



High court weighs affirmative action

MSNBC staff and wire reports

Supreme Court justices, confronting affirmative action in higher education for the first time since outlawing quotas 25 years ago, debated Tuesday whether colleges and universities may legally consider race when admitting students. Thousands of demonstrators, nearly all of them affirmative action supporters, marched outside the court to urge the justices to uphold school admissions programs that give preference to minority applicants.

HEARING ORAL ARGUMENTS on admissions policies at the University of Michigan and its law school, the justices aggressively questioned lawyers for plaintiffs and the school. The Bush administration's top lawyer also took part, arguing that the university's law school program "is a thinly disguised quota."

But Solicitor General Theodore Olson stopped short of declaring that race could never be part of admissions policies, and several justices made the point that the high court has allowed limited use of race as a criterion in other contexts. Justice Clarence Thomas, the court's only black member, broke his customary silence during oral arguments to closely question a university lawyer about whether affirmative action has furthered the broader social goal of racial understanding and harmony.

"Do you think your admissions (policies) at least provided some headwind toward that?" Thomas asked. DECISION EXPECTED BY JULY Not since the court ruled out quotas in the 1978 University of California v. Bakke decision had justices come to such a direct confrontation with the affirmative-action issue. That fractured ruling struck down quota systems but left room for race to be a factor in university admissions.

The court's decision, expected by July, could effectively end any state-sponsored affirmative action, or it could rewrite the rules for when race may be a factor in government decisions. Kirk Kolbo, a lawyer for white applicants rejected by the university and its law school, told the justices the goal of promoting diversity on campuses is not a compelling reason to justify giving preferential treatment to minorities.

But Justice Sandra Day O'Connor, widely considered to be the crucial swing vote on the issue, said law schools make many choices in picking students, and wondered aloud why they could not therefore also consider race.

"You have some precedence out there that you have to come to grips with," she said to Kolbo. "We have given recognition to race in a variety of settings." O'Connor did express concern that the term of the university's program is indefinite. The programs for minorities the court has upheld previously operated for a fixed time period, she said. WHITE HOUSE SEES 'QUOTA' Olson, the Bush administration's top courtroom lawyer, also argued the university program should be struck down because it was a "thinly disguised quota" and employed "stereotypes."

But Olson was forced to admit that the U.S. Naval Academy in Maryland and the U.S. Army at West Point use racial preferences as a factor in deciding which students to admit. He also stopped short of calling on the court to end affirmative action. When O'Connor pressed him on whether the court should use these cases to ban the use of race, he said: "We're reluctant to say 'never.' "

Justice Anthony Kennedy, another key vote, asked Kolbo if colleges should be concerned when blacks and Hispanics are underrepresented, making up a small percentage of students. "We need to get away from the notion that there's some right number," he responded. Kennedy said that leaders often look at diversity, adding: "I should think that's a very legitimate concern of the state."

OTHER JUSTICES WEIGH IN Justice Stephen Breyer said there were arguments that schools should reach out to people of all races, to train minorities to be leaders in law, military, government and other fields. The college's attorney, Maureen Mahoney, also came under sharp questioning as she argued that the admission program was "an attempt to take race into account in a modest, limited fashion" to create a diverse student body.

"The education of all students will be enriched," she said. Justice Antonin Scalia, a staunch opponent of affirmative action programs, accused the college of employing a "thinly disguised quota." "Some applicants are given a preference because of their race," he said. "Once you use the term 'critical mass,' you're into quota land."

"That is not a quota," Mahoney insisted. SUPPORTERS IN FORCE Supporters of affirmative action showed up at the Supreme Court in force. There was no visible presence of affirmative-action opponents. "I'm a direct beneficiary of affirmative action. To let something like this go by would be unacceptable," said Anthony Watson, a sophomore from historically black Howard University in Washington. "There are more blacks in prison than in college," the Rev. Jesse Jackson shouted to the crowd, many chanting and waving signs.

"Young people, fight back!" The largely young, mixed-race crowd, estimated by police at between 5,000 and 7,000 people, carried signs from as far away as California, Ohio and Michigan. "I'm white and I got in. Stop whining," said one sign. More than 100 friend of the court filings rolled in during the weeks preceding arguments.

Lawyers could not remember another case that generated more. In another sign of the case's importance, the high court released an audio tape immediately after the two-hour arguments. It is only the second time the court has done so. The first time was the presidential election cases in 2000. EXTRA CREDIT TO MINORITY APPLICANTS

The policy at University of Michigan and its law school gives extra credit to minority applicants, making it more likely that a black, Hispanic or Native American will edge out a white applicant who has similar test scores, grades or other attributes. Colleges and universities across the nation have similar admissions programs.

