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SUPREME COURT TO DETERMINE THE FATE OF AFFIRMATIVE ACTION IN EDUCATION

By Esther Choi

On December 2, 2002, the Supreme Court agreed to review the University of Michigan undergraduate and law school cases, which will decide the fate of affirmative action. The decision will either affirm or reverse the Court's decision in the landmark affirmative action case, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). The Court in *Bakke*, found that diversity is a compelling state interest. The Court also determined that as long as race is used as one of many factors, such affirmative action programs are constitutional in order to create a diverse and dynamic environment.

Hundreds of groups and individuals filed amicus curie briefs both for and against affirmative action before the February 19, 2003 deadline.

Supporters of affirmative action argue that diversity is essential to an academic environment, promoting racial awareness. Students' exposure to different cultures and

racism dispels prejudices and stereotypes and promotes tolerance. Diversity also broadens the learning process by providing a plethora of perspectives. Advocates also argue that it is necessary to yield leaders that reflect and fairly represent the United States population. Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale & The Compelling Interest Test*, 33 Harv. C.R.-C.L. L. Rev. 381, 410-411 (1998). Virtually all 3500 institutions of higher

education agree that diversity is a compelling interest. John Friedl, *Making A Compelling Case For Diversity In College Admissions*, U. Pitt. L. Rev., Fall 1999, at 28 (quoting *On the Importance of Diversity in Higher Education*, Chron. Of Higher Educ., Feb. 13, 1998, at A48).

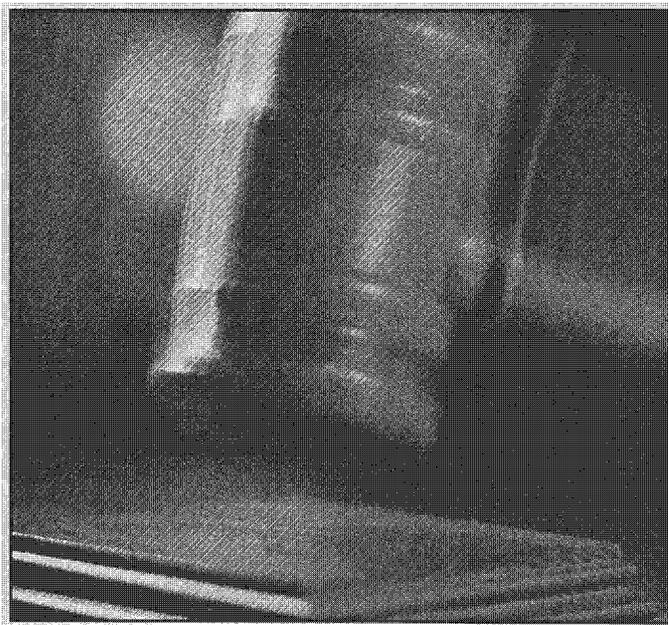
More than 300 organizations representing academia, major corporations, labor unions and nearly 30 of the nation's top former military and civilian defense officials filed briefs in support of affirmative action. Ethnic Majority, Groups Support University of Michigan Affirmative Action Case, at <http://www.ethnicmajority.com/>

[affirmative_action_news.htm](http://www.ethnicmajority.com/affirmative_action_news.htm).

Companies such as 3M, Coca-Cola, Nike, United Airlines, and General Mills filed supporting briefs as well. These companies argue that "it is necessary to ensure that members of all segments of our society receive the education and training they need to become the leaders of tomorrow." Sixty-

five companies with combined annual revenues of more than \$1 trillion stated the "future of American business is on the line." FindLaw, *Affirmative Action Filings Flood Court*, at http://news.findlaw.com/scripts/scripts/printer_friendly.pl?page=/ap_stories/a/w/1153/2-19-2003.

Many of the United States' best known retired military officers and former top Pentagon officials also filed a brief supporting affirmative



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action. Joe Reeder, a former Army undersecretary, stated that diversity is “absolutely essential to our fighting force...” FindLaw, *Ex-Officers Back Michigan Affirmative Action*, http://news.findlaw.com/scripts/print_friendly.pl?page=/ap_stories/other/1110/2-17-2003.

Professor Diane C. Geraghty, Constitutional Law Professor at Loyola University Chicago School of Law and Member of the American Civil Liberties Union’s National Board of Directors commented on the importance of diversity. “Diversity is critically important, especially in an educational setting. This is particularly true for the study of law. Law does not develop in a vacuum. It is the product of history, experience, functionality and values. The ability of students to understand and critique law and policy is enriched by the opportunity to learn

What’s At Stake, at <http://stacks.msnbc.com/news/861401.asp>.

