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The Impact of Federal Law on U.S. Higher Education: Through a Glass Darkly

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Introduction

It is very exciting to be here in Philadelphia my hometown to talk with you today about the impact of federal regulation on higher education in the United States.

I believe we can learn a lot about our future by better understanding our past. It seems appropriate that we take a look back at the past along with the major Federal litigation and regulations to better understand what is at stake. We must be clear about what we value as a nation and what the role of higher education is in developing its citizenry.

It is unclear how President-elect Trump and his new administration will impact higher education. But what is clear, is that this presidential election, has raised the specter of significant changes ahead for how we do business and how higher education will be evaluated.

I believe at this time in US history it is important for our industry to speak clearly and with one voice about the importance of access to higher education, the importance of diversity and inclusion, the importance of free speech, thought and inquiry.

We need to be sure that our industry's leaders, presidents, trustees, trade associations, and accreditors speak out when there is any attempt to roll back the progress we have made which has been so hard fought.

I believe we owe it to people like Linda Brown, and Amy Cohen, and Donald Murray to ensure that their courageous acts were not in vain.

This is a time for leaders in higher education to pursue policies, legislation, legal action and regulations that advance the cause of access to higher education and trumpet the value of inclusivity. Our future as a nation depends on innovation and inquiry and we need all the great minds in our country to contribute to this effort. We cannot afford to leave a single child behind.

So, I begin this presentation with a mirror and a quote.

Because at first we only see through a glass darkly…but if we keep at it…keep faith… we do see beyond ourselves and into the face of our better angels.

I believe this is exactly what my favorite lawyer, Abraham Lincoln, meant when he penned those same words in his Gettysburg Address… just up the road from here on November 19th, 1863.

And by the way as an aside, just up the street from this hotel at the Union League you can see the podium Lincoln used to deliver that address.

As accreditors and those who serve on accreditation committees, it is imperative that we answer the call to hold colleges and universities accountable for their students' success. It is imperative that we insist that policy makers, boards and presidents stay committed to ensuring that students in America are able to attain the highest quality education, graduate on time, with as little debt as possible and with the skills they need to succeed in the 21st century.

Higher education institutions are granted tax-exempt status based on the perceived benefits they return to our society, which contribute to the collective good. We must ensure that every school, whether, public or private, rural or urban, ivy or community college keeps faith with this commitment and meets their obligation to continue to provide opportunities to every member of our society.

Although access to education has been a critical hurtle to overcome, we must now also ensure inclusivity is measured. Student performance is inextricably bound up with inclusivity – merely creating a diverse student body is not enough.

We know that students who feel isolated because of their identity perform poorly. Likewise, we know that students who have been subjected to sexual harassment and assault cannot be expected to be fully engaged and receive the full benefits of their educational experience. We know that minority students are the

victims of unconscious bias both inside and outside of the classroom and that this bias results in poor grade performance and higher dropout rates, which is then followed by crippling student debt, as these degree-less students cannot find jobs which provide sufficient income in order to make their student loan payments.

The black and white baby dolls that were used in Brown v. Board of Education to show the stigma black children feel, is no different than the stigma a sexual assault victim experiences after a date rape. The stigma is no different than the stigma faced by trans-gender students who find the campus unwelcoming and unaccommodating to their basic needs. It is not enough for a school to state that it supports an open, inclusive and diverse campus – colleges and universities must also act in ways that demonstrate their commitment to these principles.

Section 1

Title IX

Over the summer, as I watched the thrilling achievements of the US Olympic team particularly the gymnasts, I was struck by the fact that there were so many women serving on the US Olympic Team. I went back to take a look to see what our team looked like this summer. We had 294 women out of the total 558 athletes representing about 52% of the entire team.

2016 US Olympic Team

And you can see the 30 sports in which they competed.

1992 and 1972 Olympic Teams

In 1992, in Barcelona we fielded 190 women or 34.8% of the total team that year. Looking further back to 1972, 84 women or just only 21% of the 400 competitors participated in the Summer Olympics at Munich.

