).
[16] Roald Y. Mykkeltveld, *The Nationalization of the Bill of Rights: Fourteenth Amendment, Due Process, and the Procedural Rights*, (Port Washington, Associated Faculty Press, 1983), 13-18.

The above-mentioned decisions demonstrate the evolution of conceptual understanding of the issue of races and their equality and imply that when deciding about the issue of race, the Supreme Court generally tends to follow the prevailing opinion in the politically significant part of the society. The only occasion, the Court went ahead of the opinion of a substantial part, yet not necessarily the majority, of the society was the stridently resisted ruling in *Brown.*

There are two major philosophical currents that define the way of interpretation of not only the Equal Protection Clause, or of the Fourteenth Amendment as a whole, but the way of interpretation of law at large. The positive-law approach, particularly strong in the 19th and early 20th century, relies on strict definition of rules and their textual interpretation. This current is largely embraced by the more conservative Justices, who see equality in terms of political equality, i.e. the equality before law, impartial application of unbiased rules. Contrary to this approach, the natural-law current lies more in principles than in strict application of rules, because principles often interfere between each other and thus their balancing is necessary. The difference between those philosophical currents is much like the difference between the rules-based American accounting standards (GAAP) and the principle-based internationally accepted accounting standards (IFRS). Since GAPP is basically an immense volume of strict rules and given the creativity of men, cynically speaking, there will always be a way to "get by" within the rules. Contrary to that, such action would simply not be possible when following general principles since by their nature, principles that balance each other simply do not permit the very emergence of a loophole. This is not to say that accounting frauds do not occur in countries using the IFRS standard. However, principles must be misapplied or applied in bad faith (i.e. by totally neglecting the balancing principle) in order to allow fraudulent results, while in rule-based environment, one is free to use whichever of equally applicable rules of equal force suits him best.

The difference between the positive-law and the natural law construction of the law and perception of justice and equality is alike the difference between textual and contextual reading. Connected with that is another conceptual difference in interpretation of the Equal Protection Clause. Traditionally, as well as in the "official Supreme Court doctrine," the right to equal protection of the laws is an individual right of a person within the jurisdiction of a particular state. This approach is clearly visible

in the reasoning of the conservative Justices. And surely, textually read, the Equal Protection Clause talks about *persons*, individuals, not groups. It prevents any state from denying the equal protection of the laws to *any person* within its jurisdiction. In opposition to this interpretation, the more liberal Justices – while not admitting that expressly – tend to approach the equal protection of the laws as a collective, group right. Reading the clause *contextually*, it is impossible to look at one person separately from the remainder of the society. Such interpretation stems from the last difference between the two major philosophical currents – the understanding of equality. While the conservative Justices find equality in fair application of the rules, liberal-leaning group of Justices looks behind the equality of the core legal framework and considers the equality of results the system produces to be more important than that of the system alone. The outlook of liberal Justices on the issue of justice and equality is clearly influenced by the theory of justice by John Rawls. Under Rawlsian theory of the veil of ignorance, the only just outcome is such that would have been chosen by any participant without him knowing any of his own characteristics, thus not knowing whether that or another particular setting would have been beneficial to him personally. Therefore, within the context of the equal protection of the laws and the affirmative action programs in particular, only such legal framework is truly just that would have been chosen by anyone without this person knowing whether he or she would be Caucasian, suburban kid wearing Vineyard Vines only, or a minority child brought up in a drug infested ghetto with low quality de-facto segregated public schools.

The race-related jurisprudence of the U.S. Supreme Court may be divided into two parts separated by *Brown*. Up until *Brown*, the conservative approach clearly dominated and the equality was assessed within the framework of strict adherence to the textual interpretation of *political* equality. Ever since *Brown*, the two currents are nearly equally influential and the main issue in the post-*Brown* decisions, therefore, is the very definition of equality and justice. *Brown* also constitutes a turning point with respect to prevailing philosophical current influencing decisions of the Supreme Court on the issue of race. Pre-*Brown* Courts relied on positive-law interpretation of the particular provisions, textual interpretation of the Constitution and relied heavily on the original intent doctrine. These more conservative Justices understood equality, and at large justice, as the levelled starting position, unbiased institutional framework and gave little or no regard to the historical development or social realities. Beginning with *Brown*, the

Supreme Court has adopted more progressive outlook that lies more in the natural law principles and ideas of *substantive* equality.

The issue of race and racial discrimination remains predominant even despite race inclusive policies promoted by the federal government in the aftermath of the struggle for civil rights that culminated in 1960s. Because of the inherent racial bias, minorities are forced to adjust their behavior in a way that an ordinary "majority" person must find astonishingly ridiculous – "*Never run while in the view of a police officer or security person unless it is apparent that you are jogging for exercise, because a cynical observer might think you are fleeing a crime or about to assault someone. (…) Always zip your backpack firmly closed or leave it in the car or with the cashier so that you will not be suspected of shoplifting. (…) If going separate ways after a get-together with friends and you are using taxis, ask your white friend to hail your cab first, so that you will not be left stranded without transportation.*"[17] There are two areas where the question of race is particularly visible. The first one is the criminal justice system that produces strikingly disproportionate numbers of African-American inmates in relation with the share African-American minority in the total U.S. population.[18] Racial-profiling and abuse of power on the part of the law enforcement officers with respect to minorities is ubiquitous. The second area with heightened focus on the question of race is university admissions programs. As a result of the Jim Crow laws and racial income disparities, in academia, minorities are – contrary to the prison population – significantly underrepresented. For example in California, "*a black male resident is more likely to enter a state prison than a state college.*"[19] In order to increase enrollment of minority students, universities opted to make it easier for the minority students to be admitted to study. This approach was based on broader affirmative action programs promoted by the federal government since 1960s as a necessary tool to remedy the effects of past practices and to permit attainment of an equitable

[17] Lawrence Otis Graham, "I taught my black kids that their elite upbringing would protect them from discrimination. I was wrong.", *Washington Post*, 6 November 2014 (accessible at: http://www.washingtonpost.com/posteverything/wp/2014/11/06/i-taught-my-black-kids-that-their-elite-upbringing-would-protect-them-from-discrimination-i-was-wrong/, last retrieved on 10 November 2014).
[18] See Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York : New Press, 2010).
[19] Lisa Tray, "Race remains a central issue in America today, economist argues", *Stanford Report*, 11 April 2007 (accessible at: http://news.stanford.edu/news/2007/april11/tanner-041107.html, last retrieved on 9 November 2014).

representation of minorities women and handicapped persons in public life.[20] The underlying message is that, even in 21st century United States of America, race matters. "*Race matters to a young man's view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman's sense of self when she states her hometown, and then is pressed, 'No, where are you really from?', regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: 'I do not belong here.*"[21]

Race-consciousness in education is largely viewed as the key tool to remedy past discrimination of African-Americans. This is attributed to the overall importance of education to the society as "*the very foundation of good citizenship*," indispensable for future success in life.[22] Therefore, the general idea behind the "artificial" increases of minority enrollment is that by expanding the scope of minority college graduates, so that it correlates more closely with the minority share of population, the system would eventually create a "trickle-down effect" and reduce racial disparities in other areas of public life.

However, as the "preferential" treatment is, necessarily, carried out at the "expense" of the majority population, ever since the affirmative action was initiated, it faced challenges under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. With respect to the general public perceptions it is interesting to point out the inconsistency that is seemingly inherently tied with the opinion polls regarding race and/or affirmative action policies. Even though the American public like the idea of *helping* minorities, it vocally denies the use of *race* as a factor during admissions. "To help" or "to improve" on one side and "race" or "preference" on the other seem to be a catch-words the use of which in the question predetermines the answer during polling.[23]

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[20] Philip C. Aka, The Supreme Court and Affirmative Action in Public Education, with Special Reference to the Michigan Cases, Brigham Young University Education and Law Journal, Vol. 2006, Issue 1 (2006), 6.

[21] *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. ___ (2014), Justice Sotomayor dissenting, 45.

[22] *Brown v. Board of Education*, 347 U.S. 493 (1954).

[23] The summary of various race related polls is accessible at: http://www.pollingreport.com/race.htm (last retrieved on 1 January 2015).

"*While two-thirds of Americans believe college applicants should be admitted solely based on merit, even if that results in few minorities being admitted (…) 58% of Americans saying they favor affirmative action programs for racial minorities.*"[24] This inconsistent approach with respect to race is also present in the decisions of the Supreme Court, and in *Grutter* in particular. As the thesis demonstrates in the first chapter, some of the doctrines the Court stridently denies, such as using race in admissions procedures in order to remedy past societal discrimination (see Justice Powell's opinion in *Bakke* or the majority opinion in *Grutter*) or the concept of the right to equal protection of the laws as an individual rights (see *Grutter*) either do resemble or have identical results as the allowed doctrines (the so-called diversity rationale has virtually the same effects and implications as the rationale of remedying the past societal discrimination) or these "official doctrines" even contradicts the careful reading of the decisions itself (such as the individual/group character of the right to equal protection or the quota-like character of the so-called critical mass concept).

Being an analysis of the jurisprudence of the Supreme Court of the United States, the main sources of this thesis are the decisions of the High Court concerning the Equal Protection Clause, namely *Plessy v. Ferguson*, *Sweatt v.* Painter, *Brown v. Board of Education, Topeka*, *Regents of University of California v. Bakke*, *Grutter v. Bollinger*, *Gratz v. Bollinger*, *Fisher v. University of Texas* and *Schuette v. Coalition to Defend Affirmative Action*.

Given the legal topic of the thesis, the most important category of secondary sources are articles published in law reviews and law journals that were particularly important in providing background information for the analysis of the recent cases regarding the affirmative action policies in higher education. The articles used in this thesis, mostly searched via HeinOnline, were published by law reviews of various law schools throughout the country, including law reviews published by so-called historically black universities, such as Thurgood Marshall University or Howard University.

Among the other sources, Michael J. Klarman's book called *From Jim Crow to Civil Rights: the Supreme Court and the Struggle for Racial Equality* was of an

[24] Jeffrey M. Jones, In U.S., Most Reject Considering Race in College Admissions, Gallup.com, 24 July 2013 (http://www.gallup.com/poll/163655/reject-considering-race-college-admissions.aspx, last retrieved

outstanding importance for this thesis as it provides necessary contextual background for all the decisions until *Brown v. Board of Education*. Howard Ball is the author of another important book called *The Bakke Case: Race, Education, and Affirmative Action*, which in great detail describes and analyses the issues the Supreme Court dealt with in the *Bakke* case.

on 1 January 2015).

