**Affirmative Action: Why Now and What’s Next?**

Adam Niklewicz for The Chronicle

By Mark G. Yudof and Rachel F. Moran August 03, 2017

This week *The New York Times* reported that the Trump administration’s Justice Department was seeking lawyers to pursue compliance investigations and federal lawsuits that may target affirmative-action programs in admissions at colleges and universities. That report was based on an internal [document](http://apps.washingtonpost.com/g/documents/national/doj-job-posting-seeking-lawyers-to-investigate-and-litigate-cases-related-to-intentional-race-based-discrimination-in-college-admissions/2516/) directed to the department’s civil-rights division that describes hiring for a new project that will address "intentional race-based discrimination in college and university admissions."

While it’s [uncertain whether the document reflects](http://www.chronicle.com/article/Trump-May-Find-No-Easy-Targets/240836) a broad new push against the use of race in college admissions, some observers were still puzzled by the announcement, given the Supreme Court’s track record in this area. The court has repeatedly held that the use of race and ethnicity in admissions is constitutional.

Beginning in 1978 in *Regents of the University of California v. Bakke,* the court found that colleges have a compelling interest in diversity, which promotes the "robust exchange of ideas" among students from all walks of life. Although colleges cannot use racial or ethnic quotas in admissions, they can use a "plus" for under­represented racial and ethnic groups. These pluses resemble those used to enroll a class with a wide range of backgrounds and experiences, one that includes students with special athletic or musical skills, distinct areas of intellectual attainment, and even rural backgrounds.

In 2003, in *Grutter v. Bollinger,* the Supreme Court again affirmed the constitutionality of affirmative-action programs, this time adding another rationale: the development of leadership in a diverse society, particularly at selective colleges and universities. Then, just last year, the justices again endorsed the use of race and ethnicity in admissions in *Fisher v. University of Texas at Austin,* accepting the university’s claim that race-neutral criteria alone could not achieve the pedagogical aims of promoting cross-racial understanding, counteracting stereotypes, and preparing students for a diverse work force and for leadership roles.

In light of these decisions, the Justice Department’s announcement seems untimely, unsettling an area of constitutional law that the court has been trying to stabilize. That effort has already met with resistance. Despite high-profile decisions over a period of three decades, private litigation challenging policies perceived as discriminating against white and Asian-American applicants has persisted. In general, these cases focus on the implementation of affirmative-action programs. The plaintiffs typically argue that programs give so much weight to race and ethnicity that they are using quotas, rather than pluses. In addition, litigants contend that colleges have not offered persuasive evidence that their programs actually advance compelling pedagogical objectives.

[](http://www.chronicle.com/specialreport/Race-Conscious-Admissions/136?cid=RCPACKAGE)

[**Race-Conscious Admissions Returns to the Spotlight**](http://www.chronicle.com/specialreport/Race-Conscious-Admissions/136?cid=RCPACKAGE)

Barely a year after the U.S. Supreme Court appeared to issue its final word on this form of affirmative action, the issue is back, following a Justice Department memo that seemed to promise Trump-administration investigations of colleges. Here’s all of *The Chronicle’*s coverage.

* [Trump May Find No Easy Targets if He Attacks Race in Admissions](http://www.chronicle.com/article/Trump-May-Find-No-Easy-Targets/240836?cid=RCPACKAGE)
* [Wait, Will Anyone Investigate Legacy Admissions?](http://www.chronicle.com/article/Wait-Will-Anyone-Investigate/240850?cid=RCPACKAGE)
* [Trump’s Affirmative-Action Rollback: A Promise Kept](http://www.chronicle.com/article/Trump-s-Affirmative-Action/240842?cid=RCPACKAGE)
* [Sometimes, Perceptions of Affirmative Action Don’t Mesh With Reality](http://www.chronicle.com/article/Sometimes-Perceptions-of/240837?cid=RCPACKAGE)

The Justice Department has framed its internal announcement as a hiring memorandum, and so it has not elaborated on its plans for compliance investigations and lawsuits. But the announcement itself has triggered considerable consternation among diversity advocates, and if new inquiries are launched, this area of the law will suffer from further destabilization. Make no mistake: The resulting uncertainty comes with real costs. Today, college presidents are probably wondering whether their campuses will be targeted by the Department of Justice, and if so, what the investigations will entail. Campus leaders are already likely to be setting up meetings with general counsel, handling messages from worried faculty and students, and fielding calls from concerned alumni.

And, if the investigations — whose details are murky now — become a reality, some colleges will spend considerable resources responding to requests for information, always aware that the documentation could become the basis for a lawsuit. Other colleges, watching the investigative process at sister institutions, will take steps to limit their own vulnerability to litigation. Administrators could marshal evidence to justify their use of affirmative action, or they could retreat from programs by curbing the consideration of race and ethnicity.

Confronted with the prospect of adversarial proceedings, colleges will spend more time and resources on admissions and less on programs that capitalize on diversity in their student bodies. There will be fewer opportunities to develop and refine small classroom seminars that promote the exchange of ideas, campus activities that build cross-racial understanding, or programs that cultivate leadership skills in a multi­racial society. Yet these are the very initiatives to maximize diversity’s benefits that the court very likely had expected to emerge in a more stable legal climate for affirmative action.

If the Justice Department devotes itself exclusively to the dangers of reverse discrimination, its enforcement efforts will ignore some fundamental principles that the Supreme Court has recognized in its decades-long decision-making on these issues. The court has observed that our nation is growing more diverse and that, for our democracy to succeed, institutions of higher education must prepare students to work with people whose racial and ethnic backgrounds are very different from their own.

For selective colleges and universities, the court has acknowledged that a diverse student body is especially important in enabling graduates to meet the leadership challenges presented by the changing face of "We the People." And the court has noted that colleges have a key role to play where diversity is concerned because students often arrive on campus after graduating from separate-and- unequal elementary and high schools.

At the end of the day, the court has anchored its constitutional jurisprudence in some basic truths about our nation’s needs, the unique place of colleges in meeting those needs, and the role that affirmative action must play, due to continuing inequalities in our educational system. This apparent move by the Justice Department can unsettle the state of constitutional doctrine — but it can never undo the essential realities about the state of our union that figure so prominently in the diversity jurisprudence of the nation’s highest court.

*Mark G. Yudof is president emeritus of the University of California and professor emeritus at the University of California at Berkeley School of Law. Rachel F. Moran is dean emerita and a professor of law at UCLA School of Law. She is currently a visiting professor of law at Harvard Law School.*

This article is part of:

[Race-Conscious Admissions Returns to the Spotlight](http://www.chronicle.com/specialreport/Race-Conscious-Admissions/136)