Few contemporary legal disputes have the same polarizing effect as does affirmative action in higher education. The debate is particularly acute in law schools, as administrators, educators and students turn the focus of their legal training toward themselves and their institutions. Can law schools legally consider race as a factor in admissions policies? It is a question of such importance that one might safely assume that it would have been settled long ago. Instead, two circuit courts of appeal have created such a rift in the law that the U.S. Supreme Court will decide the issue in the near future.

The Path Began With Bakke

The Supreme Court’s task will be to explain whether its fractured decision in Regents of the University of California v. Bakke recognized diversity of student populations in higher education as a compelling state interest.

Bakke, decided in 1978, involved a challenge to the admissions policies at the University of California at Davis medical school. The medical school had a “special admissions program” by which it set aside a predetermined number of seats in its entering classes for minority applicants. Allan Bakke claimed that he would have been accepted at the medical school had he been permitted to compete for the seats that had been set aside. He claimed discrimination in violation of the equal protection clause and the 1964 Civil Rights Act.

The Supreme Court ultimately ordered Bakke admitted to the medical school. In doing so, the Court produced five separate opinions. Justice Powell wrote for himself, yet his opinion announced the decision of the Court. He wrote that racial preferences in admissions are, by definition, racial classifications that must be narrowly tailored to support a compelling state interest. However, Justice Powell also believed that a college or professional school could consider an applicant’s race as a “plus” factor among the many other factors used in evaluating whom to admit into a program. In Justice Powell’s opinion, “The attainment of a diverse student body” was “clearly … a constitutionally permissible goal for an institution of higher learning.”

Because Davis Medical School’s admissions program permitted race to be decisive with respect to the seats that were set aside for minorities, Justice Powell held that the school’s program was unconstitutional and also violated the 1964 Civil Rights Act. He described what a constitutionally permissible affirmative action program might look like, however: “In such an admissions program, race or ethnic background may be deemed a ‘plus’ in a particular applicant’s file, yet it does not insulate the individual from comparison with all other candidates for the available seats.”

Justice Powell’s description of a constitutional affirmative action program became the guidebook for many academic affirmative action policies. That is why the Fifth Circuit Court of Appeals’ 1996 interpretation of Bakke, in Hopwood v. Texas, sent shockwaves that resounded far beyond the confines of the University of Texas College of Law.

The Circuits Speak

The Fifth Circuit held that the only constitutionally permissible rationale for considering race as a factor in the admissions process is elimination of the lingering effects of prior intentional racial discrimination at the law school. The judges gave no precedential weight to Justice Powell’s holding in Bakke that diversity of the student body was a compelling state interest permitting consideration of race as a plus factor in admissions. The court rejected the diversity rationale as a compelling state interest: “The use of ethnic diversity simply to achieve racial heterogeneity, even as part
of the consideration of a number of factors, is unconstitutional.”13

The Ninth Circuit Court of Appeals is the only other federal circuit to answer the Hopwood panel. In Smith v. University of Washington,14 the court emphatically disagreed with its colleagues to the east, holding, “The Fourteenth Amendment permits university admissions programs which consider race for other than remedial purposes, and educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures.”15 The Ninth Circuit, unlike the Fifth, looked upon Justice Powell’s opinion in Bakke as precedent.16

The defeated parties in Smith and Hopwood each petitioned the U.S. Supreme Court to hear their cases, but in each case the Court declined to accept certiorari. There is no shortage of cases from which the Supreme Court might accept review, however.17 For example, in cases involving the admissions policies at the University of Michigan, two separate decisions from the Eastern District of Michigan have resulted in inconsistent pronouncements: One district court judge has validated diversity as a compelling state interest, and the other has repudiated it.18 The University of Michigan has been exceptionally proactive in defense of its affirmative action program.19 Not content to merely recite Justice Powell’s opinion as constituting the law of the land, it has sought to prove, by reference to the social sciences, that diversity does indeed serve a compelling educational purpose.20

Local Schools Concerned

Dean Patricia D. White, of the Arizona State University College of Law, knows the price that the University of Michigan is paying to defend its affirmative action program. She was formerly on the faculty at the University of Michigan and currently serves on the Michigan law school’s Board of Visitors. The toll on the administration, faculty and student body is not one that White would relish accepting for her law school. “No school wants to have to divert its attention from its educational mission to defend a lawsuit,” she says.

