
V. STANDING THE TEST OF TIME: USING DIVERSITY AS THE FOUNDATION FOR JUDICIAL DECISION-MAKING

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I want to congratulate each of you for your appointment or election to the bench. And I should congratulate your dean, Michael Garcia, for his appointment to the Judicial Council. And it is certainly a pleasure to see a number of you who either tried cases before me or appeared in my court when I served on the state and federal trial courts.

By this time, I know many of you are exhausted with the rigors of judges' college, but the end is in sight. I'll have you know that I had to attend judges' college twice, having flunked the first time — and look at me now. No, the truth is I attended judges' college in 1987 for the Municipal Court and in 1994 for the Superior Court. In fact, I still have the judges' college T-shirts that were issued to us as proof. I was informed that you were not issued T-shirts because it would not serve an educational purpose. But if you note from the logo on my 1994 T-shirt there is a Latin reference to “To or for the judge, the punishment is sufficient” — that's educational enough for me.

Thank you for inviting me this evening to deliver the twenty-seventh annual Roger J. Traynor Forum Lecture. When I received the invitation to speak tonight, Judge Michael Garcia reminded me that the Traynor Forum is an opportunity to challenge new judges on a controversial and thought-provoking subject. This is an appropriate forum to honor Justice Traynor's legacy. As a champion of civil and personal rights in his thirty years on the California Supreme Court, Justice Traynor led California to the forefront of the protection of free speech and authored the opinion overturning a California anti-miscegenation law sixteen years before the United States Supreme Court addressed the issue in *Loving v. Virginia*.¹¹¹ This California

¹¹¹ 388 U.S. 1 (1967).

precedent was much like Justice Mosk's opinion in *People v. Wheeler*¹¹² which foreshadowed the *Batson* decision.¹¹³ I am honored and humbled to have been appointed to the same judicial seat occupied by both Justice Traynor and Justice Mosk.

Tonight, I'd like to discuss the decision-making process of judges, and consider whether that process ensures that our rulings and opinions achieve justice today and will stand the test of time to achieve justice tomorrow. Diversity is an important element in this process, and the experience that comes from increased diversity on the bench, I believe, will help ensure that our opinions do stand the test of time. Our challenge today is to realize that law is not a mere abstraction, and our challenge is to use legal principles and doctrines that we will not regret in the future. In doing so, we can take advantage of the great force of history and experience that we all carry within us.

I. INTRODUCTION

The case reports of this country are filled with decisions that we now feel were poorly decided. Yet, when most of these cases were decided, they were met generally with widespread judicial approval and were readily incorporated into existing legal doctrines. How is it possible that cases that were once so right are now so wrong? These cases did not deal with obsolete technology or novel legal principles or facts; they were issues that were as pertinent then as they are now.

One explanation for our shifting legal perspective is a gradual change in social dynamics and the resulting increase of diversity in the legal system. Most of the decisions that are held in disdain were issued by courts that lacked a diversity of background, experience, or ideals. Many cases that have stood the test of time included diverse adjudicators or advocates, or acknowledged the virtues of diversity in the pursuit of justice. Diversity does not merely provide the appearance of justice (although it certainly does that); I argue that it aids substantially to obtain actual justice.

Nonetheless, it remains to be seen whether the cases we decide today will withstand the test of time. Though we have moved toward racial and gender diversity on the bench, our job is far from done. We must continue

¹¹² 22 Cal. 3d 258 (1978).

¹¹³ *Batson v. Kentucky*, 476 U.S. 79 (1986).

our pursuit of a judiciary that represents a cross-section of the society we live in. Whether our judiciary should represent more than just racial and gender diversity remains to be seen. Should the breakdown of sexual preferences of the judges mirror those of the community? Should their religious beliefs mirror those of the community? Should their social and/or economic status mirror that of the community? All of these issues will come into play when the decisions put forth by the judges today are scrutinized for fairness and bias in the years to come.

