Affirmative Action: An Idea Whose Time Has Passed?

The idea of providing a preference to minority groups as a way of remedying the effects of historical discriminatory practices has been implemented in various ways in this country for several decades. It has been common practice in the realm of higher education to admit black and other minority race students under a less demanding set of admission criteria than is used for white applicants or to hold a predetermined number of spots in an entering class for minority students in the name of promoting diversity in the student body. In recent years, however, these practices have come under increasing scrutiny, and several lawsuits have been filed challenging these practices, usually by white applicants who were denied admission at the university of their choice but who feel that they were equally or better qualified than minority admittees benefitting from special admission practices. A July 24, 2000, decision by a federal court in Georgia that strikes down the University of Georgia admissions policy represents the current judicial attitude toward affirmative action policies at public institutions.

Under Georgia's admissions policy, applicants with a specified minimum high school grade point average and standardized test score received automatic admission to the university. Those applicants who did not meet the requirements for automatic admission were re-ranked, using their initial score as a starting point and then adding "bonus points" for certain characteristics. One of these characteristics was being non-white. Applicants who obtained a certain score after the bonus points had been added were then admitted to the university. The purpose of this bonus point system based on race was to promote diversity in the university and to insure that all Georgia citizens have equal access to the university.

University officials offered several justifications for and educational benefits derived from a diverse student population. For example, it was argued that after graduation students will need to work cooperatively with people of different ethnic and cultural backgrounds, and this skill, according to university officials, cannot be acquired in a racially homogenous environment. Another university official testified that, based on his teaching experience, student heterogeneity, including racial diversity, contributes to learning inside the classroom.

These arguments did not impress the trial court judge. In the first place, the university officials did not offer any quantifiable evidence to support their testimony. The judge gave little weight to such "because I say so" statements. The court indicated that it would approve only specific and carefully defined uses of racial classifications, and implementation of the amorphous goal of "student diversity" did not meet that standard. For example, Georgia officials could not identify with particularity when or how the goal of diversity would be met. "To base racial preferences upon an amorphous, unquantifiable, and temporally unlimited goal is to engage in naked racial balancing," the court concluded, a practice that the U.S. Supreme court has condemned on many occasions.

In addition, the court noted that the university's diversity rationale relied on stereotypical beliefs regarding the contributions of members of particular races. It was improper for the university to assume that all black students will think and act differently from whites students and thus contribute to some diverse, overall educational experience. A state entity "may not allocate

benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think." The Constitution commands racial neutrality and the university's admissions policy did not promote the "ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race."

This decision clearly establishes that Georgia's admissions policies designed to promote racial diversity were not narrowly tailored to promote a compelling state interest as required by the Constitution. This issue is far from being settled, however. Georgia has appealed the trial court's order, although the university has suspended the use of race in its admissions decisions. Some appellate courts agree with the Georgia trial court, having concluded that student diversity can never be a compelling interest that will pass constitutional muster. *Hopwood v. Texas,* 78 F.3d 932 (5th Cir. 1996); *Lutheran Church-Missouri Synod v. Federal Communications Commission,* 141 F.3d 344 (D.C.Cir. 1998). Other courts have intimated that diversity in a student population may be a sufficiently compelling interest to justify race-conscious decisions if such a policy can be supported by detailed, particularized evidence. *Wessman v. Gittens,* 160 F.3d 790 (1st Cir. 1998). Other challenges to racial preference admissions policies are pending in Washington and Michigan.

Perhaps this issue will be decided on a national basis by the United States Supreme Court. The Court has been asked to review a decision of the Ninth Circuit Court of Appeals upholding a race-based admissions policy at an elementary school established and run by a university graduate school as a method of researching urban education. To date, the Court has not decided if it will accept that case for review. *Hunter v. Regents of the University of California,* 190 F.3d 1061 (9th Cir. 1999), *petition for cert. filed* (U.S. July 18, 2000)(No. 00-135).

In Alabama, this issue has taken a slightly different twist. As part of the order for relief in the long-running higher education desegregation suit, *Knight v. Alabama*, the trial court ordered that Alabama A&M University and Alabama State University establish scholarship programs available to white applicants only. These scholarship programs are designed to promote desegregation of these predominantly black institutions by encouraging white students to enroll. After the program had been in effect for several years and had demonstrated some success in attracting white students to A&M and ASU, a group of black students challenged the program at ASU on the grounds that it was based on an unconstitutional racial preference. This matter is still pending before the *Knight* court. One important distinction between the Alabama case and cases filed in other states is, of course, that the Alabama scholarship program is the result of a court decree and not a voluntary preferential admissions policy. It remains to be seen, however, if that distinction makes a difference in the mind of any appellate court that may review the Alabama case.

Do these cases mean that a university cannot take any steps to promote diversity in its student population? Clearly not. For example, several state systems of higher education, including Texas, Florida, and California, have adopted admissions policies that grant automatic admission to applicants who graduate within a specified percentage at the top of their high school class. These systems are premised on the expectation that this policy will increase the number of minority admissions. In addition, the Center for Individual Rights (CIR), a conservative

organization that is the moving force behind many of the suits challenging race-based admissions policies, suggests that diversity in a student population may be enhanced by considering factors other than race. For example, geographic origin, work experience, record of leadership, civic involvement, success in overcoming hardship, demonstrated maturity, scholarly interests, and musical or other talents are all factors that could increase diversity. Courts have suggested that other factors, such as an applicant's economic and social background and the educational background of that applicants' parents, may be appropriate factors for admissions officers to consider as well. To increase minority enrollment, the CIR has proposed the following actions in lieu of using outright racial preferences: broaden admission criteria, increase the weight given to grades, discontinue giving differential weight to high school grades based on the high school attended, increase the weight given to applicant essays, and increase the number of applicants given full-file review.

Some of these practices may have a high correlation to the race of the applicant. The courts have said, however, that such a correlation will not make the use of that factor unconstitutional if it is not adopted for the purpose of discriminating on the basis of race. Obviously, any effort to increase student diversity requires that an admissions policy chart a narrow course between constitutional and unconstitutional practices. For those institutions seeking to increase minority enrollments or create other types of diversity in the student population, such an effort is challenging indeed.