On the undergraduate level, all black, Latino and American Indian applicants to the University of Michigan receive 20 bonus points on the university's 150-point scale that determines who is admitted. For all applicants, points are awarded based on geography, standardized test scores and other factors. The university says that academic qualifications are the overwhelming factor.

"There are no separate tracks or set-asides. There are no numerically specified or minimum targets," a university fact sheet explains. The goal of the racial and ethnic bonus system, the university says, is a more diverse student body. The question facing the court, says Brannon Denning, a law professor at Southern Illinois University Law School, is "whether the achievement of 'diversity' in the classroom is a 'compelling governmental interest' and whether Michigan's program is 'narrowly tailored' to achieve that diversity."

"Even assuming that pursuit of diversity is a compelling governmental interest, opinions could differ about the narrowness of Michigan's -- and presumably everyone else's -- programs to ensure diversity," he said. "If the programs had the effect of making race the factor in admissions decisions, as opposed to being merely a factor, then they will probably be struck down."

1978 CASE RECONSIDERED The court last considered racial preferences in school admissions in 1978, when it handed down a decision in the case of Allan Bakke, an applicant to the University of California Medical School who had been rejected, he contended, because the school used a quota system.

On their face, racial quotas would violate the 14th Amendment to the Constitution, which says that no state shall deny to any person "the equal protection of the laws." The Bakke decision held that, where a university had no prior record of discrimination, its admissions program could not set aside a specific number of places for applicants who were members of particular racial or ethnic minorities. Such a program violated the Equal Protection Clause of the 14th Amendment, as well as the 1964 Civil Rights Act.

But, in an opinion written by Justice Lewis Powell, the court decided that it was constitutionally

permissible for universities to consider race or ethnicity as one factor, among several other factors, in deciding who it admitted to its student body. BAKKE 'SETTLED VERY LITTLE'

But as University of Texas law professor Sanford Levinson explains, the Bakke decision "really settled very little in a formal sense. After all, there was no 'opinion for the court,' and it is an embarrassing truth -- for those of us who support affirmative action -- that Justice Powell's opinion in fact got the support of no other justice.

The court has ducked the issue for a quarter century because, when all is said and done, most decision makers accepted Powell's opinion as a 'Solomonic compromise,' i.e., 'diversity, yes, quotas, no' and learned to live with it." Powell "was really only speaking for himself," says Denning. At least one federal appeals court judge has said that Powell's decision can't be used as legal precedent for that reason.

Denning explains that four justices concurred with Powell's view that University of California's quota violated part of the 1964 Civil Rights Act, which barred schools receiving federal funds from engaging in racial discrimination. But those four justices dissented from Powell's holding that the school could use race as one factor in admissions.

A separate group of four justices agreed with Powell that the school could use race as a factor in admissions, but dissented from Powell's finding that the quota system used in the Bakke case was unconstitutional. In his opinion, Powell held that courts had to apply "strict scrutiny" in reviewing race-conscious admissions programs.

To pass muster, a program had to advance a "compelling governmental interest" and be "narrowly tailored" to further that interest. But less than a majority of justices agreed with Powell's view -- leaving college admissions in a kind of legal no-man's land until the court agreed to hear the Michigan cases.

HOW THEY MIGHT VOTE Based on Supreme Court decisions over the past several years, it is likely that the justices will line up this way: Chief Justice William Rehnquist, as well as Justices Scalia, Thomas and Kennedy have opposed racial preference programs in the past. Justices Breyer, David Souter and Ruth Bader Ginsburg have supported programs that use racial preferences to remedy the effects of past discrimination. Justice John Paul Stevens voted in the Bakke case that race could not be used as a factor in determining admissions to a state university.

But in more recent cases, Stevens has written that Congress has the power to provide benefits to certain members of a racial or ethnic minority "notwithstanding its incidental burden on some members of the majority" race. He has said that Congress has the authority "to overcome historic racial subjugation" by setting up programs such as set-asides for minority-owned construction firms so that they get a guaranteed slice of federal contracts.

Justice O'Connor has emphasized the need for "narrowly tailored" remedies to deal with the effects of racial discrimination. But unlike the conservative justices, she hasn't said that government can never discriminate on the basis of race. She has said the government is "not disqualified" from acting to remedy discrimination -- but she has not spelled out exactly when she thinks it is necessary to act.

The Michigan cases could be rallying point for Democrats in the 2004 elections since blacks and Latinos are an indispensable constituency for Democratic candidates.

A Supreme Court ruling that strikes down the Michigan programs could mobilize black and Latino voters, as well as those white voters who see racial preference programs as necessary.

MSNBC.com's Tom Curry and The Associated Press and Reuters contributed to this report.

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