1. Evolution of Equal Protection Clause Jurisprudence

This chapter provides an analysis of the Supreme Court rulings regarding the Equal Protection Clause to illustrate the developments in the approach of the High Court to the issue of race. As discussed in *Plessy*, initially in the 19th century, the Court relied exclusively on positive-law theory and textual interpretation. After the Second World War, as shown in *Sweatt* and *Brown*, the principle-based natural-law approach began to influence a substantial part of Justices, which eventually led to upholding the affirmative action policy in *Bakke* (even though the particular policy in question was rejected, the affirmative action at large was permitted under the controlling opinion of Justice Powell) and *Grutter*. However, as first visible in dissent to *Grutter*, in *Gratz* and more clearly in the two recent decisions, in *Fisher v. University of Texas* and *Schuette v. Coalition to Defend Affirmative Action*, the textual reading of the Fourteenth Amendment to the Constitution is becoming predominant on the Roberts Court.

1.1 Plessy v. Ferguson

Decided in 1893, the Supreme Court decision in *Plessy v. Ferguson*[25] is best known for introducing the so-called "separate, but equal" doctrine, and thus legitimizing segregationist policies that emerged in the last quarter of the 19th century.

With the ratification of the Thirteenth and the Fourteenth Amendments, former slaves gained freedom and citizenship. However, the content of their citizenship was questionable. Given the lack of opposition both from liberals in the North and as well as from Southern conservatives and the rise of white supremacist radicalism in the South amidst the economic, political and social frustrations, Jim Crow laws flourished.[26] Nearly all aspects of public life became segregated. De facto segregation was established long before the Supreme Court expressly constitutionalized the practice in *Plessy*.

[25] *Plessy v. Ferguson*, 163 U.S. 537 (1896).
[26] C. Vann Woodward, *The Strange Career of Jim Crow*, (New York: Oxford University Press, 1955), 52-65.

The case was artificially created by the Citizens Committee to Test the Constitutionality of the Separate Car Law to challenge the newly promulgated Louisiana state law requiring segregated but equal accommodation on railroad cars. The chosen plaintiff, "nearly white" Homer A. Plessy was arrested and convicted of failure to leave a coach designated for whites on his interstate trip. After an unsuccessful appeal to the Supreme Court of Louisiana, the case reached the U.S. Supreme Court.[27]

The Louisiana law was challenged on the grounds of violating the Thirteenth and the Fourteenth Amendment to the U.S. Constitution. While the alleged Thirteenth amendment violation was dismissed with a mere reference to construction of the amendment in the *Slaughterhouse Cases* as the law in question had not established slavery, the Fourteenth Amendment violation was addressed thoroughly.[28]

The majority of seven Justices[29] held that the purpose of the Fourteenth Amendment was to enforce equality of races before law, not their social equality. Moreover the Court argued that mere separation on the basis of race does "*not necessarily imply inferiority of either race.*"[30] According to the *Plessy* Court, "*the enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws within the meaning of the Fourteenth Amendment,*"[31] on the contrary it is deemed to be a reasonable execution of the state police powers.[32] Finally, the Court observed that social equality cannot be artificially forced upon the people by legislation. The only way to achieve social equality, the majority held, is through natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals.[33]

Denying that the law in question possessed any "badge of inferiority," the Court assessed only equality of application of the law that was, however, unequal in itself. Louisiana's separate car law was enacted because of the white majority did not feel

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[27] Paul Oberst, "The Strange Career of *Plessy v. Ferguson*", *Arizona Law Review* 15 (1973), 390-391.
[28] *Plessy v. Ferguson*, 163 U.S. 542.
[29] The majority consisted of Chief Justice Fuller, Justice Brown, who authored the opinion and Justices Field, Gray, Shiras, White and Peckham. Justice Harlan wrote a dissenting opinion and Justice Brewer recused himself.
[30] *Plessy v. Ferguson*, 163 U.S. 544.
[31] Id., 548.
[32] Id., 550.
[33] Id., 551.

comfortable traveling in the same facilities with Blacks. It is therefore evident, that the law – with a bluntly racist title: "An Act to Promote *Comfort* of Passengers"[34] – was passed as a result of alleged inferiority of Black people who – in the view of Louisiana legislators were not worthy to use facilities the white majority was using. Considering the subsequent jurisprudence of the Supreme Court, the influence of such racist beliefs is even more obvious. Just six years after the *Plessy* ruling and the equality was no longer required pursuant to the 1899 decision in *Cumming v. Richmond County Board of Education* provided that the decision with racially distinctive results was not motivated purely by racial reasons.[35] In this case, due to economic difficulties, a local board of education decided to close a segregated Black school and concentrate its funds to a segregated White school. By the end of the century, segregation was established in all states in nearly every aspect of life.[36]

Justice Harlan presented the sole dissenting opinion arguing that the U.S. Constitution is "*color-blind, and neither knows nor tolerates classes of citizens.*"[37] Referring to the obvious purpose of the law that is "*exclude colored people from coaches occupied by or assigned to white persons,*"[38] Harlan found the statute interfering with personal freedom of citizens and contrary to the equality before the law and as such "*hostile to both the spirit and letter of the Constitution of the United States.*"[39] Ironically enough, the "color-blind Constitution" argument would also be, a century later, relied upon by the conservatives to tackle affirmative action remedy of past discrimination.

In *Plessy*, the Supreme Court legitimized the longstanding practice of discrimination of African-Americans. *Plessy* did not cause the segregation of races in the United States, nor did the decision lead to any substantial expansion in segregationist practices.[40] Segregation was a reality supported by general (white) public opinion and to Justices, it "*seemed a reasonable response to escalating white-on-black violence and overwhelming white consensus behind preserving 'racial purity.*"[41] The

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[34] James C. Cobb, "Segregating the New South: The Origins and Legacy of *Plessy v. Ferguson*", *Georgia State University Law Review* 12 (1995), 1019 (emphasis added).
[35] *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899).
[36] Cobb, 1031.
[37] *Plessy v. Ferguson*, 163 U.S., 559.
[38] Id., 557.
[39] Id., 563.
[40] Michael J. Klarman, *From Jim Crow to Civil Rights*, 48.
[41] Id., 58.

popular consensus was, indeed, so strong that the ruling did not received significant coverage in the press.[42]

The composition of the Supreme Court reflected the white majority viewpoint. The supremacist beliefs of majority of Justices were visibly expressed in *Plessy* itself, when Justice Brown writing for the majority argued that a white man assigned to a colored coach may have a claim for damages as his *reputation* of being a white man would be hampered.[43] Moreover, the opposite result was unacceptable for political reasons. Ever since the Compromise of 1877, the general political attention shifted to finding a mutually acceptable modus vivendi between the North and the South.[44] The advancement of former slaves lost prominence and since the Justices had close ties to politics, they declined to reverse the trend. Neither the political and economic context were favorable to protection of the minorities' rights. Economic hardship following the Panic of 1873, especially among the southern farmers, gave rise to populist movements promoting, among other, white supremacy. Furthermore, increased migration of Blacks coupled with the immigration wave of South- and East-Europeans deteriorated racial relations in the North leading to greater leniency with respect to abuses of rights of African Americans in the South.[45] In fact, by 1890s, "*Northern whites too had become more accepting of segregation.*"[46]

Plessy constitutes the starting point of the interpretation of the Equal Protection Clause with respect to racial discrimination. The Supreme Court betrayed the core purpose of the whole Fourteenth Amendment – in the majority's own words: "*to enforce the absolute equality of the races before the law.*" However, as interpreted by the Court, the equality was not *absolute* at all. Although not being expressed in plain words in the opinion of the court, the white supremacy argument is evident especially from the notion that the "reputation of being white" is more valuable than the "reputation" of belonging to the colored race. The Court argued contrary to the fundamental "American" value of equality expressed in the Declaration of

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[42] Oberst, 412.
[43] *Plessy v. Ferguson*, 163 U.S. 549 (emphasis added).
[44] Edward M. Gaffney, Jr., "History and Legal Interpretation: The Early Distortion of the Fourteenth Amendment by the Gilded Age Court", *Catholic University Law Review* 25 (1976) In: Kermit L. Hall (ed.), *Civil rights in American history: major historical interpretations* (New York : Garland Pub., 1987), 354-357.
[45] Klarman, 11-12.
[46] Id., 22.

Independence that "all *men are created equal,*"[47] when it upheld a statute that implied inferiority of one part of the population.

The strict distinction between political and social equality is the best example of the positive-law nature of majority's reasoning in *Plessy*. The Court held that it is not the role of the state to enforce social equality.[48] On the contrary, it construed the Equal Protection Clause narrowly, as to cover only the right to *political* equality. The reliance on textual interpretation and narrow construction is expressed in the reasoning itself – "only the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security."[49] Under *Plessy*, the equal framework was required.[50] Whether the framework produced unequal results or, as was the case in *Plessy*, prevented from achieving a social equality, was not decisive in assessing the constitutionality of the particular measure.

[47] U.S. Declaration of Independence, U.S National Archives (accessed at: http://www.archives.gov/exhibits/charters/declaration_transcript.html, last retrieved on 9 November 2014).
[48] *Plessy v. Ferguson*, 163 U.S. 552
[49] Id., 545.
[50] Id., 551.

1.2 Sweatt v. Painter

Similarly to *Plessy, Sweatt* was another "artificial" challenge to segregation brought to courts by civil rights activists. Herman Sweatt applied to University of Texas School of Law in 1946 and was denied access solely on the basis of his race.[51] When the lawsuit was filed with the trial court, there was no other law school in Texas. The court did not order the admission of Sweatt to the university and, instead, provided the state six months period to create a law school for Blacks and subsequently dismissed the case when law education for Blacks "had been made available". Before the appeal was decided, Texas established another school – Texas State University for Negroes and argued that it provided legal education for Blacks. Siding with the state, the court denied appeal, and after the State Supreme Court denied hearing the case, it was brought before the U.S. Supreme Court.

