

South Dakota Newspapers, #10  
"We the People"  
November 2, 2022

"Affirmative Action in Universities: Has it a Future?"

David Adler

The controversial use by college admission committees of an applicant's race was the subject of a five-hour hearing before the U.S. Supreme Court this week in cases involving Harvard University and the University of North Carolina. The lengthy oral argument brought to a fever pitch the long-simmering question of the constitutionality of race-conscious programs—affirmative action policies—that were upheld in the Court's landmark ruling in 1978 in *Regents of University of California v. Bakke*.

The Supreme Court has repeatedly affirmed the use of race as a factor in the admissions practices of the nation's colleges and universities. But affirmative action programs have suffered declining public support in the four decades since the *Bakke* ruling was handed down. The Court, firmly controlled by six strong conservative Justices, seems poised to strike down the practice that, to many Americans, represents for historically disadvantaged minorities the most effective entryway to the nation's elite universities and the leadership opportunities that accrue to graduates of those schools.

Lost in the roiling waters of the debate on affirmative action has been understanding of what the Court actually ruled in *Bakke*.

The Court, in a 5-4 opinion written by Justice Lewis Powell, appointed to the High Bench by President

Richard Nixon, rejected the use of "quotas," but found constitutional under the 14<sup>th</sup> Amendment's Equal Protection Clause the use of an applicant's race as one of several factors that admission committees may consider.

Justice Powell rejected the concept of a "benign" racial classification. He wrote that the burden of providing remedies for past racial discrimination could not constitutionally be placed on the shoulders of individuals who had no part in that discrimination.

But the Court approved the use of race as one factor—"race plus 1"—in a university's admissions policy for the purpose of promoting diversity in its student body. Race, Justice Powell explained, is relevant to diversity, principally because societal discrimination has made race relevant to a student's views and experiences. It is permissible, Powell noted, that a student's race may be a decisive factor in a particular case. How important a student's race may be in the admissions process may depend on "some attention to numbers," that is, the number of minority students already admitted.

The Court, in 2003, in *Grutter v. Bollinger*, in an opinion authored by Justice Sandra Day O'Connor, appointed by President Ronald Reagan, embraced the Bakke ruling. Indeed, the Court applied the "strict scrutiny" doctrine and approved the approach employed by the University of Michigan's law school. Justice O'Connor wrote that diversity represented a "compelling governmental interest," one that sought to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts."

The educational benefits that flow from diversity, O'Connor emphasized, were indeed compelling. Several amicus curiae briefs, including those filed by

American corporations, stressed the invaluable importance to their employees of experiencing a racially diverse student body.

This required, the Court observed, particular attention to the inclusion of students from groups that have been historically discriminated against, such as African Americans, Hispanics and Native Americans, who, without this commitment, might not be represented in the student body in meaningful numbers.

The goal of the school was to enroll a "critical mass" of students from these underrepresented groups in order, as Justice O'Connor wrote, to "ensure their ability to make unique contributions to the character of the Law School."

The future of affirmative action admissions programs in the nation's universities is unclear. Advocates of affirmative action programs, first introduced at the federal level by President Lyndon Johnson in the mid-1960s, have emphasized that the programs are but "temporary," that is, lasting long enough to overcome the historic practice of racial discrimination.

For her part, Justice O'Connor, in the 2003 Grutter opinion, stated: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." Dissenters in that case—Justices Antonin Scalia and Clarence Thomas—along with Justices Ruth Bader Ginsburg and Stephen Breyer, who joined the majority, agreed that race conscious admission programs must have a "logical end point." Justice Ginsburg rightly pointed out that nobody can anticipate the future with any certainty. Thus, the 25-year goal could be only a "hope" and not "firmly forecast."

For those who hope for a race-neutral nation—one in which law and society truly are color blind—the question, always, is one of the means to the end. Thus, we ask: if affirmative action in college admission policies is still necessary to overcome the impact of historic practices of race discrimination in higher education, should Supreme Court Justices worry about deadlines, that is, whether achievement of that goal requires 25 or 35 or 45 years? If that, indeed, is the goal, shouldn't the answer be: as long as it takes?