Ideas & Trends
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New York Times (1857-Current file); May 19, 2002; ProQuest Historical Newspapers The New York Times (1851 - 2003)
pg. C4

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How Much Weight Can Race Carry?

By DAVID J. GARROW

ATLANTA

LAST week, a badly divided federal appeals court ruled 5 to 4 that the University of Michigan Law School could give preferential treatment to minority applicants. It was a judgment that only added to the confusion over affirmative action in higher education, since it conflicts with both a 1996 appellate decision concerning the University of Texas Law School and a 2001 appeals court ruling that rejected racially preferential admissions at the University of Georgia.

"We need a national resolution of the issues involved," Larry Faulkner, the president of the University of Texas, told The Los Angeles Times. "It is patently not right for the law to be different in one part of the country from what it is in another, and that is very much the case now."

The stakes are high. Lee Bollinger, the incoming president of Columbia University and a former dean of Michigan Law School, said that, "a ruling that race and ethnicity could not constitutionally be considered in admissions would be drastic and disheartening, threatening a decline in minority enrollment of as much as 70 to 75 percent."

If, as expected, lawyers for the unsuccessful Michigan plaintiff, Barbara Grutter, appeal to the Supreme Court, most legal experts believe the court will take the case and re-examine the constitutionality of affirmative-action admissions programs for the first time since 1978.

It was then that Supreme Court Justice Lewis F. Powell Jr. delivered his Bakke opinion, in which he held that a university's interest in recruiting a diverse student body was so important that it justified using race in deciding whether or not to admit an applicant. Justice Powell was joined by four members of the court in that part of the decision; the other four joined him when he also said that racial quotas were unconstitutional.

Justice Powell wrote that, while race could be "a plus" in reviewing a student's application, it couldn't be used to assure the admittance of "some specified percentage" of students from particular racial groups.

Just how much weight race can carry will likely be a central question for Justice Sandra Day O'Connor, perhaps the crucial swing vote if the Grutter case is argued before the Supreme Court in 2003. Seven years ago, in the court's last major affirmative-action ruling, Justice O'Connor joined with Chief Justice William H. Rehnquist and Justices Antonin Scalia, Anthony Kennedy and Clarence Thomas to strike down an affirmative action contracting program.

In his majority opinion in the Michigan case, Chief Judge Boyce F. Martin Jr. acknowledged that Justice Powell "did not define" how weighty "a permissible 'plus' " could be when minority applicants' grades and standardized test scores fall well short of those of other applicants'. But Judge Martin argued that the Bakke decision was never meant to apply only in cases where applicants' grades and test scores were equal.

THE four dissenters declared, however, that Michigan had gone overboard. Judge Danny Boggs said that in the university's admissions program, "race is worth over one full grade point of college average or at least an 11-point and 20-percentile boost" on the Law School Admissions Test. He added that "majority applicants are all but summarily rejected with credentials, but not ethnicity, identical to their under-represented minority 'competitors' who are virtually guaranteed admission." This, Boggs concluded, went well beyond the "plus or tip that Justice Powell thought might be permissible."

The same conclusion was reached by Judge Ronald Lee Gilman, a Tennessee Democrat appointed to the appeals court in 1997 by President Clinton. Judge Gilman noted that the law school has insisted that it must recruit a "critical mass" of racial minorities so that students of color will not feel isolated. But critical mass, the judge said, "appears to be a euphemism for the quota system that Bakke explicitly prohibits."

Jeffrey S. Lehman, the dean of Michigan Law School, rejected both Judge Boggs's and Judge Gilman's conclusions, contending that Michigan's actual practices reflect "relatively small differences" between minority and other applicants and fall "comfortably within what Justice Powell contemplated."

Justice Powell's biographer, John C. Jeffries Jr., who is now dean of the University of Virginia School of Law, agreed. In his book, "Justice Lewis F. Powell Jr.," Mr. Jeffries wrote that Justice Powell's distinction between an unconstitutional quota and giving extra weight to race was nothing more than "pure sophistry," that he was simply looking for an acceptable way to employ racial preferences, which he saw "not as morally right but as socially necessary."

Many African-American law students at Virginia, Mr. Jeffries said, "would not be admitted except for race." But viewed in light of Virginia's own state history and racial composition, the law school's highly diverse student body is "a great victory for America," he added.

This is the sort of social engineering that others find objectionable. Last month, the Center for Equal Opportunity, a Virginia-based policy institute opposed to affirmative-action, denounced the University of Virginia Law School's policies. In 1999, the center announced, "a student with an L.S.A.T. score of 160 and an undergraduate G.P.A. of 3.25 had a 95 percent chance of admission if he or she was black, but only a 3 percent chance of admission if white."

In a way, it's not surprising that affirmative-action admissions programs have never satisfied everyone. After all, the Bakke decision was an uncomfortable compromise, even for the man who wrote it, said Robert D. Comfort, the clerk who worked most closely with Justice Powell on the case.

TO Justice Powell, "there was no good answer in 1978," said Mr. Comfort. "He believed he was buying the polity 25 years to work it out."

But those 25 years have just about run out and society still relies on Justice Powell's unhappy compromise. Now, it appears that the Supreme Court will try once again to resolve the hard questions of race, history, privilege and merit raised by affirmative action.

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Protesters rallied in Cincinnati last December for and against affirmative action.