The federal Supreme Court, in a unanimous ruling drawn up by Chief Justice Vinson, thoroughly examined and compared the characteristics of both the newly established school and the school Mr. Sweatt applied to and held that it "*[could not] find substantial equality in educational opportunities offered white and Negro law students."*[52] In *Sweatt*, the Court did not focus solely on substantial, or nominal equality of facilities, but acknowledged that intangible qualities such as reputation of faculty, traditions and prestige of the institution, size of the student body et cetera have to be considered as well when determining whether institutions provide equal opportunities. Sweatt rested upon two central prepositions – first, the two law schools were substantially unequal, second, segregated institutions can never be equal within the scope of legal education Moreover, the Court also held that race-based enrollment restrictions created an academic vacuum in segregated schools and limited the possible exchange of views. Also, according to the Court, segregation "*constituted a formal statement that blacks were unworthy of full membership in the community*."[53]

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[51] Paul Finkelman, Breaking the Back of Segregation: Why *Sweatt* Matters, Thurgood Marshall Law Review 36 (2010), 29.
[52] *Sweatt v. Painter*, 339 U.S. 629 (1950) 633.
[53] Jonathan L. Entin, *Sweatt v. Painter*, the End of Segregation, and the Transformation of Education Law, The Review of Litigation 5 (1986), 69.

The Supreme Court decision in *Sweatt v. Painter* opened door to outlawing segregation in education at large.[54] Even though the court denied reversing *Plessy*, the practical outcome of the decision was the inevitable integration of professional education, as the hastily created "schools for Negroes" would not be sufficient to withstand the substantial equality test under the doctrine of separate but equal.[55] From arguing that some forms of segregation could never be equal, it was just one step ahead outlawing all segregation at large. In addition to that, *Sweatt* was also the first case, in which the Court ordered a state to integrate some facility.[56]

From the long-term perspective, *Sweatt* constitutes a visible shift in the philosophy of the Supreme Court with respect to perception of equality. In *Sweatt* and subsequent cases, the Court demonstrated that it will no longer assess equality solely in the nominal terms. Considering the intangible characteristic of the particular institutions, the Court set a new level of scrutiny under the *separate but equal* doctrine that was for the most part unbearable for state administrations willing to maintain segregation, because it was either economically unfeasible or just impossible; the latter being the case of considering reputation of particular universities. This further encouraged a full-scale attack on segregation as "Sweatt *converted the demise of Plessy from a long-range dream to a substantial likelihood*."[57]

[54] *Sweatt v. Painter*, 339 U.S. 629 (1950) 634.
[55] Finkelman, "Breaking the Back of Segregation", 25.
[56] Id.
[57] Entin, 70. Dwonna Naomi Goldstone, "I Don't Believe in Segregation: *Sweatt v. Painter* and the Groundwork for *Brown v. Board of Education*," *Judges' Journal, Vol. 43, Issue 2* (Spring 2004), 24.

1.3 Brown v. Board of Education, Topeka

The separate but equal doctrine with respect to education was unanimously outlawed by the Supreme Court in "*what is probably the most important American governmental act of any kind since the Emancipation Proclamation,*"[58] its decision in Brown v. Board of Education.[59] Overruling *Plessy v. Ferguson,* the Court declared the segregation in education to be unconstitutional based on the violation of the Equal Protection clause of the Fourteenth Amendment to the U.S. Constitution.

The decision of the Warren court in *Brown* was a political decision that was reached by political bargaining of the Justices rather than by deliberations over legal questions related to the issue and so was the unanimity that did not actually reflect true opinions of all the Justices. When the five consolidated cases challenging racial segregation in schools reached the Supreme Court in early 1950s, only four Justices (Black, Douglas, Burton and Minton) were ready to overrule *Plessy.* Justices Frankfurter, Jackson and Clark were reluctant and Chief Justice Vinson and Justice Reed were willing to upheld segregation.[60] However, before the case was decided in 1954, Chief Justice Vinson died and the appointment of Chief Justice Warren created an anti-segregationist majority on the Court.[61]

The new Chief Justice played the key role in negotiating the "terms of the deal" over the Court's decision in *Brown* and thus securing unanimity of the Supreme Court. The Justices realized the possible damaging effect of a split opinion – possible violent opposition to enforcement of the judgment or, in some counties, the possibility of abolishment of public education whatsoever to prevent its integration.[62] The dissent

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[58] Quoted in: Entin, 1.
[59] *Brown v. Board of Education*, 347 U.S. 483 (1954).
[60] Michael J. Klarman, *From Jim Crow to Civil Rights: the Supreme Court and the Struggle for Racial Equality* (New York : Oxford University Press, 2004), 298.
[61] S. Sidney Ulmer, "Earl Warren and the *Brown* Decision", *The Journal of Politics* 33 (1971) In: Kermit L. Hall (ed.), *Civil rights in American history: major historical interpretations* (New York : Garland Pub., 1987), 665-666.
[62] Linda S. Greene, "From Brown to Grutter", *Loyola University Chicago Law Journal 96 (2004), 9.*

might rally segregationists and empower them with solid legal argumentation against the evident "abuse of judicial authority."[63]

Chief Justice Warren secured the unanimity of the entire court by offering "conciliatory" language and slow, step-by-step remedy in exchange for outlawing the segregation in public education.[64] Moreover, as Justices for any reason opposing overruling *Plessy* were in minority and thus "irrelevant" to the overall decision whether to outlaw segregation, they were willing to sacrifice their opinion in order to prevent the possible negative outcomes of a split decision.[65]

The Supreme Court based its opinion on the assumption that education is of utmost importance as a "*foundation of good citizenship.*"[66] The Court held that segregation has a detrimental effect on equality of educational opportunities as it "*generates a feeling of inferiority (...) that may affect their hearts and minds in a way unlikely to be undone.*"[67] This argumentation was further supported by an expert study in psychology. The Court overruled the *Plessy* without directly contesting the argumentation contained therein simply by declaring segregation to be "*inherently unequal*" based on an expert witness testimony.[68]

As evident from the previous paragraph, the opinion of the Court in *Brown* offers very little "legal" reasoning in the positive-law sense of the term. In the argumentation in *Brown,* the High Court used only a few case-law, from the landmark cases, the Court only quoted *Sweatt*. Neither the court used many of universal legal principles American legal system is built upon. The reasoning would have been much more compelling, for example, if the Court quoted the Declaration of Independence, one of the fundamental laws of the land, that proclaimed that it is a *self-evident truth* that "*all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.*"[69]

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[63] Anonymous quoted in: Ellis Washington, „Brown v. Board of Education: Right Result, Wrong Reasoning", *Mercer Law Review* 56 (2005), 718
[64] Ulmer, 702. Greene, *9.* Klarman, 313-314.
[65] Klarman, 303.
[66] *Brown v. Board of Education*, 347 U.S. 493.
[67] Id., 494.
[68] Id., 494-495. David A. Eisenberg, „In the Names of Justices: The Enduring Irony of *Brown v. Board*", *Journal Jurisprudence 101 (2014),* 106-107.
[69] The Declaration of Independence, *U.S. National Archives & Records Administration,* (http://www.archives.gov/exhibits/charters/declaration_transcript.html, last retrieved on 23 November 2014), emphasis added.

Assuming that the Court might have easily argued that segregation clearly violates the fundamental principle of equality as it creates two distinct classes among citizens, moreover, by preventing one group of citizens from entering some (in this case) educational facilities, it abridges their right to the pursuit of Happiness, even more so considering the immense importance of education in such pursuit. The court might have also used some abolitionist arguments against racial segregation that are based on immorality of the institute.[70]

One reason for such language of the decision was that there were simply almost no arguments available within the scope of positive law. As several Justices acknowledged during their deliberations, there were no sufficient legal arguments available to contest the constitutionality of segregation. No matter how immoral or backward they found the segregation, it could not be contested neither on the grounds of simple construction of the wording of the Fourteenth Amendment or the original intent behind it, nor relying on precedents, nor demonstrating the evolution of the general public opinion on the matter.[71] Moreover, Justices felt that the Congress should decide whether to end racial segregation.[72]

The other reason was that given the social environment where the segregation was widespread and accepted, the *Brown* ruling were designed, rather than to convince constitutional lawyers, to persuade the American public, because the decision massively boosted the rights of a minority against the majority opinion of the "dominant" race.[73]

In *Brown*, the Supreme Court was rather creating than construing the law. Despite the reluctance of several Justices with respect to either (un)constitutionality or the doubts about the Court's authority to decide and outlaw segregation, Chief Justice Warren was able to secure a unanimous decision. As a former politician, he used political tools. Over numerous lunches and other meetings with potential dissenters,[74] he made a deal exchanging the overall result for a slow integration. This is why, in the remedial decision, the Supreme Court ordered to integrate public schools with "*all*

[70] Ellis Washington, „*Brown v. Board of Education*: Right Result, Wrong Reasoning", *Mercer Law Review* 56 (2005), 717-721
[71] Klarman, 303-307.
[72] Id., 308.
[73] Paul Finkelman, "The Radicalism of *Brown*", University of Pittsburgh Law Review 66 (2004), 35-38.
[74] Ulmer, 699.

deliberate speed, at the earliest practicable date."[75] In *Brown*, the Court decided to go ahead a substantial part of the society on the question of race. The decision thus must have been at the same time acceptable for all the Justices (in order to avoid dissent) and compelling and understandable enough for an average citizen, so that a majority of the population could rely to it. Therefore, the Chief Justice sacrificed the compelling, persuasive argumentation – that would not produce a unanimous ruling – and used "plain language" without legal jargon as the designated audience of the ruling was not the academia, but the citizenry.

By the unanimous decision, the High Court showed a firm position on the delicate and controversial issue, by the soft language and slow remedy, the Court "*made the southern white resistance appear to be unreasonable and radical.*"[76] Moreover, considering social changes that appeared after Second World War and within the context of the "battle over hearts and minds" with the Soviet Union, the opposite decision of the Court, seems at least in retrospect as politically unfeasible. No matter the opinion of the dominant race, the segregation of races was incompatible with the claims of moral superiority of American democracy over the Soviet regime.