Title IX Described

I'd say we're making progress. But, what happened between 1972 and 2016? What made the difference? In 1972, the Federal government passed Title IX which prohibits sex discrimination in programs and activities offered by colleges and universities. Title IX is intended to eliminate sex discrimination in ALL programs and activities not just those that receive federal funding and is designed to provide equal opportunity in class, health insurance, facilities,

academic standards and other aspects of higher education including the right to be safe from assault on campus.

But what really made the difference between 1972 when the act was passed and 2016? The answer is Amy Cohen.

Amy Cohen sued Brown University in 1992 and 93 seeking equal opportunities in athletic competitions.

In 1991, Brown University attempted to demote women's gymnastics and volleyball teams from university to donor-funded sports. Amy Brown filed suit claiming the elimination of participation opportunities for female students was a violation of Title IX, in that it did not provide women with equal benefits in athletics.

The trial court agreed and ordered Brown University to come up with a plan that would permit equal participation opportunities for women based on the total percentage of women at the University, and not merely those who tried out for sports.

Amy Cohen's case was a game changer for women's athletics.

Now with more participation opportunities at colleges and universities across the US more scholarship opportunities opened up for young women. This means that more girls are competing in high school for scholarships to colleges. This also means that more young girls in middle school begin to compete in sports so they can get to high school and then to college.

It is my belief that this laid the groundwork that allowed Simone Biles, Aly Reisman and Gabby Douglas to train as gymnasts at such an early age, and resulted in them bring home gold medals in the summer Olympics.

Someone should give Amy Cohen a medal too, don't you think?

Section 2

Access to Education

As we look forward to a new Supreme Court appointment, I believe it is important to also look back at the Court.

This chart shows significant federal cases that have allowed a variety of groups to attend US higher education institutions. These include Plessy v. Ferguson in 1896, which was later overturned by Brown v. Board of Education in 1954, passage of the 1964 Civil Rights Act, the 1965 Executive Order approving affirmative action and in 1978, Bakke's challenge to affirmative action. Throughout the last 50 years, we have continued to debate both the value of diversity and how to achieve it, without also acknowledging that race matters

Let's turn the clock back to May 1869 and take a look at **Plessy v. Ferguson**.

Plessy

In June 1892, **Mr. Plessy** purchased a first-class ticket in Louisiana to travel from New Orleans to another part of Louisiana. Plessy was of mixed race and a resident of the State of Louisiana. The conductor ordered him removed from the train car reserve for white passengers. When he refused, he was taken to jail.

The Supreme Court found that the laws of the State of Louisiana which permitted the railroad to separate passengers based solely on race was constitutional and consistent with the equal protection clause of the 14th Amendment. From that decision until 1954, separate but equal facilities was the law of the land.

Segregated schools

Murray v. Pearson

In Maryland in the 1930s, the State, rather than integrate its colleges and universities, would provide scholarships for black students to attend schools in other states. Maryland resident, Donald Murray, received one of those scholarships and used it to attend Amherst College in Massachusetts. After his graduation from Amherst, Murray applied to the University of Maryland's law school. He was denied admission solely on the basis of his race.

Thurgood Marshall, a lifelong Maryland resident, hearing of Murray's case at his church brought the case to his teacher and mentor Charles Hamilton Houston, then dean of Howard University's law school. Houston had been looking for cases that his students could use to bring about some measure of equal opportunity for African-Americans.

Houston, beginning with Murray's case, built a body of cases that would expose the inequality of the separate but equal doctrine. He selected law schools in particular because he believed that the courts would understand the need for equal training of black attorneys and other professionals who would serve the black community.

Marshall and Houston

In 1936, Thurgood Marshall under the direction of Charles Hamilton Houston argued the case of **Murray v. Pearson**. Marshall argued that the State of Maryland had failed to provide equal education for Donald Murray and that as a citizen of the State and a lifelong taxpayer in Baltimore, he was entitled to attend Maryland's only state law school. The court agreed and ordered the University of Maryland to admit Murray into its law school.

Marshall and Houston had successfully put the first nail in the coffin of Separate but Equal.