II. JUDICIAL RECOGNITION OF THE VALUE OF DIVERSITY

A. *STRAUDER v. WEST VIRGINIA*

The idea of diversity as an essential ingredient to justice is not novel. Blackstone said, “The right of trial by jury is . . . that trial by the peers of every Englishman” and prejudice in a community was historically grounds for change of venue. The Supreme Court itself recognized, very soon after the Civil War, the value of diversity to justice. The Court said that justice could not be served when the law precludes diversity. In *Strauder v. West Virginia*,¹¹⁴ the U.S. Supreme Court overturned the conviction of a black man because a West Virginia statute prevented Blacks from serving on a jury. The Court noted that exclusion of a particular race from the jury pool would lead to injustice, particularly where the defendant is a member of the excluded race. The Court likened the West Virginia law excluding Blacks from juries to a hypothetical law in a nonwhite-majority state that excluded Whites from juries.

Strauder states, “The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.” Though juries — like judges — are expected to be impartial, the Court recognized that inherent racial prejudices continued to exist and that the exclusion of all members of the defendant’s race amounted to legal acknowledgement and enforcement of that prejudice. This early Court recognized the value of diversity in striving to procure unbiased judgment.

¹¹⁴ 100 U.S. 303 (1880).

B. SEX DIVERSITY ON THE JURY

Though this early Court lauded the merits of diversity, their praise was reserved. The *Strauder* Court specifically limited its decision to African Americans, saying that nothing in their decision should be interpreted to mean that women (!) can serve on a jury. This stemmed from the belief that women, unlike African Americans, were not discriminated against (or, at least, that was the prevailing view at the time).

Women's feelings toward their own treatment and their inability to participate in society were neither acknowledged nor solicited. It was not until women began to participate in the legal system that social and legal attitudes toward women began to be addressed. (And, as we know, that was slow in coming.)

The year 1946 marked a turning point in judicial attitudes toward female participation in the justice system. The Court decided *Ballard v. U.S.*,¹¹⁵ which involved a prosecution against a woman and her son for engaging in a fraudulent religious scheme. The Court, while noting that women do not act as a class, said that a jury from which one sex is excluded can be highly prejudicial. "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference" (Justice Ginsburg or Justice O'Connor has said that presented with the same case a "wise old man" and a "wise old woman" would likely reach the same result). The *Ballard* court continued: "Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded."

C. CALIFORNIA CASES ITERATING IMPORTANCE OF DIVERSITY ON THE JURY

In 1954, the California Supreme Court expanded the notion of diversity to include class. In *People v. White*,¹¹⁶ the California Court held that a jury selected from membership lists of exclusive clubs was inherently unfair,

¹¹⁵ 329 U.S. 187.

¹¹⁶ 43 Cal. 2d 740 (1954).

because it tended to include a disproportionate number of members from particular classes and was therefore not representative of the community. In recognizing the importance of community representation on the jury, the Court reinvigorated and reinforced the historical foundations of a jury as judgment by one's peers. I remember one day when I served on the Compton Municipal Court when, late in the day, we ran out of jurors and the bailiffs went out and rounded up a group of citizens, who it turned out were mostly D.A.'s. Not to be outdone, another judge ordered his bailiff to get some jurors from the Public Defender's office. A truce was declared and the next day new jurors were selected from the regular jury pool.

D. DIVERSITY IS IMPORTANT FOR EVERYONE, NOT JUST MINORITIES OR THE DISADVANTAGED

Though courts in the latter half of the twentieth century had recognized that diversity of the jury was essential to justice for minorities and the oppressed, they also became increasingly convinced that diversity benefited all groups, not just certain select minorities. In a pair of cases, the U.S. Supreme Court recognized that excluding members of a group from jury service can cause injustice for a defendant who is not a member of the excluded group. The *Peters* case¹¹⁷ held that a white defendant was denied a fair jury trial because Blacks were systematically excluded from jury service.¹¹⁸ The *Taylor* case held that a man had standing to challenge a law that excluded women from jury service. Even jurors themselves have an independent right not to be discriminated against for an invidious purpose. A diverse jury ensures that the fate of a defendant is decided by a group of people who represent a cross-section of the community, thereby combining perspectives from different backgrounds and experiences.

III. EXAMPLES OF NON-LASTING DECISIONS

Though the Court recognized the importance of diversity on the jury as early as 1879, it did not yet perceive the need for diversity within its own ranks. I submit that the effects of this lack of diversity were profound and devastating.

¹¹⁷ *Taylor v. Kiff*, 407 U.S. 493 (1972).

¹¹⁸ *Taylor v. Louisiana*, 419 U.S. 522 (1975).