The U.S. Supreme Court decision in *Brown* constitutes a breaking point in the jurisprudence regarding the issue of race. It is one of the earliest decisions that is based rather on principles than on positive-law (and many Justices thus had a hard time finding *legal* arguments – in the positive-law sense – to support outlawing segregation). Even though the argumentation does not seem that way at the first sight, read carefully, it is not just narrow textual reasoning, but it relies on a broad, yet vaguely defined principle of equality. However, given the social context, the Court carefully worded the decision in the way not to offend anyone, not to cause any unnecessary uproar, and therefore, it did not expressly referred to any principle. It is thus one of the first judgments, in which the Court in its majority consisted of liberal Justices (as defined in the introduction of this paper). As the strident opposition to the implementation of the ruling in the South demonstrates, it is also the only race-related decision that significantly diverted from the generally accepted opinion throughout the country.

[75] *Brown v. Board of Education II*, 349 U.S. 300.
[76] Finkelman, "The Radicalism of *Brown*", 38.

1.4 Regents of University of California v. Bakke

Regents of the University of California v. Bakke was the first case dealing with affirmative action that was decided by the Supreme Court on the merits. Despite the initial opposition to desegregation of many southern educational institutions, many of them embraced affirmative action and in some sort recognized race as a beneficial factor for applicants from historically disfavored backgrounds. Medical School of the University of California was - apart from regular admissions procedure - running a special admissions program that was open only for economically and/or historically disadvantaged applicants from minority groups. 16 out of 100 seats were allocated through the special admissions program and therefore inaccessible to the white applicants.[77] Allan Bakke after being twice rejected challenged the constitutionality of the special admissions program. The trial court upheld his claim, however, it did not order the university to accept him. The California Supreme Court afterwards ordered the university to reconsider Bakke's application without any respect to the special program; the university subsequently appealed to the U.S. Supreme Court. The decision of the High Court was inconsistent and inconclusive – it struck down the special admissions program and ordered Bakke accepted, however it allowed the use of race as a factor in considering applicants.[78]

Contrary to *Brown*, the Court in *Bakke* was deeply divided. As split opinion on the issue of affirmative question, was not as damaging to the reputation of the United States as a divided Court deciding the legal end of segregation would have been 25 years earlier, the new Chief Justice did not try to secure a unanimous Court. Moreover, with President Ford's appointees, the Supreme Court became more conservative.[79] Therefore, the unanimous decision was neither necessary, nor possible. The Supreme Court was divided into two blocks of four. The first one led by Justice Stevens willing to outlaw the reverse discrimination on the basis of the Civil Rights Act. The conservative Justices (Chief Justice Burger and Justices Stevens, Stewart and

[77] Charles J. Ogletree Jr., *All Deliberate Speed: reflections on the first half century of Brown v. Board of Education (New York: W.W.Norton & Company, 2004), 147-154.*
[78] Dawn R. Swink, Back To *Bakke*: Affirmative Action Revisited in Educational Diversity, B.Y.U. Education and Law Journal (2003), 212-213. Howard Ball, The *Bakke* Case: Race, Education, and Affirmative Action (University Press of Kansas, 2000), 54-61.
[79] Ogletree, 151.

Rehnquist) were not even willing to consider the constitutionality of the program as they found it unlawful already at the statutory level. Justice Brennan led the second, more liberal group consisting of himself and Justices White, Marshall and Blackmun. These Justices were willing to apply intermediate scrutiny when reviewing the constitutionality of the affirmative action and wanted to uphold the special admissions program at the University of California as reasonable in order to counter the underrepresentation of minorities in the student body.[80]

Justice Powell was as divided as the Supreme Court as a whole. In the opinion that ended up being the most important one and the authoritative opinion of the case,[81] Justice Powell partially joined both groups. On one hand, he agreed with the conservative group that the special admissions program used by the Medical School of the University of California was unconstitutional. On the other hand, he sided with the liberal group when he held that race may still be used as a factor in university admissions procedures. Referring to *Korematsu*[82] and *In re Griffiths*[83], Powell argued that affirmative action programs are immediately suspect, because they curtail civil rights of a racial group and as such they must withstand the strict scrutiny test, which means that such racial classification must be necessary to accomplishment of a constitutionally permissible purpose.[84] It is also noteworthy and somewhat ironic that Justice Powell decided to refer to the Court's decision in *Korematsu* given the strikingly opposite outcomes of *Korematsu* and *Bakke* in terms of treatment of racial minorities. Nevertheless, *Korematsu* was the first time the Court recognized that there might be some special circumstances when race may be considered as a factor. However, in *Korematsu*, the special circumstances entitled the government to discriminate against one racial group of its citizens, while *Bakke* sought to promote rights of minority citizens at the "expense" of the majority.

There are three levels of scrutiny, the Supreme Court uses when considering constitutionality of a provision. The first and the most relaxed of them is the *rational*

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[80] Swink, 217 – note 37. Ball, 112-140. Alan Sultan, Legal Logic, Judicial Activity and the *Bakke* Case: Mr. Justice Powell and the Integrity of Constitutntional Principle 30 Am. J. Comp. L. Supp.51 (1982), 53-54.

[81] Bernard Schwartz, Behind *Bakke*, Affirmative Action and the Supreme Court (New York: New York University Press, 1988), 152.

[82] *Korematsu v. United States*, 323 U.S. 214 (1944).

[83] *In re Griffiths*, 413 U.S. 717 (1973).

[84] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), 291-305.

basis review. To be permitted under this test, the provision must be rationally related to a legitimate government interest. The rational basis review is most commonly used when deciding ordinary cases.[85] The medium level of scrutiny is called *intermediate scrutiny* and it requires the contested provision to further an important government interest by means that are substantially related to that interest. This level is currently being used with respect to gender-related issues.[86] The *strict scrutiny test* constitutes most severe level of constitutional scrutiny. To comply with this level of judicial review, the measure must be narrowly tailored to achieve a compelling governmental interest. Apart from the cases involving race, this level is also usually applied when other "suspect classification," such as national origin, religion, alienage, or poverty are present.[87]

Justice Powell acknowledged two kinds of such compelling governmental interests, or in the language of *Korematsu* two kinds of *special circumstances*. Firstly, it was in his view permissible to consider race for the purposes of ameliorating or eliminating effects of past discrimination, provided that the particular institution willing to establish such program could further substantial evidence of past discriminatory practices. Justice Powell expressly denied the possibility of remedying past *societal discrimination* as such remedy would "*force innocent persons (...) to bear the burdens of redressing grievances not of their making.*"[88] Secondly, education institutions were allowed to consider race of their applicants in order to attain a diverse student body. In Powell's view, the Constitution limited equality to all applicants by the right of universities, secured by the First Amendment as a part of academic freedom, to decide who will be accepted to study, i.e. to select its student body.[89]

However, Powell did not agree with the method used by the university. The special admissions program failed to withstand strict scrutiny test because race was the only criterion in attaining diversity.[90] As such, the measure was not narrowly tailored,

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[85] Rational review, Legal Information Institute at Cornell University Law School (http://www.law.cornell.edu/wex/rational_basis, last retrieved on 23 November 2014).
[86] Intermediate scrutiny, Legal Information Institute at Cornell University Law School (http://www.law.cornell.edu/wex/intermediate_scrutiny, last retrieved on 23 November 2014).
[87] Strict Scrutiny, Legal Information Institute at Cornell University Law School (http://www.law.cornell.edu/wex/strict_scrutiny, last retrieved on 23 November 2014).
[88] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), 298.
[89] Id., 306-312. Lisa A. Kloppenberg, Playing it Safe: How the Supreme Court Sidesteps Hard Cases and Stunts the Development of Law (New York: New York University Press, 2001), 113-114.
[90] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), 315.

because it did not exploit other, in the Justice Powell's opinion, not-as-explicitly-racially-biased methods of securing diversity of the student body.[91] Therefore, the program as it was designed excessively, in an unnecessary manner relied on race and as such it had to be struck down as unconstitutional.

Nevertheless, Justice Powell eventually agreed, in the general terms, that "*there is no racially blind method of selection, which would enroll more than a trickle of minority students.*"[92] As he acknowledged that diversity of the student body, as well as at least partial remedy to those who had been discriminated in the past is a compelling interest, he allowed for some use of racial consideration in the application procedures. In his opinion, Powell held that "*race may be deemed a 'plus' in a particular applicants file, yet this does not insulate the individual from comparison with all other candidates for the available seats.*"[93] Generally, Powell acknowledged, that apart from remedying past discriminatory practices of the particular institution, educational benefits of an ethnically diverse student body could be constitutional justification for race to be considered during admissions.

Contrary to *Plessy*, the case was under immense public scrutiny, the public was waiting a day ahead in order to secure place at the gallery.[94] Therefore, the announcement of the decision sparked a wave of reactions. According to the initial ones, the judgment seemed perfect – as both sides claimed victory, there seemed to be no losers, which is rarely the case.[95] However, the inconclusiveness – the race may be considered, but not as apparently as in *Bakke* – led to insecurity about the future of the affirmative action, the answer to the question: "who won?" was complicated.[96] Even though the admissions procedures remained slightly altered but in essence the same.[97]

In *Bakke*, the Court essentially produced two mutually conflicting majorities differing on the view of equality. The conservative part of the Court, ironically, embraced the century-old progressive idea of colorblind Constitution and fostered the equality as a levelled field and relied on substantive law when looking for arguments to

[91] Id., 315-316.
[92] Schwartz, 49.
[93] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), 316.
[94] Schwartz, 47.
[95] Ball, 140-144.
[96] Id., 141.
[97] Schwartz, 156.

support their case. The liberal part of the Court promoted substantial equality of races, in other words the equality of opportunities and therefore felt the need for some remedial process. As Justice Blackmun wrote in his opinion in *Bakke*, "*In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.*"[98] Therefore, as mentioned in the introductory chapter, the liberal Justices relied on natural-law legal principles of justice and on the spirit, rather than the strict letter, of the law. In Bakke, Justice Powell assumed the role of Chief Justice Warren in *Brown* and articulated the middle ground between these conflicting views. Given the different context, however, the compromise was not negotiated "secretly" in Justices' chambers and the public was aware of the conflicting views right upon the announcement of the decision. Also contrary to *Brown*, since *Bakke* did not produce a majority opinion, in essence, an opinion of one single Justice shaped the practice in the area for the following 25 years.