Sweatt v. Painter

In addition to serving as Howard University's Dean, Houston also became the first attorney for the NAACP Legal Defense Fund. In 1950, the NAACP brought a case by Herman Sweatt against the University of Texas seeking admission to its all-white law school. But rather than integrate the University of Texas, the State of Texas decided to build a new law school exclusively for black students that they said would be equivalent to the white law school of University of Texas at Austin.

Houston and the NAACP were able to show that the new black law school could never be "substantially equivalent" to the University of Texas Law School. The court agreed that Herman Sweatt was entitled to attend the University of Texas Law School based on the protections of the equal protection clause.

McLaurin v. University of Oklahoma

Similarly, **George McLaurin** brought a case in Oklahoma in 1948 against the University of Oklahoma seeking admissions to a master's degree program in education. The Court agreed and required the University of Oklahoma to admit Mr. McLaurin. However, rather than integrate, the University constructed a separate facility for McLaurin to attend school. This included separate cafeteria, separate desks and library, as well as separate dormitory space.

In 1938, **Lloyd Gaines** brought a claim against the University of Missouri Law School which denied him admission solely on the basis of race. The Supreme Court ultimately ordered the State of Missouri to build a separate law school exclusively for African-Americans.

Charles Houston, by then the General Counsel of the NAACP, successfully designed a set of cases, primarily law school admissions cases, to test the boundaries of the equal protection clause and to establish that separate but equal facilities in education were inherently unequal.

Houston's cases continued to open the doors for women, and other minorities to access higher education into the 1970s and beyond.

But Houston was also interested in the inequality within the public schools. Houston's mother, a local school teacher in Washington DC, had never been paid a salary equivalent to her white counterparts. Houston was building a body of case law that would ultimately require EQUAL education, EQUAL access, and EQUAL pay. The fight for equal pay for equal work for women still goes on today.

Marshall at the Supreme Court

Over the course of time, Houston collected a number of cases through the NAACP culminating in 6 cases later known as **Brown v. Board of Education**. Unfortunately, Houston suffered a heart attack before trial and Thurgood Marshall was asked to step in. The central question in Brown was whether the doctrine in Plessy of separate but equal should continue to be applied in public education. Secondary to the case was the issue of whether students could be segregated solely based on race.

The Supreme Court held in Brown that "separate but equal had no place in education" and that segregation was a violation of the Equal Protection Clause of

the 14th Amendment. In so finding, the court ordered desegregation of public schools "with all deliberate speed".

Using the testimony of young children who were asked about their feelings for black-and-white dolls, the court agreed that separating students by race generated feelings of inferiority and lack of self-worth in the community which affected their hearts and minds in ways that were unable to be undone.

Linda Brown

This is a picture of **Linda Brown** for whom Brown v. Board of Education is named. I think she looks mighty determined in that photograph.

A Prayer in Baltimore

Newspapers of the day in Baltimore and later across the country echoed the sentiment that times were changing and that access to education for all people regardless of race or difference should be a right of every American.

All Deliberate Speed

JFK Quote

Perhaps **John F. Kennedy** said it best when he gave his commencement address in 1963 at American University.

> "If we cannot end now our differences, at least we can help make the world safe for diversity. For in the final analysis, our most basic common link is that we all inhabit this small planet. We all breathe the same air. We all cherish our children's future. And we are all mortal."

After the assassination of JFK in 1963, Lyndon Johnson pushed hard for the adoption of the **Civil Rights Act** and finally in July 1964 the Act was passed.

Civil Rights Act

LBJ in Cotulla, Texas

Johnson began his life as a school teacher in Cotulla, Texas. He once stated that he had seen the "poverty in the eyes of the Mexican children" he taught and was compelled as President to do something to fight poverty, illiteracy and ignorance.

Johnson's **Great Society** began with the Civil Rights Act but you'll see that between 1964 and 1968, he enacted a massive amount of legislation most of which we take for granted today.

Executive Order 11246

In 1965, he issued **Executive Order 11246** which created affirmative action.