A. *DRED SCOTT*

Perhaps the most infamous Supreme Court case is *Dred Scott v. Sandford*.¹¹⁹ Justice Taney, delivering the opinion of the Court, held that Blacks were not citizens of the United States. Justice Taney listed laws of several states calling for special treatment for Blacks — including harsher penalties for offenders, and prohibitions against intermarriage — to support his holding. Justice Taney’s opinion held that neither the words “all men” in the Declaration of Independence, nor any reference to “citizens” in the Constitution, was meant to include African Americans.

It appears that Justice Taney had only researched sources that supported his preconceived conclusion. His argument, that Blacks could not be citizens because they were treated differently under state and federal law, is shortsighted and fails when applied to other groups. Women and those who did not own land were also treated differently under the law, but during that period enjoyed some of the benefits of citizenship. Justice Taney also ignored clear precedent by distinguishing a prior U.S. Supreme Court decision,¹²⁰ which recognized the citizenship of a black man who had inherited property.

Dred Scott was far from a well-reasoned legal decision, and in fact, was even repudiated by President Abraham Lincoln. Rather, it appears to be a decision based on the justices’ personal beliefs. One wonders: had a black justice occupied a seat on the United States Supreme Court at that time, a different perspective might have been provided regarding the meaning of citizenship and its origins in our country. Such a person (a Frederick Douglass, perhaps), subject to the horrors of slavery, would have been able to relate his experience to other members of the Court on the burdens and injustices he suffered as a result of his dual status as a non-citizen and piece of property. Although he or she, too, would certainly not be unbiased, she would present a balance to the one-sided approach undertaken by the Court at that time. Had there been a diverse Court, these racist themes might not have pervaded the decision as deeply as they did. In this case, however, even this perspective might not have changed the outcome in the case given the pending conflict between North and South in the Civil War.

¹¹⁹ 60 U.S. 393 (1856).

¹²⁰ *Legrand v. Darnall*, 2 Peters 664 (1829).

B. *PLESSY v. FERGUSON*

Seventeen years after the Court recognized the importance of diversity on the jury in the Strauder case, it handed down *Plessy v. Ferguson*,¹²¹ which established the infamous “separate but equal” doctrine.

In *Plessy*, the Court rejected the argument that the separation of the races somehow stamps Blacks with a badge of inferiority. Instead, the Court noted, if this is so, it is because Blacks, as a race, believe it to be. The Court then distinguished between civil and political rights on the one hand, and social rights on the other, finding that legislation could not force Blacks and Whites to mingle socially. Instead: “If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits and a voluntary consent of individuals.” President Eisenhower echoed the same sentiments when I was growing up in Los Angeles.

Again, one wonders if an African-American justice had occupied a seat on the United States Supreme Court at that time, would the decision have been the same or different given the social context of the era.

Only Justice Harlan dissented, stating, “In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by the tribunal in the *Dred Scott* case.” “The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.”

The very history of the United States up to that point had demonstrated that racial discrimination could not be ended without positive governmental action. Indeed, that is why the country had, very recently, fought a civil war, amended its constitution, and passed several civil rights statutes in an effort to end black slavery. An African-American justice would have been able to speak from personal experience when addressing the issue of whether, as the Court framed it, legislation could lead to social equality. In fact, that’s exactly how many African-American citizens had achieved their equality through legislation and amendments to the Constitution.

¹²¹ 163 U.S. 537 (1896).

It took an extremely gifted African-American lawyer to persuade the minds of the Court that the policies condoned by the Court flew in the face of the Thirteenth and Fourteenth amendments. Thurgood Marshall, who later became a Supreme Court justice, convinced the court in *Brown v. Board of Education* that Separate but Equal was inherently unequal.¹²² Although the facilities and education provided for Blacks and Whites could be identical, the stigma associated with being forcibly separated from the other race, and the missed opportunity of schoolchildren of one race to interact with those of the other race, bred hatred and inequality that extended throughout the students' lives.

Those of you from Orange County are no doubt aware of the 1947 case of *Mendez v. Westminster School District*,¹²³ which found unlawful the intentional segregation of Mexicans and Anglos in the local schools.