The Supreme Court decision in *Bakke* showed the real philosophical make-up of the Court better than *Brown* that in fact did not show the conservative viewpoint of some of the Justices. In fact, after Second World War, the Supreme Court has been somewhat evenly influenced by the positive-law and the natural-law approaches. The liberal one, though, was still slightly prevailing in the Court. Even Justice Powell firmly denied possibility of remedying *societal* discrimination, the race-conscious programs allowed under the diversity rationale, produced exactly the same outcomes. It might "unduly" harm some majority applicants and it at the larger sense remedied the past societal discrimination by enhancing the social status of minorities by allowing them to attend colleges in greater proportions than they would do if the admission was decided by traditional basis of knowledge or merit.

[98] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), 407.

1.5 The Michigan Cases

Deciding about admissions policies to the University of Michigan's School of Law in *Grutter v. Bollinger*[99] and the University of Michigan's College of Literature, Science, and the Arts in *Gratz v. Bollinger*[100], the Supreme Court assessed the affirmative-action policies in higher education for the first time since *Bakke* decision 25 years earlier.

Even though the Court, following the precedent set in *Bakke*, provided divided opinions in both of the Michigan cases, it used the opportunity to provide a clearer guidance on the law governing race-conscious admissions programs to universities and clarified legal opinions expressed in Justice Powell's opinion in *Bakke*. Furthermore, since the Court was able to produce a majority opinion in both *Grutter* and *Gratz*, its findings possess more legitimacy than the ones in *Bakke*, where the controlling opinion only reflected Justice Powell's viewpoint.

Seeking to attain a diverse student body, both the Law School and the undergraduate college of the University of Michigan considered race as a factor during theirs admissions programs. The admissions procedure used by the Law School that was upheld in *Grutter*, individually considered race as one of many factors – along with for example artistic talents, distinctive personal experiences or geographical origin – when assessing the applicant's contribution to the diversity of student body. Contrary to that the undergraduate college – using a 150-point scale during the admissions process – automatically awarded 20 points to applicants belonging to one of the "*underrepresented racial or ethnic minority group.*"[101] This framework was struck down in *Gratz*, because it failed to comply with the strict scrutiny requirement of narrow tailoring. The Court did not accept the argument that the universal 20-point bonus does not prevent individual assessment of the applicant, claiming that "*the individual review is only provided* after *admissions counselors automatically distribute the University's version of a 'plus' that makes race a decisive factor for virtually every minimally qualified underrepresented minority applicant.*"[102]

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[99] *Grutter v. Bollinger*, 539 U.S. 306 (2003).
[100] *Gratz v. Bollinger*, 539 U.S. 244 (2003).
[101] Id., 6.
[102] Id., 26.

The most significant outcome of both the cases is that in *Grutter*, the Supreme Court endorsed the affirmative action by expressly upholding a race-conscious university admissions policy for the first time ever.[103] Although *Gratz* adopted a broad the meaning of quotas, encompassing not only "set-asides," and thus outlawed virtually all in any way automatized mechanisms for considering race as a factor requiring the universities to assess every single applicant individually, in *Grutter*, the Supreme Court proved that admissions program that considers race as a factor is not per se unconstitutional and can survive the strict scrutiny test.[104]

Justice Sandra Day O'Connor, writing for the 5-to-4 majority in *Grutter*, to a large extent relied on Justice Powell's analysis in *Bakke* and on an overwhelming number of *amici curiae* briefs in concluding that diversity of student body provides educational benefits to both "minority" and "majority" students, while also being beneficial to the society as a whole.[105] Justice O'Connor further developed this argument claiming that solid representation of minorities at elite universities legitimizes the political system. As most of the national leaders graduate from the most selective universities, it is essential to enable substantial enrolment of minority students so that minority citizens see the possibility of producing national leaders and thus do not feel excluded from the system.[106] The Court thus underlined the classification of a diverse student body as a compelling governmental interest.

In accordance with *Bakke*, the Supreme Court reaffirmed that strict scrutiny shall be applied to assess any race-conscious policy, and that to withstand such scrutiny, the policy must be narrowly tailored to achieve a compelling governmental interest. Quoting *Bakke*, the Court held that to be narrowly tailored, such program cannot use quotas, and may use race only as one in many elements of diversity, in a manner flexible and individualized enough to consider different traits of each applicant.[107] The university willing to establish a race-conscious admissions program does not need to

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[103] Peter Caldwell, Defining the New Race-Conscious Frontier in Academic Admissions: Critical Perspectives on *Grutter v. Bollinger*, *Thurgood Marshall Law Review 31 (2006)*, 201.
[104] Marica G. Synnott, The Evolving Diversity Rationale In University Admissions: From *Regents v. Bakke* to the University of Michigan Cases, *Cornell Law Review 90 (2005)*, 493.
[105] Leland Ware, Strict Scrutiny, Affirmative Action, and Academic Freedom: The University of Michigan Cases, *Tulane Law Review 78 (2004)*, 2105.
[106] *Grutter v. Bollinger*, 539 U.S. 306 (2003), 20.
[107] Id., 22.

exhaust all race-neutral policies, however, it must in good faith consider "*workable race-neutral alternatives that will achieve the diversity the university seeks.*"[108]

The particular application of the diversity rationale depends on the particular university. It is the university that decides what traits shall be promoted, what is the "critical mass" of a minority representation, therefore how approximately should the student body be composed. The only restriction placed upon the university's decision-making during the admissions procedure is the good faith. The Supreme Court strongly deferred to academic freedom, university is thus free to choose whichever applicant it deems to fit the best in order to achieve diverse student body containing "critical masses" of minority students provided that it acts in a good faith.[109] Under *Gratz*, such vague language of "critical masses" is required, because any more specific term might be construed as constituting a quota that is understand as "*a certain fixed number or proportion of opportunities*" being reserved for a particular group."[110] Critical mass is defined as the proportion of the particular minority in proportion to the whole student body in which the minority students "*do not feel isolated or like spokespersons for their race.*"[111] The downside of such emphasis on flexibility, praised by the Court in *Grutter*, on the other hand, is its vulnerability to more or less honest mistakes. The universities thus must institute an evolved system of internal checks and balances and a significant level of good faith, so that the university avoids being accused of using arbitrary measures.

Even though *Gratz* expanded the range of impermissible quotas as compared to the definition used in *Bakke*, the *Grutter* Court significantly enhanced the possible use of affirmative action programs by reaffirming the diversity rationale as a compelling governmental interest. The majority of Justices thus, in silence, departed from the opinion expressed in Justice Powell's opinion in *Bakke* that remedying societal discrimination may never be a compelling governmental interest, "*because such measures would risk placing unnecessary burdens on innocent third parties who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.*"[112] As discussed earlier in the chapter on *Bakke*, the

[108] Id., 27.
[109] Synnott, 495.
[110] *Grutter v. Bollinger*, 539 U.S. 306 (2003), 22.
[111] Id., 6.
[112] Id., 11, internal quotations omitted.

diversity reason provides for the same results under a different name. It prioritizes some applicants at the expense of others in order to achieve the level of diversity that would have probably existed had there not been for the past discriminatory practices. The social status of minorities should thus be enhanced to a "just" level by allowing them to attend colleges in greater proportions than they would be able to in a purely merit-based system. The deflection from the prohibition of remedying past societal discrimination is even more clear when considering that the *Grutter* court, led by Justice O'Connor, was driven by ideas of social justice in the largest sense possible. In the name of attaining a diverse student body, universities are thus entitled to try to remedy past injustices. However, so that the "injured" or the more conservative part of the society can digest the policy more easily, the Justices had to wrap the actual result in the coat of diversity. The possibility of such remedy was even more important for the *Grutter* majority, considering the exceptional role of education that – as held in *Brown* – "*is a very foundation of good citizenship*"[113] and "just" access to education for all the social groups further enhances the legitimacy of the political system.

This line of reasoning also signals that the Supreme Court embraced a slightly different interpretation of the Equal Protection Clause. Historically, it has always been interpreted as protecting rights of *individual* citizens, and this is also the official doctrine the Court adheres to. However, as the Court relied more on the idea of equality as the equality of opportunities, rather than the idea of "deregulated" levelled playground, it interpreted the Equal Protection Clause and the Fourteenth Amendment as a whole more in terms of collective, *group* rights. Such contemplation is apparent, when the court acknowledged the necessity of "effective participation of all *racial and ethnic groups* in the civic life."[114] Also the reasoning of Justice O'Connor uses a lot of references to minority groups and their role in the society – especially with respect to the legitimacy of government, the necessity of participation of all racial groups in civic life, the need for members of any minority to see the possibility to become a national leader (i.e. to see a fighting chance for a relatively talented member of the minority to be admitted to the most prestigious universities). Reading her opinion, one does not imagine Justice O'Connor talking about Joe, but rather about the minorities as a group. This argumentation shows the shift in the majority's views on equality that requires the

[113] *Brown v. Board of Education*, 347 U.S. 493 (1954), quoted in: *Grutter v. Bollinger*, 539 U.S. 306 (2003), 19.

not merely an impartial legal framework even more, but this framework must take into account a historical facts, the differences in starting positions of different parts of society.

Ironically enough, the decision in *Grutter* is – in abstract terms – more similar to *Plessy* than it is to *Bakke*. In *Plessy* the Supreme Court held that mere separation of races does not violate the Equal Protection Clause. The *Grutter* Court essentially argued that such violation is on the constitutional level somehow "rebutted" by the diversity rationale provided that it is applied in good faith, because in that case "the institution's policy 'does not unduly harm nonminority applicants.'"[115] Therefore, both *Plessy* and *Grutter* acknowledged that the government has a right to make distinction between citizens on the basis of race. Although in completely different historical context and for different reasons, both rulings acknowledged the possibility of different treatment of people belonging to different racial groups.