President George W. Bush told reporters that he “strongly supports diversity of all kinds, including racial diversity, but the method used by the University of Michigan was... fundamentally flawed.” CNN, *Bush criticizes university ‘quota system,’* at <http://www.cnn.com/2003/ALLPOLITICS/01/15/bush.affirmativeaction>. He stated however that, “We must be vigilant in responding to prejudice wherever we find it... As we work to address the wrongs of racial prejudice, we must not use means that create another wrong, and thus perpetuate our divisions.” FindLaw, *Bush Opposes College on Race in Supreme Court Case*, at http://news.findlaw.com/scripts/print_friendly.pl?page=/politics/s/20030116. The Bush Administration wants the Court to rule in favor of “race neutral factors,” such as socio-economic status.

The Bush Administration wants the Court to rule in favor of “race neutral factors,” such as socio-economic status.

The Center for Individual Rights and over 100 organizations are also opponents of affirmative action. The organization believes that “preferences are almost always unconstitutional when used to achieve an arbitrary racial diversity; they are only legal when narrowly tailored to remedy past discrimination against identifiable individuals.” Center for Individual Rights, *A commitment to protecting civil rights*, at http://www.cir-usa.org/civil_rights_theme.html.

from others who bring a different set of experiences and perspectives to the issue. Equality of opportunity, of course, is important in other settings, such as employment. But in the education setting, the learning process itself depends on the creation of the fuller context that diversity allows.”

There are three major arguments against affirmative action. First, critics of affirmative action argue that programs that give preference to race unconstitutionally discriminate against white applicants, creating a “reverse discrimination.” Second, opponents argue that it actually hurts some minority students, specifically those that have to compete in schools they are not prepared for. Third, critics argue that it perpetuates a stereotype and suspicion that the minority students are unqualified, and are only admitted because of their race. Newsweek,

Ward Connerly, an African-American chairman of the American Civil Rights Institute, comments that “people are entitled to equal treatment under the United States Constitution, and affirmative action does not supercede that.” He further stated that, “it is important for admissions officers to judge people as individuals, not by the proportion of students of a particular race at a university.” The Digital Collegian, *Connerly speaks against affirmative action*, at <http://www.collegian.psu.edu/archive/2003/02/02-14-03tdc/02-14-03dnews-12.asp>.

On December 13, 2000, the Sixth Circuit found the University of Michigan’s Undergraduate admissions affirmative action

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program constitutional. On May 14, 2002, the Sixth Circuit also found the University of Michigan Law School admissions program's use of race constitutional. Since *Bakke*, the Supreme Court has not granted petitions to review cases on affirmative action in education.

The Supreme Court cases following *Bakke*, support the principle that using racial classifications are contrary to rights protected under the Equal Protection Clause of the Fourteenth Amendment.

In May 1986, minority teachers were given preference when they were protected against layoffs because the school felt there was a compelling need to have minority role models. The Supreme Court held the school's policy of extending preferential protection based on race violated the Fourteenth Amendment. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). In 1989, the city of Richmond required prime contractors to subcontract 30 percent of their contracts to "Minority Business Enterprises," particularly to African Americans, Asian Americans and Latinos. The city felt these groups were underrepresented, and wanted the city's contracting scheme to reflect that of the minority population of Richmond. The Court found that the city failed to demonstrate a compelling governmental interest of remedying past wrongs done specifically by the city. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

More recently, in 1996, a Texas census revealed a population increase allowing three more congressional seats in the House of Representatives. Texas set up two African American districts and one Latino, so the people in these districts would elect minority representatives. The Court found the state's program that tracked race was evidence that race was the predominant factor that motivated the legislature to redistrict, and thus the redistricting program was unconstitutional. The Court found that based on race, the state denied the rights of other citizens the opportunity to participate in the political process. *Bush v. Vera*, 517 U.S. 952 (1996).

If the Supreme Court did not allow enhancing diverse representation in the state election process, it is unclear whether the Court will continue to consider diversity in an educational institution a compelling interest. The Supreme Court essentially has three options. The Court can affirm the *Bakke* decision, bar any use of race in admissions programs, or narrowly tailor their opinion to affect only the University of Michigan's admissions system. Newsweek,

"If the Court's majority strikes down the Michigan affirmative action programs, it will send a terrible signal to students of color that the highest court in the land fails to recognize their historical exclusion from institutions of high education and the contributions they make to the educational process."

***– Professor Diane C. Geraghty,
Constitutional Law Professor,
Loyola University Chicago
School of Law and Member of
the American Civil Liberties
Union's National Board of
Directors***

What's At Stake, at <http://stacks.msnbc.com/news/861401.asp>.

