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The Path to Diversity? Different Differences

By DAVID J. GARROW

A FEDERAL appeals court ruling last week striking down the University of Georgia's use of racial preferences in its freshman admissions program once again places the issue of affirmative action at the forefront of America's legal agenda. If Georgia appeals, and if the Supreme Court chooses to hear the case, the resulting decision could well be the court's most decisive statement on race since its landmark 1978 ruling in Regents of the University of California v. Bakke.

But even if the case is not heard by the high court — and there are many reasons why it may not be — last week's unanimous opinion from a three-judge panel of the United States Court of Appeals for the 11th Circuit should, if properly understood, fundamentally alter the debate about the use of racial preferences in college and graduate school admissions.

The university admitted its first African-American students in 1961 and began meaningful desegregation only in 1970. In 1989 the federal Office of Civil Rights ruled that Georgia had completed the necessary remedial steps and that "no additional desegregation measures will be required." The university is thus unable to invoke its own history to justify a reparative motive for its use of racial preferences, and is left to defend its program only as a means of ensuring a diverse student body.

The linchpin of the argument that student racial diversity is a "compelling" interest is the opinion written by Justice Lewis F. Powell Jr. in the 1978 Bakke case, which struck down a racial quota system used by the University of California at Davis. "Ethnic diversity, however, is only one element in a range of factors a university may properly consider in attaining a heterogeneous student body," he declared.

Justice Powell said that an admissions process using race must "consider all pertinent elements of diversity in light of the particular qualifications of each applicant." To focus "solely on ethnic diversity," he held, "would hinder rather than further attainment of genuine diversity."

But that, according to last week's ruling, is exactly what Georgia's program did. The university used a numerical computation in which all nonwhite applicants were awarded an extra half-point, significantly boosting their chances for acceptance. The admissions director testified the half-point figure had been chosen from "out of the blue."

Writing last week on behalf of the appeals panel, Judge Stanley Marcus, a New Yorker whom President Bill Clinton promoted from trial judge in 1997, found that Georgia's racial bonus "does not even come close" to meeting Justice Powell's standard.

"Individuals who come from economically disadvantaged homes," Judge Marcus wrote, "individuals who have lived or traveled widely abroad; individuals from remote or rural areas; individuals who speak foreign languages; individuals with unique communications skills (such as an ability to read Braille or communicate with the deaf); and individuals who have overcome personal adversity or social hardship — none of the characteristics that make these kinds of individuals 'diverse' are taken into account."

BUT he also emphasized that his view of diversity has never been endorsed by any Supreme Court majority. Justice Powell's opinion controlled the outcome in Bakke, but it was signed only by him.

"The status of student body diversity as a compelling interest justifying a racial preference in university admissions is an open question," Judge Marcus wrote, and "is one that, because of its great importance, warrants consideration by the Supreme Court."

Supporters of affirmative action, worried that the Georgia case's weaknesses will yield a decision ruling out racial considerations entirely, are calling upon the state's attorney general, Thurbert Baker, and Gov. Roy Barnes not to appeal.

Affirmative action proponents would rather see significant rulings emerge from two pending cases, both of which challenge admissions programs at the University of Michigan. One involved the use of a racial bonus in undergraduate admissions; a federal trial judge upheld it last December. The other concerned racial advantages in law school admissions; a different trial judge ruled in March that it was unconstitutional. Appeals of both will be heard by a three-judge panel of the Court of Appeals for the Sixth Circuit in Cincinnati on Oct. 23. The university, with no history of racial segregation in its admissions practices, will, like Georgia, be advancing only a student diversity argument.

Affirmative action questions are certainly on the minds of the nine high court justices, since on Oct. 31 they will hear for a second time a case challenging limited racial preferences in a federal transportation contracting program. Whether it be the Georgia case this fall or the Sixth Circuit's ruling on the two Michigan programs in 2002, the time when the high court will have to weigh in on the constitutionality of racial preferences in university admissions is inexorably moving closer.

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