In the aftermath of World War II and integration of the Armed Forces by Pres. Dwight D. Eisenhower, minority soldiers returning home found that they had less rights as citizens. Using the G.I. Bill, many were able to attend colleges and universities–including my father who attended Wilberforce University in Ohio.

By 1965, Pres. Johnson sought to implement a plan to counteract the last vestiges of discrimination held over since the Civil War. This new federal regulation required contractors, and ultimately colleges and universities, to design affirmative plans to ensure the full participation of minority citizens in the United States.

Bakke and Podberesky

In the late 1960s and early 1970s, colleges and universities used a variety of affirmative action plans to provide admission to minority students, as well as the admission of women for gender balance. In 1976, **Alan Bakke** brought a case against the University of California seeking to reverse the denial of his admission to the UC-Davis School of Medicine.

The University of California had an affirmative action program in place at the time of Bakke's denial. Bakke challenged the admissions program as discriminating against white applicants in order to reserve a specific number of seats for black students.

In Bakke, the primary opinion of the Supreme Court case was written by Justice Louis Powell but there was a total of 6 different opinions written by the 9 justices in that case. Powell wrote in his opinion that diversity in the classroom was in fact a compelling governmental interest of the state, and that affirmative action was permissible. However, the Court found that the UC Davis program went too far by assigning a prescribed number of seats specifically for minority students. Bakke was admitted to the medical school.

Although the Bakke case narrowed the application of affirmative action plans in higher education admissions, it for the first time, articulated the value of diversity in US higher education.

In 1994, the University of Maryland offered merit scholarships to African-American students at College Park. A Hispanic student, Daniel Podberesky, who had a superior grade point average**,** was denied the opportunity to compete for one of those merit-based scholarships because he was not African-American. Podberesky filed suit against the University alleging that the scholarship program violated the Equal Protection Clause. Citing the need to provide for the *present* effects of *past* discrimination, the University of Maryland argued that the scholarship program was sufficiently narrowly tailored to achieve its objectives.

The District Court agreed with the University of Maryland. The inequities and indignity of past discrimination at the University of Maryland were undeniable. However, the use of race as a repairational device was highly suspect and strict standards of review are required to justify the practice. Consequently, on appeal, the Fourth Circuit reversed and remanded judgment in favor of Podberesky and invalidated the race-based targeted scholarship program at Maryland. The Court held that the University had violated the Equal Protection Clause by maintaining a scholarship program solely for African-American students and that the scholarship program was not "narrowly tailored" to remedy the present effects of past discrimination.

As I stated previously, it is not enough for a school to create programs which it hopes will meet its goals of creating an open, inclusive and diverse campus – colleges and universities must also verify whether those programs are effective in achieving those goals.

The next challenge to affirmative action came in Texas. In Hopwood, white students denied admission to the University of Texas Law school at Austin challenged the affirmative action admissions program which had been implemented after the Bakke decision.

This reverse discrimination case challenged the University's use of race as one factor in the development of a diverse student body. Again, like in Maryland, the University of Texas argued that its poor reputation in the black community as well as the present effects of past discrimination lingered in Texas since the 1950 case of Herman Sweatt. The Fifth Circuit disagreed and issued a ruling which barred all use of racial preferences in university admissions in the states under that

court's jurisdiction. The Supreme Court in 1996 declined certiorari and the case never reached full consideration by the Supreme Court.

Hopwood aftermath

After the initial ruling in Hopwood, the Texas legislature developed the Top Ten Percent Rule to increase diversity at state universities. The program offered automatic admission to all Texas high school students who finish in the top ten percent of their graduating class would to be guaranteed admission to the public university system in Texas. Texas' goal was to increase the number of minority students and foster a diverse student body at its public institutions of higher education without violating the Constitution.

Grutter and Gratz

In 2004, two cases emanating from the University of Michigan were decided by the Supreme Court. Not since Bakke in 1978 had the Supreme Court been asked to decide the merits of affirmative action programs in higher education. The Grutter case involved the denial of admission to the University of Michigan's Law School. In the law school admissions process, the law school applied a holistic review of the candidate's qualifications including race as one factor. Justice Sandra Day O'Connor writing the opinion for the Court, endorsed the position rendered by Powell in Bakke that "diversity in higher education is substantially important and a laudable educational benefit".