One wonders if the conclusion in *Brown* that government sanctioned segregation of schools amounted to a blatant violation of the Fourteenth Amendment would have been reached much earlier had the Court been more diverse and able to share directly their personal experiences under the Separate but Equal doctrine.

C. *PEOPLE v. HALL*

California also has had its share of shameful cases. In 1854, the California Supreme Court, my Court, was asked whether a Chinese witness could testify against a white citizen charged with murder, since California statutes prohibited Blacks and Indians from offering such testimony, but said nothing about the admissibility of testimony from a Chinese witness.¹²⁴ The California Supreme Court decided to extend the prohibition to Chinese by means of perverse and pseudo-scientific reasoning that the word "Indian" included Chinese (Indians crossed the Bering Strait from Asia, after all), effectively construing the statute to exclude all nonwhite testimony. The Court said with a straight face that construing the statutes narrowly would allow many undesirables, including recent African immigrants and other clearly inferior people, to testify against those who were considered full

¹²² 347 U.S. 483 (1954).

¹²³ 161 F.2d 774 (9th Cir. 1947).

¹²⁴ *People v. Hall*, 4 Cal. 399 (1854).

citizens. Additionally, the Court feared, “The same rule that would admit them to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls.” To prevent this “actual and present danger,” the Court needed to construe the statutes broadly. This decision, like many others, was borne of plain and simple ignorance and outright prejudice. A diverse colleague on the court, or even counsel in the case, could have chipped away at the notion of inherent racial difference that infested the Court’s logic. Had a justice of Chinese descent been present on the Court at this time, arguably this opinion would have come out the other way, given that one justice out of three dissented. How could a Chinese justice have voted to prevent those of his own race from testifying against Caucasians in court? More likely, a hypothetical Chinese justice would have joined Justice Wells’ dissenting opinion to form a new majority holding the testimony admissible.

D. *KOREMATSU*

Korematsu v. United States is perhaps the most painful of recent cases, and also perhaps the most historically relevant in today’s climate of fear and terrorism.¹²⁵ It also reveals the ease with which we can justify curtailing the human rights of our own citizens on account of their race. In *Korematsu*, the Court held that the military could evacuate and imprison people, including U.S. citizens, solely because of their Japanese heritage. The Court justified its decision by saying that the country was at war, and the military was justified in taking any measure to ensure the safety of the country.

The Court held, “We are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did.” The court refused to recognize that Mr. Korematsu had been singled out on the basis of his race: “He was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded

¹²⁵ 323 U.S. 214 (1944).

that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders — as inevitably it must — determined that they should have the power to do just this.”

Had a justice of Japanese descent occupied a seat on the U.S. Supreme Court at the time it decided these cases, it is likely that their outcomes would have been very different. First, a Japanese-American justice would have been evidence, contrary to the Court’s reasoning, that those who are of Japanese descent are extremely loyal to the United States and are not a greater source of danger than those who are not of Japanese descent. Second, it is likely that a Japanese-American justice would have been able to enlighten the other members of the Court as to the conditions existing in local Japanese communities at the time, as well as the patriotism exhibited by many Japanese Americans who volunteered to serve in the war.

Instead, the Court relied on population statistics, the dual citizenship of some Japanese residents, and an overview of discriminatory laws to conclude that those of Japanese ancestry posed a greater threat to national security than others in the general population.

Of course, we must put this ruling in the proper context — a context not all that different from the one facing some Arab Americans today. The country was at war, had been attacked by Japan, and was clearly frightened. This fright manifested itself as xenophobia. Although justice is expected to be colorblind, the judiciary is composed of people who are influenced by many of the same factors as the rest of the population. Had the Court consisted of a diverse sampling of the community, would these embedded racist feelings be counterbalanced? Certainly, it is more difficult to maintain that generalization when a fellow Japanese judge, who has dedicated his life and sworn his allegiance to the country, flies in the face of that stereotype. Similar concerns should be remembered as the United States Justice Department continues its registration process and detentions for certain nationalities in the wake of the September 11 attacks.

E. *VIRGINIA v. BLACK*

The contributions of diverse members of the judiciary cannot be overemphasized. Even Justice Clarence Thomas, who is widely regarded as one of the more conservative justices on the Supreme Court, has made an

important impact on the Court. In early April of this year, Justice Thomas issued a dissent in *Virginia v. Black*,¹²⁶ which concerned the constitutionality of a Virginia statute outlawing cross burning. While the majority opinion focuses on the direct issue of whether the prima facie language of the statute violates the First Amendment, Thomas gives a historical and pragmatic perspective.