Substantial difference between *Grutter* and *Plessy*, however, lies in the fact that the *Grutter* court recognized the problematic character of its decision. While the racially biased majority in *Plessy* was convinced of white supremacy arguing that the "reputation of being white" is more valuable than the "reputation" of belonging to the colored race, the "defensive" language used by the *Grutter C*ourt reveals that the court realized the awkward nature of racial distinctions that were nevertheless deemed necessary in order to achieve a desired level of social justice between the majority and minority population and secure the legitimacy of the political establishment. The tone of the opinion in *Grutter* reminds a natural-law defense of a measure not entirely admissible under strict positive-law approach. This is clear from the paragraph preceding the substance of the majority's argumentation in part III. Here, the Court emphasizes that "[c]ontext matters *when reviewing race-based governmental action under the Equal Protection Clause,*" that strict scrutiny must take into account relevant differences and that this particular test was "*designed to provide a framework for carefully* examining the importance and the sincerity of the reasons *advanced by the governmental decisionmaker for the use of race in that particular context.*"[116] The court could not have expressed the natural law principles any stronger. The opinion could be

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[114] *Grutter v. Bollinger*, 539 U.S. 306 (2003), 19, emphasis added.
[115] Stephen J. Caldas, The *Plessy* and *Grutter* Decisions: A Study in Contrast and Comparison, *Ohio State Law Journal 67 (2006)*, 76.

viewed as following this sentence: "Yes, it is not entirely constitutional in the positive-law scope, but you need to understand that there are some principles of justice." This is also the reason why the majority of Supreme Court Justices considered it necessary to include a sunset provision into its decision in *Grutter*. The majority of Justices held that they did not "expect the use of racial preferences to be no longer necessary to further he interest approved [on June 23, 2003] 25 years from then," thus setting a deadline for race-conscious admissions programs in the year of 2028.

In the Michigan Cases, the affirmative action survived first serious conservative challenge at the level of the U.S. Supreme Court. The Court – as it did in *Plessy* and *Brown* – once again proved that it tends to decide in accordance with the predominant view in the society at large.[117] Since in 2003, majority of U.S. population rather supported affirmative action policies,[118] and since the policies were heavily supported by universities itself, business and even the military, there was no incentive for the Supreme Court to strike down the provision. Nevertheless, given such relatively strong popular and even more so institutional support, it is somewhat surprising that, in *Grutter*, the Supreme Court produced another split decision.

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[116] *Grutter v. Bollinger*, 539 U.S. 306 (2003), 19, emphasis added.
[117] Jack M. Balkin, *Plessy*, *Brown*, and *Grutter*: A Play in Three Acts, *Cardozo Law Review 26 (2005)*, 1718.
[118] Jeffrey M. Jones, "Race, Ideology, and Support for Affirmative Action", *Gallup.com*, 23 August 2005 (accessible at http://www.gallup.com/poll/18091/race-ideology-support-affirmative-action.aspx, last access on 27 October 2014). However, the polling results alone should not be used as granted, given the effect of even slight changes in the wording of the question asked.

1.6 Fisher v. University of Texas

After a decade-long rule of *Grutter*, in 2013, the Supreme Court was expected to provide a new landmark decision with respect to the affirmative action in higher education in the case of *Fisher v. University of Texas*[119]. Although the decision was highly anticipated as one of the landmark of the session, the High Court refrained from reaching the merits of the case, vacated the decision of the Court of Appeals on rather "technical" grounds and remanded the case for further consideration. Nevertheless, the 7-to-1 majority decision written by Justice Kennedy hinted the future of the affirmative action programs in the United States. With Justice Kagan recusing herself, Justice Ginsburg wrote the lone dissenting opinion.

University of Texas' admissions policies have often been litigated. Originally, before the 1996 decision in *Hopwood v. Texas*[120], the University of Texas had been openly considering race as a factor in the admissions procedure. After the United States Court of Appeals for the Fifth Circuit had prohibited such consideration, Texas adopted so-called Top Tem Percent Plan that assured automatic enrollment to any public college or university in Texas to anyone who graduated among the top 10% of his/her class. To select students among those not admitted under the plan, the University began to use so-called Academic Index that took into account the applicants GPA, SAT results and Personal Achievement Index that considered applicants' extracurricular activities, work experience, community service and other special characteristics. After *Grutter* reaffirmed the use of race in admissions and since the University of Texas was not satisfied with the diversity achieved by the Top Ten Percent Plan, applicant race was added as a factor to the Personal Achievement Index.[121]

The plaintiff, Abigail Fisher, a Caucasian female, applied to the University of Texas in 2008. Since she was not entitled to automatic admission under the Top Ten Percent Plan, she was assessed against other applicants and she was eventually denied admission. Fisher filed suit against the university claiming that the university violated

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[119] *Fisher v. University of Texas*, 570 U.S. ___ (2013)
[120] *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). This decision was abrogated by the Supreme Court by the *Grutter* ruling.
[121] Danielle Holley Walker, *Defining Race-Conscious Programs in the* Fisher *Era*, Howard Law Journal, Vol. 57 (2013-2014), 547.

her right to equal protection of the law. Fisher claimed that given the success of Texas's Top Ten Percent Plan, the use of race was not necessary and thus in violation of the judicially defined criteria for using the race-conscious admissions framework. Apart from that, she argued the University of Texas did not consider race-neutral alternatives, thus race was not used as the last resort as mandated by *Parents Involved*, a 2007 Supreme Court decision dealing with high school assignments.[122] Contrary to this argument, the University of Texas claimed that use of race by colleges and universities in admissions procedures was governed by *Grutter* and that the University of Texas complied with all criteria set therein. The District Court fully sided with the University citing its argumentation and the U.S. Court of Appeals for the Fifth Circuit affirmed the ruling.

The majority of the Supreme Court declined to decide on the merits of the case. Only Justice Thomas, in his concurring opinion, expressed his preparedness to overrule *Grutter,* while the only dissenter Justice Ginsburg wrote that, in her opinion, the university had complied with the *Grutter* conditions and thus the ruling of the Court of Appeals should have been affirmed. However, speaking for the Court, Justice Kennedy held that the Court of Appeals misapplied the standard of strict scrutiny when reviewing the University's admissions policies, so the judgment was incorrect and the case was remanded back to the Court of Appeals.[123]

Justice Kennedy began the reasoning by reaffirming the *Bakke, Grutter* and *Gratz* decision, citing them as "*given for purposes of deciding this case.*"[124] *Fisher* ruling reaffirmed the diversity rationale as a compelling state interest that is able to justify use of race as a factor in admissions policies of colleges and universities. At the same time, the court confirmed that the strict scrutiny level of judicial review must be applied when considering these policies. Justice Kennedy, writing for the Court, stated that "*race may not be considered unless the admissions process can withstand strict scrutiny,*"[125] i.e. unless it is narrowly tailored to further a compelling state interest. "*Essentially, the Supreme Court determined that the court of appeals construed the strict scrutiny inquiry too narrowly, deferring to the University's good-faith assertion*

[122] Kimberly A. Pacelli, Fisher v. University of Texas at Austin: Navigating the Narrows between Grutter and Parents Involved, *Maine Law Review*, Vol. 63 (2011), 584-585.
[123] Fisher v. University of Texas, 570 U.S. ___ (2013), 12-13.
[124] Id., 5.
[125] Id., 7.

that its use of race in admissions was narrowly tailored to accomplish the constitutionally permissible goal of attaining educational benefits that flow from a diverse student body."[126]

The significant change brought by *Fisher* lies in the level of deference given to universities within the strict scrutiny review. As the Court held in *Grutter*, *"[e]ven in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still constrained under equal protection clause in how it may pursue that end: the means chosen to accomplish the government's asserted purpose must be specifically and narrowly framed to accomplish that purpose.*" The strict scrutiny test is thus composed of two parts – the *goals* part, i.e. whether the particular policy complies with a compelling state interest, therefore in the context of education, whether the particular policy furthers the goal of diverse student body, and the *means* part, i.e. whether the policy itself, the way that the policy operates is permissible under the Constitution, whether it is narrowly tailored to accomplish its purpose.

In the goals part of the test, *Fisher* agrees with the substantial deference already given to universities and their expertise in determining whether greater diversity among theirs student bodies would further educational benefits. However, in determining whether the means of achieving such goal are narrowly tailored, "*the University receives no deference.*"[127] Moreover, it must be courts, not universities, who "*verify that it is 'necessary' for a university to use race to achieve the educational benefits of diversity. (...) [S]trict scrutiny does require a court to examine with care, and not defer to, a university's 'serious, good faith consideration of workable race-neutral alternatives.'*"[128] To comply with the strict scrutiny, "*the University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal (and that) no workable race-neutral alternatives would produce the educational benefits of diversity.*"[129] The level of deference to the universities' good faith was significantly lowered by the Court's decision in *Fisher*.

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[126] Samuel C. Pierce, *Constitutional Law – Equal Protection – Strict Scrutiny To Be Applied In Evaluating The Consideration Of Race In University Admissions Processes*, Cumberland Law Review, Vol. 44 (2013-2014), 340-341.
[127] Fisher v. University of Texas, 570 U.S. ___ (2013), 10.
[128] Id.
[129] Id., 10-11.

Even though the decision quotes *Grutter* as one of the cases it is based on, it departs from its findings substantially. Under *Grutter*, universities were required to conduct "*serious, good faith* consideration *of workable race-neutral alternatives that will achieve the diversity the university seeks.*"[130] In *Fisher*, Justice Kennedy worded the narrow tailoring requirement as follows: "*strict scrutiny imposes on the university the ultimate burden of* demonstrating, *before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.*"[131] The strengthened level of judicial review is obvious. While under *Grutter* it was the university itself, who made the decision whether no workable race-neutral alternative was available, *Fisher* moves this consideration to courts. Moreover, under *Fisher*, it is not clear, whether all possible race-neutral alternatives must be actually implemented in practice, before the university may proceed to using race-conscious policies.

More than the opinion of the Court in *Grutter*, Justice Kennedy relates to his own dissent in the *Grutter* case, where he called for a far stricter scrutiny than the one applied by the majority in the case and wants educational institution to ensure, through sufficient procedures, that each applicant receives individual consideration and that race does not become a "*predominant factor in the admissions decision-making.*"[132]

Had the Court really based its consideration on the opinion in *Grutter*, it would have had to affirm the ruling of the Court of Appeals. *Grutter* set four criteria of constitutional use of race in admissions procedures: 1) No quotas, i.e. there shall be no exact number or percentage that the university seek to achieve; 2) Flexibility, i.e. the program must consider every applicant individually, with race being only one of the factors; 3) Time limitation; and 4) Good faith consideration of race-neutral alternatives. The University of Texas obviously complied with all of these criteria, which is natural since the plan was modelled after the Michigan University's example. Moreover, the plaintiff did not contest to the first three criteria and argued only, that the race-conscious program was not necessary given the alleged success of the Top Ten Percent Plan. With respect to the fourth criterion, under *Grutter*, universities were given a great deal of deference in evidencing the good-faith consideration of race-neutral alternatives,

[130] *Grutter v. Bollinger*, 539 U.S. 306 (2003), 339 (emphasis added).
[131] *Fisher v. University of Texas*, 570 U.S. ___ (2013), 11.
[132] *Grutter v. Bollinger*, 539 U.S. 306 (2003), 393, Justice Kennedy dissenting.

therefore, as Justice Ginsburg concluded in her dissent, that the University of Texas's admissions policy met the requirements set forth by *Grutter*.