O'Connor stated that in addition to the educational value of diversity espoused by Justice Powell, diversity in higher education plays a critical role in cultivating leaders in this country. And ensures the "effective participation by members of all racial and ethnic groups in the civic life of our nation [and] is essential if the dream of one nation, indivisible, is to be realized."

In contrast, the admissions process for the rest of the University of Michigan used a more complicated formula which the court found in Gratz could not withstand strict scrutiny review because race had been given more than a plus factor in the admissions process.

Fisher

The Center for Civil Rights, a nonprofit public interest law firm dedicated to the defense of individual liberties and against aggressive federal regulation which they believe impinge on constitutional rights, provided support to Abigail Fisher in

her 2013 lawsuit alleging discrimination in admissions by the University of Texas. Fisher sought to overturn the decisions in Grutter and Bakke.

After Hopwood, Texas began using its Top Ten Percent Rule to ensure the admission of minority students throughout the University of Texas system. But in applying the Top Ten Percent Rule, the University found too many minority students were enrolling in particular fields of study and in other degree programs there was a paucity of minority students. In order to spread out the minority students throughout the academic curriculum, the University of Texas attempted to limit admission of certain students into programs undersubscribed by minorities. Fisher sought admission to one of the programs where the University was seeking to enroll more minority students. She was denied admission to the program. The Supreme Court remanded the case back to the lower court requesting that it apply the standard of strict scrutiny in reviewing its admissions program.

In 2015, the Supreme Court heard the second challenge by Abigail Fisher to the University of Texas admissions policy. Justice Kennedy joined by Ginsburg, Sotomayor and Breyer wrote the opinion in Fisher II. The Court found that the University of Texas using the combined Top Ten Percent Rule and holistic admissions policies had successfully and narrowly tailored its admissions program to ensure diversity in the class in the narrowest way possible. But the court cautioned the University to regularly evaluate its data to ensure that its admissions programs are sufficiently narrowly tailored and race neutral.

Section 3

First Amendment

The First Amendment of the United States Constitution reads "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for redress of grievances."

Below is a copy of the original text of the First Amendment

Tinker and TPM

In December of 1965, in a plan to show support for a proposed truce in the Vietnam War, students in the Des Moines public school system decided to wear black armbands throughout the holiday season and to fast between December 16th and New Year's Eve. On December 16th, Mary Beth Tinker along with other members of her class were sent home from school for wearing black armbands.

In a 7-2 decision by the United States Supreme Court in Tinker v. Des Moines, the Court held that students do not lose their First Amendment right to freedom of speech when they cross the threshold of school property. In order for a school to prevail in curtailing speech, the institution must show that the prohibited conduct or speech would "materially and substantially interfere with the operations of the school".

Freedom of Speech, however, does allow for restrictions on the time, place and manner (TPM) of an individual's expression. TPM restrictions may be imposed where the words are obscene, fighting words, pornography or reasonably calculated to incite violence.

Symbolic Speech

Whether students will be permitted to burn flags on our campuses as an act of symbolic speech, is anyone's guess. But if President-Elect Trump's tweets are to be believe, even that free speech right may be short lived. As leaders, we must be vigilant.

Section 4

Immigration

Suffice to say that even our countries immigration laws are subject to change, and many students are fearful, that without sanctuary, they may find the dream of a college education taken away.

Dream Act

Dreamers may find that their opportunities are limited by oppressive immigration policies that punish them for being born in the wrong place.

Campus Security and laws affecting students

Other laws which we now assume protect and support our campuses may come under review. While these laws do impose some administrative and financial challenges, remember, that like Title IX, it may take 30 or 40 years before we see the gains which result from providing safe and secure campuses so that both women and men may seek a college education free from fear of sexual assault.