Thomas' dissent highlights how the burning cross is inextricably linked with terror and conduct, and, in the overwhelmingly vast majority of circumstances, conveys no message other than intimidation. Consequently, the speech aspect of the burning cross cannot be independently protected without condoning and protecting the intimidation and terror that accompany it.

During oral argument, Justice Thomas recounted the history of how the burning cross served as the symbol of the reign of terror perpetrated on African Americans in the deep South. Justice Thomas noted that groups such as the Knights of Camellia and the Ku Klux Klan used this symbol to promote almost one hundred years of lynching. Justice Thomas seemed to imply that its use in this manner might be significantly greater than intimidation or a threat. He then continued by opining that counsel had understated the case when he compared a burning cross to a mere religious symbol. Rather, Justice Thomas found that the use of the cross in this manner had a virulent effect. In other words, the only purpose of the cross was to cause fear and terrorize populations.

I have read that this insight added a perspective to the oral argument and opinion that otherwise may have been lost on the Court. It allowed counsel and the other justices on the Court to confront the effects of racism as seen firsthand by an African-American fellow justice.

IV. PERCEPTIONS OF JUSTICE VERSUS ACTUAL JUSTICE

As you can see, I believe that diversity has a direct impact on attaining actual justice in the law. However, another significant byproduct of diversity is a shift in the perception of justice. A public perception of justice has a

¹²⁶ 538 U.S. 343 (2003).

profound effect on attitudes toward our justice system and the ability of the system to serve all communities.

Even where a case is properly decided, a perception of injustice may exist where a participant's race is not represented on the bench, jury, or by counsel. This perception of injustice is dangerous, because it leads to a lack of confidence, however unmerited, in the legal system. Our legal system persists, and is on the whole respected, because of the trust that society has that it will be treated fairly. A diverse judiciary and legal system strives to ensure that whatever the outcome in a case, a party will not perceive that it has been prejudged. The perception of justice not only serves to increase faith in the legal system but also encourages society to obey the law and to respect the justice system.

V. IMPACT OF RECENT SUPREME COURT AFFIRMATIVE ACTION CASES: AFFIRMATIVE ACTION IS CONSTITUTIONAL

In closing, I also want to comment briefly on the Supreme Court's decision yesterday in the University of Michigan affirmative action case. The Supreme Court's holding in *Grutter v Bollinger*¹²⁷ reaffirms the Court's recognition of the role that diversity plays in achieving justice and equality. Justice O'Connor's majority opinion recognizes the importance of "the skills . . . developed through exposure to widely diverse people, cultures, ideas, and viewpoints," and acknowledges the added legitimacy that is bestowed on leaders when the "path to leadership [is] visibly open to talented and qualified individuals of every race and ethnicity." The same diversity on the bench that has served to overturn many of the Court's less admirable decisions also has shown the Court the importance of maintaining a judiciary composed of a cross-section of society. Affirmative action and diversity in our nation's schools and universities helps feed that diversity on the bar and the bench.

¹²⁷ 539 U.S. 306 (2003).

VI. CONCLUSION

The cases I have discussed demonstrate that diversity on the Court can provide a unique and particularly relevant perspective to the issues that the Court addresses. At the very least, we should consider the role that diversity plays in educating fellow judges. Justice Sandra Day O'Connor recently spoke of the great impact of Justice Thurgood Marshall's stories of his upbringing and background as a lawyer in the South. Justice O'Connor found persuasive not only Justice Marshall's legal arguments, but also the power of his moral truth.

Under some circumstances, this unique moral perspective can be outcome determinative. However, the most important function of diversity on the court is to bring an experience that is outside the mainstream to bear on the court's decisions. This function is essential in a state and country that are becoming increasingly pluralistic, both socially and politically. Indeed, our democracy has successfully balanced a wide variety of social and political interests over time. Our Court should be no different, and should strive to achieve the maxim of Oliver Wendell Holmes that the life of the law has not been logic; it has been experience. I challenge you to find the same perspective, inner wisdom, and moral truth so that your work also will stand the test of time. Thank you.

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