Contrary to that, in *Fisher* the Supreme Court de facto overruled *Grutter*, even though neither party asked the High Court to do so. Even without reaching merits of the case, the Court weakened the level of deference to universities in determining the necessary level of narrow tailoring and declined to rely on good faith of universities. Justice Kennedy's amendment to the famous quote from *Grutter* that strict scrutiny cannot be "*strict in theory, but fatal in fact*" is characteristic of the change in the High Court's stand on the level of judicial review in the cases of race-conscious admissions policies of colleges and universities. Justice Kennedy did not consider the strict scrutiny used in *Grutter* to be strict enough, and in *Fisher* he held that "*strict scrutiny can neither be strict in theory but feeble in fact*".[133]

Besides the "tougher" language the Court used in its reasoning, the mere fact that the opinion of the Court was drafted by Justice Kennedy is a sign that with the "momentum" shifting towards the positive-law current, the affirmative action in higher education will face dire times next time the Supreme Court accepts to review admissions policy of some college or university. This is because Justice Kennedy has never voted to uphold a race-conscious admissions policy. Kennedy, who is believed to be the crucial Justice on the current Court when deciding equal protection cases (given the block of solid conservatives consisting of Chief Justice Roberts and Justices Alito, Thomas and Scalia and the block of solid liberals – Justices Breyer, Ginsburg, Kagan and Sotomayor) has repeatedly upheld the diversity rationale, however, not a single university has been able to craft an admissions policy that would be able to surpassed the level of scrutiny Justice Kennedy deems to be "meaningful."

[133] *Fisher v. University of Texas*, 570 U.S. ___ (2013), 13.

1.7 Schuette v. Coalition to Defend Affirmative Action

Two actions were taken in Michigan in response to the 2003 Supreme Court decision in *Gratz v. Bollinger*. First, the University of Michigan altered its undergraduate admissions procedures in order to comply with the criteria set forth in the companion case of *Grutter v. Bollinger*. Secondly, Jennifer Gratz, the successful plaintiff in *Gratz v. Bollinger*, started a political campaign against racial preferences that culminated in 2006 by approval of the so-called Proposition 2, an amendment to the state constitution forbidding any state actor to use racial or gender preferences of any kind in any matter.[134]

The constitutional amendment was challenged on the grounds of violating the Equal Protection Clause and ultimately reached the Supreme Court who was asked to consider the following question: "*Does an amendment to a state's constitution to prohibit race- and sex-based discrimination and preferential treatment in public university admissions decisions violate the Equal Protection Clause of the Fourteenth Amendment?*" Justice Scalia pointed out the absurdity of that question in his concurring opinion joined by Justice Thomas: "*[W]e confront a frighteningly bizarre question: Does the Equal Protection Clause of the Fourteenth Amendment forbid what its text plainly requires?*"[135] This notion is the prime example of his textual interpretation of the Constitution, as reading without any context, the question does look strange, because the state constitution seemingly reaffirms the provision of the federal Constitution. The argument against the state's constitutional amendment lied in the fact that the amendment singled out the use of racial preferences as the only question that was no longer at discretion of the university itself, but may be only altered by another constitutional amendment; this placed a special burden on minorities (who could only promote use of race as a factor in admissions through a constitutional amendment, as opposed to any other group that would seek to promote any other classification, i.e.

[134] Schuette v. Coalition to Defend Affirmative Action, 572 U.S. ___ (2014), 3. Bill Mears, "Michigan's ban on affirmative action upheld by Supreme Court", CNN, 23 April 2014 (http://www.cnn.com/2014/04/22/justice/scotus-michigan-affirmative-action/, last retrieved on 2 January 2015).
[135] Id., Justice Scalia concurring, 1.

alumni, religious group that would only need to lobby at the particular decision-maker at the university level) and thus violated the Fourteenth Amendment.[136]

Despite internal disagreements, the majority of the Court, declined such interpretation. Speaking for the plurality in what is thanks to concurring opinions the controlling opinion, Justice Kennedy started by emphasizing that *Schuette* "*is not about how the debate about racial preferences should be resolved. It is about who may resolve it.*" And to that question, he answers that "*[t]here is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters.*"[137] The "democratic process" argument gained the majority of six Justices, including traditionally liberal-leaning Justice Breyer. Apart from that Justices Kennedy and Scalia presented further arguments.

Justice Kennedy based his reasoning on the argument that in democracy, courts may not take an issue, no matter how sensitive or divisive, from voters' reach,[138] that it is "*demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.*"[139] However, such premise is false. First, Court of Appeals that sided with petitioners did not "take away any issue from voters' reach," it merely said that such decision does not comply with the Constitution as it is an example of majority abusing power at the minorities' expense. Secondly, the ability of electorate to decide on such a delicate issue is illustrated by the opinion polls concerning the affirmative action policies. Whenever the question asked includes "positive" phrases such as "to help minorities," or partly abstract such as "affirmative action" itself, the result is an overwhelming support.[140] On the other hand, whenever the question asks about "race" or "preferences," the result is

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[136] The so-called political process doctrine is based on the famous footnote no. 4 from the Supreme Court decision in *United States v. Carolene Products Company*, 304 U.S. 144 (1938) as reaffirmed and further detailed by following jurisprudence the respondent in *Schuette* relied on, namely Hunter v. Erickson, 393 U.S. 385 (1969) and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982).
[137] *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. ___ (2014), 18.
[138] Id., 18.
[139] Id., 17.
[140] Bruce Drake, "Public strongly backs affirmative action programs on campus", Pew Research.org, 22 April 2014 (http://www.pewresearch.org/fact-tank/2014/04/22/public-strongly-backs-affirmative-action-programs-on-campus/, last retrieved on 2 January 2015). The summary of various race related polls is accessible at: http://www.pollingreport.com/race.htm (last retrieved on 1 January 2015).

an overwhelming rejection.[141] If public opinion can be influenced as easily as by changing one single word in the wording of the question asked in a referendum, it is not demeaning, but rather reasonable to question the ability of voters to decide such issue. And finally, pursuant to *Carolene Products*, courts indeed may invalidate any such decision, as the Supreme Court itself did in *Washington v. Seattle School District No. 1*.

Justice Kennedy argued that one of the underlying premises of democracy is that "*a democracy has the capacity—and the duty—to learn from its past mistakes*; to discover and confront persisting biases*; and by respectful, rationale deliberation* to rise above *those flaws and injustices. That process is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues.*"[142] This is certainly true. However, the courts have the obligation to prevent the majority acting under these *biases* (note that the campaign to amend Michigan's constitution started just three days after the Supreme Court announced its decision in the Michigan cases in summer 2003) from imposing its will on the minority by restricting the minority's ability to participate in the political process (under the new amendment, to make universities consider race in admissions, one must pass a constitutional amendment and lobby the board, while to make them consider use of any other trait, it is sufficient to lobby the board), and thus perpetuating its own advantage.[143]

Justice Scalia, in his concurring opinion joined by Justice Thomas, argued more broadly against any racial preferences whatsoever and invoked the century-old color-blind argument raised by Justice Harlan in his dissent in *Plessy*. "'*Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.' The people of Michigan wish the same for their governing charter. It would be shameful for us to stand in their way.*"[144] However, this arguments is "*out of touch with reality*," as it neglects decades of racial discrimination.[145] This argument was needed in the times of *Plessy*, not in the times when the society need to remedy decades long political, legal

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[141] Jeffrey M. Jones, In U.S., Most Reject Considering Race in College Admissions, Gallup.com, 24 July 2013 (http://www.gallup.com/poll/163655/reject-considering-race-college-admissions.aspx, last retrieved on 1 January 2015). The summary of various race related polls is accessible at: http://www.pollingreport.com/race.htm (last retrieved on 1 January 2015).
[142] Id., 16-17 (emphasis added).
[143] *United States v. Carolene Products Company*, 304 U.S. 144 (1938), footnote 4.
[144] *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. ___ (2014), Justice Scalia concurring, 17.
[145] Id., Justice Sotomayor dissenting, 45.

and social inferiority of one of its parts that was legitimized by the Supreme Court itself. The use of color-blind argument is a perfect example of the conservative, positive-law perception of justice and equality as a set of neutral rules, without any regard to prospects of participants caused by the larger context.

Justice Sotomayor authored a lengthy and passionate dissenting opinion, which Justice Ginsburg joined. Contrary to Justice Kennedy's plurality opinion, Justice Sotomayor argued that "*[t]his case is not about 'who may resolve' the debate over the use of race in higher education admissions. (...) Rather, this case is about how the debate over the use of race-sensitive admissions policies may be resolved.*"[146] In the view of Justices Sotomayor and Ginsburg, the amendment violates "*the right of minorities to participate meaningfully and equally in self-government*" guaranteed by the Equal Protection Clause because it restructures political process in the way that it "*create[s] one process for racial minorities and a separate, less burdensome process for everyone else.*"[147]

Schuette once again demonstrates the divisiveness of the issue of affirmative action, as Justices expressed their will to eliminate racial preferences in their entirety (Justice Scalia and Thomas), to sustain the decision of the electorate once it was reached (Chief Justice Roberts, Justices Kennedy, Alito and Breyer) and to reverse such decision and uphold the affirmative action (Justices Sotomayor and Ginsburg). Same as in *Bakke*, the Supreme Court was not able to create a majority, therefore the controlling opinion only reflects views of only three Justices. Nevertheless considering *Schuette* in context of *Fisher*, the two decisions show that the Supreme Court – with the exceptions of Justices Scalia and Thomas – is reluctant to outlaw the affirmative action by its own decision.