Federal Workplace Laws

The federal employment laws which we presume to be chiseled into the stone of our ivy-covered walls, may not be available if our leaders in higher education fail to stand up and make their voices count like Houston, and Marshall, and Johnson and Kennedy. The commitment of higher education to create opportunities for all, to respect diverse ideas and to create a community which fosters inclusivity carries over and onward as these students enter the workforce.

Conclusion

After reviewing this line of cases and the federal laws that have enacted changes within higher education, our progress towards equality and diversity is more like a double helix. In the aftermath of the Civil War, there was limited opportunity for education. But, as the US economy grew and the middle-class expanded, the importance of education grew alongside. Citizens went off to WWI and returned seeking a better life and looked to higher education as a means to achieve that goal.

With the integration of the military in WWII, the GI Bill and legal decisions such as *Brown* created greater opportunities for African Americans to challenge society for their right to seek equal access to an equal education.

As the Vietnam War came to a close, President Johnson saw the role of education as a tool to lift people of all types out of poverty. Affirmative Action Plans further widened the door for women and minorities of all types to come to campus.

I believe that our future as a nation depends on the continuation of this commitment to diversity, inclusivity, innovation, imagination and inquiry. We cannot afford to leave a single child behind. Without great leaders and courageous people, those doors may again close for Dreamers, for LGBTQ students, for

minorities, for young women, and, yes, even the flag burners, who all play a critical role in the growth and advancement of this nation.

We must remain vigilant and honor those who have seen the future though that glass darkly.

How then can we ensure the quality of education and excellence of the student experience? Because quality is more than the number of faculty, the size of the endowment, the number of bullets in the strategic plan, or books in the library.

Are we doing enough to ensure not only institutional quality but institution equality. And are we doing enough not only to accommodate innovation and academic inquiry but also accommodation of racial, ethnic, gender and cultural difference?

I title this presentation "through a glass darkly" because in some ways it reminds me of a mirror, if we look back at our history perhaps we will be better prepared to face our future.

I'd like to thank the Catholic University of America Office of General Counsel and NACUA as well as a number of others who have contributed to this presentation.

I'll take your questions.

Thank you.

Additional Resources and Credits

Additional Resources:

Office of General Counsel of the Catholic University of America

http://counsel.cua.edu/default.cfm

National Association of College & University Attorneys

http://nacua.org/

Kent M. Weeks, College Legal Information, Inc.

http://collegelegal.com/legal-manuals

Court Cases

Plessy v. Ferguson (1896)
163 U.S. 537

Pearson v. Murray (1936)
169 Md. 478

Brown v. Board of Education (1954)
347 U.S. 483

Tinker v. Des Moines (1969)
89 S.Ct. 733

Regents of the University of California v. Bakke (1978)
98 S.Ct. 2733

Podberesky v. Kirwan (1994)
38 F.3d 147

Hopwood v. Texas (2000)
236 F.3d 256

Gratz v. Bollinger (2003)
123 S.Ct. 2411

Grutter v. Bollinger (2003)
125 S.Ct. 2325

Fisher v. University of Texas at Austin (Fisher I) (2013)
133 S.Ct. 2411

Fisher v. University of Texas at Austin (Fisher II) (2016)
136 S.Ct. 2198

Acts of Congress and Executive Orders

Civil Rights Act of 1963

Great Society Legislation

Economic Opportunity Act
Pub.L. 88-120

Tax Reduction Act
Pub.L. 88-272

Urban Mass Transportation Act
Pub.L. 88-365

Wilderness Preservation Act
Pub.L. 88-577

Clean Air Act
Pub.L. 88-206

Elementary and Secondary School Act
Pub. L. 89-10

Higher Education Act
Pub.L. 89-329

Social Security Amendments of 1965 (Medicare & Medicaid)
Pub.L 89-97

Housing and Urban Development Act of 1965
Pub.L. 89-117

Voting Rights Act

Pub.L. 89-110

Water Quality Act
Pub.L. 89-234

Executive Order 11246
Exec. Order No. 11,246, 3 CFR, 1964-1965 Comp., p. 339