Professor Geraghty commented on whether the Supreme Court will find affirmative action unconstitutional and the implications. "The future of affirmative action in higher education as we know it probably rests in the hands of Justice O'Connor. Although she has voted to strike down affirmative action programs in such areas

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FEATURE: Family Cap Welfare Provision

NEW JERSEY SUPREME COURT TO CONSIDER CONTROVERSIAL FAMILY CAP WELFARE PROVISION

By Jessica Hunter

The New Jersey Supreme Court is the first high state court in the nation to consider whether the family cap public assistance provision, known by opponents as the “Child Exclusion” law, violates state constitutional protections. The class action plaintiffs of *Sojourner A. v. New Jersey Dep’t. of Human Servs.*, along with the American Civil Liberties Union (ACLU) and National Organization of Women (NOW) Legal Defense and Education Fund and the private law firm of Gibbons Del Deo Dolan Griffinger & Vecchione, allege that the family cap provision denies public assistance recipients their fundamental right to reproductive autonomy and violates the equal protection clause by denying benefits to a class of children solely because of the timing of their birth. 803 A.2d 1165 (2002).

The family cap provision in New Jersey’s state welfare law denies the increase in additional cash benefits available to public assistance recipients for any children they bear while on state assistance. Its application has prompted unique coalitions among interest groups who do not traditionally work together, yet collectively protest that the family cap is unconstitutional and a seriously misguided public welfare policy. Moreover, while the controversy over the family cap provision draws those concerned with public policy, race and poverty, it is also uniquely a women’s issue due to the fact that women represent 90 percent of the custodial parents on welfare. *American Civil Liberties Union*, available at <http://www.aclu.org/reproductive/rights>.

The 60-year-old federal entitlement

program, known as Aid to Families with Dependent Children (AFDC) established under Title IV-A of the Social Security Act, 42 U.S.C.A. §§ 601-603 (1935), was replaced during the Clinton Administration with Temporary Assistance for Needy Families (TANF). Unlike the AFDC, which guaranteed income support to all individuals meeting nationally defined criteria, TANF as Title I of the Personal Responsibility and Work Reconciliation Act of 1996 (PRA) created fixed lump-sum payments to states, known as block grants. 42 U.S.C.A. § 601-

To date, 23 states have implemented some form of the family cap provision as part of their public assistance program.

608. These grants are meant to be administered, in the state’s broad discretion, to state public assistance programs. The welfare reform from AFDC to PRA was catalyzed by political pressure, which advocated that public assistance should no longer be viewed as an entitlement program, but rather, that it should stress personal responsibility and encourage individual employment.

The family cap provision, one of the many tools implemented to meet these reformative goals, is not a new creation under TANF. States could apply and did receive waivers from the federal requirement. However, after the passage of TANF in 1996, states are free to enact family caps at their own discretion, without federal

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approval. To date, 23 states have implemented some form of the family cap provision as part of their public assistance program.

Generally, the family cap provides that no additional cash benefits are to be paid to a recipient household for children born while on public assistance. While women may receive in-kind benefits, such as vouchers for diapers, food stamps and additional Medicaid, they forfeit additional cash of about \$50 to \$60 a month, on average, if they have another child while on public assistance.

State lawmakers propose that TANF, and the family cap specifically, are meant to break the cycle of poverty by encouraging employment, individual responsibility and family stability. The broad purpose of the PRA is clear from its title;

...critics deride the common belief that women on public assistance have more children to get benefits and argue that a logical extension of such a theory would lead to the equally preposterous notion that middle-class women have children in order to attain federal tax deductions.

it is meant to serve these goals by promoting heterosexual marriage, ending non-marital childbearing and obliging single mothers receiving public assistance to work outside the home in the paid labor market.

State lawmakers contend that the family cap stresses the financial responsibility of giving birth and directs the recipient's focus on job and career training. They cite studies that have concluded that the family cap discourages out-

of-wedlock births, provides incentives to get off public assistance, causes postponement or avoidance of pregnancy and increases the likelihood of family planning and contraception. In support of the family cap, lawmakers cite an overall decline in birth rates of recipient mothers as proof that the family cap is meeting its goals. See Rutgers University Study, *A Report On the Impact of New Jersey's Family Development Program: Results from A Pre-Post Analysis of AFDC Case Heads from 1990-1996*. (reporting 14,057 fewer births to welfare mothers since the implementation of the family cap).

Critics of the family cap provision assert that it is premised on the faulty assumption that women in poverty irresponsibly reproduce and are motivated primarily by economic incentives. They accuse lawmakers of operating under the assumption that mothers receiving public assistance get pregnant in order to fatten their monthly welfare check. Among its critics, the family cap is viewed as a punitive rod rather than a carrot. The core of their complaint is that the purposes and justification for the family cap are wrapped up in stereotypical, mythical and false understandings of the welfare mothers.

Critics charge that one stereotype driving the legislative push for the family cap is the belief that mothers receiving public assistance have more children than mothers in the general population. However, they point to statistics that show that families receiving public assistance are no larger than those in the general population to prove that the legislative fear of public assistance recipients' "over-procreation" is unfounded. American Civil Liberties Union, available at <http://www.aclu.org/reproductiverights>. Some critics also assert that the aim of the family cap is more sinister than what states profess; they allege that the family cap is an attempt to keep the poor class' reproduction at an unnatural low. Moreover, critics deride the common belief that women on public assistance have more children

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