The recent decisions in *Fisher* and *Schuette* also show that the balance of power between the positive-law and natural-law currents on the Roberts Court is being tipped in favor of the former.

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[146] Id., 5.
[147] Id., 4.

2. Currently Prevailing Interpretation of the Equal Protection Clause

This chapter briefly summarizes the practical implication of the Supreme Court decisions discussed in the first chapter and outlines the scope within which colleges and universities may consider race as a factor in theirs admissions policies.

Under *Grutter*, universities may use race-conscious admissions policies, however they are limited in reasons for which they may adopt such measures and in the extent to which the race may be a factor, unless it is forbidden on local level by, for example, a constitutional amendment, such as in Michigan, California or Washington. These state-wide bans were upheld by the Supreme Court in the recently decided *Schuette v. Coalition to Defend Affirmative Action.*

However, as "*[r]acial and ethnic classifications of any sort are inherently suspect and call for the most exacting judicial scrutiny*"[148] Therefore, strict scrutiny test is applied to review any use of race by universities. To comply with this level of judicial review, the policy must be narrowly tailored (the *means* part of the test) to achieve a compelling governmental interest (the *goals* part of the test).

In *Bakke*, the Supreme Court identified two compelling governmental interests that may justify the use of race in admissions procedures. First one of them is remedying present results of past discrimination that was perpetrated by the particular university. However, to employ this justification, the university must further substantial evidence of 1) its own past discrimination; 2) present effects of past discrimination and 3) causal link between the past discrimination and present effects; and in particular the third factor is so difficult to meet that this justification is rarely used. The second compelling governmental interest justifying the use of race as a factor in admissions procedures, which was also reaffirmed in *Grutter* and *Fisher*, is the so-called diversity rationale. Reaffirming Justice Powell's opinion in *Bakke*, the Supreme Court held in *Grutter* that universities may, in certain manner, use race in order to obtain "*the educational benefits that flow from a diverse student body.*"[149] The Harvard plan

[148] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), 267.
[149] *Grutter v. Bollinger*, 539 U.S. 306 (2003), 307.

referenced in *Bakke* and the Michigan University Law School's plan upheld in *Grutter* served as role-model for many universities.

In order to survive the strict scrutiny test, the policy must first sustain the goals part of the test, i.e. be designed to serve a compelling interest. Therefore, it must be established that the level of diversity is not sufficient to attain desired educational benefits. With respect to this assessment, universities are still given substantial deference by the judiciary, given their expertise in education. The university may not pursue a diversity defined in percentage quotas, or to pursue the balance between the demography of the campus and the state, or the country. Apart from that, with respect to the university's educational judgment to pursue more diverse student body, courts should only "*ensure that there is a reasoned, principled explanation for the academic decision.*"[150] The second part of the strict scrutiny test is whether the means are narrowly tailored. Here, *Grutter* set four criteria – 1) In any case, the university is not permitted to use quotas or quota-like measures, such as set-asides outlawed in *Bakke* or automatic benefits proscribed in *Gratz*. 2) The policy must be highly individualized, non-mechanical review, in which each applicant is reviewed independently, and race is used in a flexible way and only as one of many "plus" factors. 3) "*Race-conscious admissions policies must be limited in time.*"[151] 4) Prior to instituting the race-conscious policy, the university must consider workable race-neutral alternatives. With respect to this criterion, *Fisher* imposed a higher evidentiary burden on universities. The university now must demonstrate that it in good faith considered all workable race-neutral alternatives to the plan it adopted. Moreover, *Fisher* significantly heightened the level of judicial review that was originally established by *Grutter* for the entire narrow tailoring test. Under *Fisher*, courts may give no deference to university in assessing that the means chosen are narrowly tailored; such assessment may now only be carried out by the reviewing court itself.[152]

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[150] Id., 334-343.
[151] Id.
[152] *Fisher v. University of Texas*, 570 U.S. ___ (2013), 10-11.

Conclusion

The jurisprudence of the Supreme Court of the United States regarding the Equal Protection Clause shows how the philosophy influencing the particular Justices changed and how this evolution affected the overall perception of equality and justice that prevailed at the Court in the particular era. In this case, the Court evolved from being almost exclusively influenced by the 19th century positive-law doctrine to the state where there are two equally influential philosophical currents. All of the reasoning also shows that the court tends to follow the opinion in society and only in exceptional cases (*Brown*) it takes a pioneering position. However, even in the case of *Brown*, the reason for such action was not merely the conception of justice, but rather a larger geopolitical implication of the opposite or split ruling.

The decisions also demonstrate the importance of "labels" in the American society. Even though the Court repeatedly held that 1) remedying past *societal* discrimination may never constitute a compelling governmental interest, and that 2) the right to equal protection of the laws is an *individual* right, the actual meaning of the decisions implies otherwise, although in the latter case this is rather true for the liberal Justices. With respect to societal discrimination, the Court acknowledged that diverse student body may a legitimate reason to consider race as a factor during the admissions procedure, even though that in doing so, the outcomes of the practice are the same as if the Court allowed remedying past societal discrimination. Regarding the individual character of the Equal Protection Clause, while the Court insists on such doctrine, the argumentation, especially in *Grutter*, suggests that the Court has also shifted his position and began stressing the collective, group character of the right to equal protection of the laws. This "label phenomenon" is also visible from the results of opinion polls regarding the use of affirmative action, in which change of few words in the question may easily alter the result of the poll.

After the Second World War, the natural-law legal philosophy began influencing the Justices and slightly overshadowed the positive-law current that was predominant in the pre-War era, in particular in the 19th century. This new philosophic background of the High Court helps to constitutionally entrench the affirmative action policies by Justice Powell's opinion in *Bakke* and particularly by *Grutter*. However, the natural-law

current has never become as dominant as the positive-law one in the 19th century, and as shown in *Grutter*'s companion case of *Gratz* and most notably the recent cases of *Fisher* and *Schuette*, the positive-law philosophy is – also thanks to changes in the composition of the Supreme Court – regaining its position on the Court, and thus threaten the future of the affirmative action.

The fate of the program is also threatened by the changes in the composition of the Court. Two liberal Justices (Justice Ginsburg and Justice Breyer, both appointed by President Clinton) as well as two conservative ones (Justice Scalia and Justice Kennedy, both appointed by President Reagan) are expected to retire in near future. Given that Republican Party controls Senate, it is improbable that President Obama could get any "solid liberal" approved for appointment; therefore, the 2016 elections will also be important in terms of the future philosophic composition of the Supreme Court.

Summary

Judikatura Nejvyššího soudu Spojených států týkající se *Equal Protection Clause* ukazuje proměny filozofických směrů ovlivňujících jednotlivé soudce a vliv těchto proměn chápání spravedlnosti a rovnosti, které v té dané době v Nejvyšším soudu převažovalo. V 19. století byl soud pod dominantním vlivem pozitivněprávní teorie. Od druhé světové válce se mezi soudci Nejvyššího soudu ustálila rovnováha mezi konzervativnějším právním pozitivismem a liberálnější přirozenoprávní teorií. Analyzované rozsudky rovněž ukazují, že soudci se obvykle neodchylují od názoru, který převažuje v politicky významné části společnosti. Pouze ojediněle – jako např. v případě *Brown v. Board of Topeka* – se Nejvyšší soud rozhodne zaujmout progresivnější postoj. Nicméně i v případu *Brown* důvody pro tento progresivní postoj nebyly pouze filozofické, ale spíše širší geopolitické důsledky daného rozhodnutí,

Vybrané rozsudky rovněž ukazují důležitost „nálepek" v americké společnosti. Přestože soud opakovaně judikoval, že 1) náprava minulé *celospolečenské* diskriminace nikdy nemůže být dostatečně přesvědčivým důvodem pro zavedení programů zohledňující rasu, a 2) právo na rovnou ochranu práv je právem *individuálním*, význam jednotlivých rozsudků často naznačuje opak (i když v druhém případě se toto více projevuje u názorů liberálněji zaměřených soudců). V prvním případě soud judikoval, že diverzita mezi studenty dané univerzity může být dostatečným důvodem pro zavedení přijímacích procedur zohledňujících rasu jako faktor, přestože tyto programy mají stejné důsledky, které by nastaly v případě, že by soud přistoupil na odůvodnění nápravy dřívější celospolečenské diskriminace. Co se individuálního charakteru práva na rovnou ochranu, přestože soud trvá na této doktríně, odůvodnění jednotlivých rozsudků, zejména ve věci *Grutter* implikuje, že soud začal prosazovat kolektivní, skupinový charakter tohoto práva. Důležitost „nálepek" je zřejmá z výsledků průzkumů veřejného mínění ohledně tzv. *affirmative action*, jejichž výsledek může být naprosto změněn změnou několika slov v položené otázce.

Po druhé světové válce přirozenoprávní teorie začala ovlivňovat soudce Nejvyššího soudu a mírně převážila do té doby dominantní právní pozitivismus. Tato nová filozofická skladba soudu vedla k ústavněprávnímu zakotvení tzv. *affirmative action* názorem soudce Powella ve věci *Bakke* a zejména pak rozsudkem v případu

Grutter. Přirozenoprávní teorie se však nikdy nestala tak dominantní jako právní pozitivismus v 19. století a jak je zřejmé z rozsudku *Gratz* (sesterský případ případu *Grutter*) a zejména v nedávno rozhodnutých případech *Fisher* a *Schuette*, právní pozitivismus – i díky změnám v obsazení Nejvyššího soudu – získává své ztracené pozice, čímž je ohrožena budoucnost tzv. *affirmative action*.

Budoucnost programu rovněž ohrožují budoucí změny v obsazení soudu. Dva liberální soudci (soudkyně Ginsburg a soudce Breyer, oba jmenovaní prezidentem Clintonem), stejně jako dva konzervativní soudci Scalia a Kennedy (oba jmenovaní ještě za Reaganovy administrativy) by měli soud v blízké budoucnosti opustit. Vzhledem k tomu, že republikáni mají pod kontrolou Senát, je nepravděpodobné, že by se prezidentu Obamovi podařilo prosadit v Senátu nominaci jakéhokoliv liberálně smýšlejícího soudce. Volby v roce 2016 tak určí i další filozofické zaměření Nejvyššího soudu.

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