Dean Toni M. Massaro from the University of Arizona’s James E. Rogers College of Law compares the fitful evolution of affirmative action caselaw to that involving the tension between the Constitution’s establishment clause and the prohibition against governmental endorsement of viewpoints in speech. In both areas, lower courts and public institutions have struggled with Supreme Court pronouncements that have made it difficult to act with constitutional certainty. Massaro believes it is “just a matter of time” before the Court steps in to resolve what she calls a “chasm” opened by the opposite results reached in the Hopwood
and Smith cases.

Neither Arizona law school is likely in danger of running afoul of even the most restrictive affirmative action ruling the Supreme Court might deliver. The programs that have been subject to the most successful attack are those that give quantifiable preferences to members of specified minority groups or that use separate evaluation procedures for minority students.21 Neither Arizona law school has such programs. Instead, each uses what the University of Arizona’s Assistant Dean of Admissions Terry Sue Holpert describes as a multifaceted, “whole-student” approach to candidate evaluation. At both law schools, dozens of evaluative criteria are considered. According to White at ASU, “We read the files in their entirety, and many, many factors are considered.”

Affirmative Action Under Fire

Opponents of affirmative action have not relied only on the courts to establish their case. By referenda, constitutional amendment and executive order, respectively, Washington, California and Florida have prohibited governmental entities from granting preferences based on race.22 Thomas C. Horne, a former member of Arizona’s House of Representatives, sponsored legislation and a constitutional amendment in 1997 that would have prevented the state or its political subdivisions from granting “preferential treatment to an individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting.”23 Horne, who maintained his private construction law practice in Phoenix while representing the Paradise Valley area at the state capital, is critical of affirmative action. To him, qualifications for admission to a college or professional program include “intelligence, knowledge, experience, character and aesthetic sensibility.” He is opposed to admissions criteria that permit race even as a plus factor among many other criteria.

The legislation Horne sponsored had sufficient votes to pass the House but would have stalled in the Senate, so he let the bills die. Horne, who also has been a member of the Paradise Valley School District’s board for 23 years, is considering a run for State Schools Superintendent. He is aware that opposition to race and gender preferences bears political consequences but recalls his presence at the August 28, 1963, March on Washington, where Dr. Martin Luther King, Jr., delivered the historic “I Have a Dream” speech, including the words, “I have a dream that my four children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.” Horne believes “It is patronizing to tell people they cannot achieve as individu-
als” and adds that preferences in educational admissions often are based on “racist assumptions.”

Dean Massaro’s experience as an educator and law school administrator has shown her the benefits to students—and faculty—of having a wide range of backgrounds represented in the law school setting. To Massaro, the debate about affirmative action is a subset of the debate about “what kind of pluralism matters.” To her, diversity in the law school setting requires recognition of many individual characteristics of applicants, which can include whether they have had careers outside the law, whether they have multiple degrees or advanced degrees, their geographical region, standardized scores, grade point averages and many other factors. “We just continue to look for the best people possible and a class that reflects a wide range of strengths and experience,” she says.

**Effects in Arizona**

What would be the consequences for Arizona’s law schools if the Court were to reject diversity as a compelling interest in higher education? On the one hand, both deans think that their schools would be able to maintain a diverse student population. Both law schools consistently seat classes with a quarter of students who are African American, Hispanic, Native American, Asian or Pacific Islander. One third of last year’s first-year class at ASU was comprised of minority students. Because the law school’s admissions procedures emphasize multiple factors, eliminating consideration of ethnic or racial diversity as a plus factor in admissions may not create a significantly different demographic at the law schools, according to both deans.

It is not impossible, however, to conceive of a rule of law that prohibits consideration of race entirely in the admissions process. White is doubtful that such a rule would be workable, given that law schools consider so many personal characteristics
that are often indicators of race and ethnicity: fluency in foreign languages, family history, economic status and geographical location, community and public service, for example.

Dean Massaro does not think even ardent opponents of affirmative action would want to return to a law school classroom “where everyone looks the same” and believes that diversity of student backgrounds and experiences will always be an important, noncontroversial value in public education. “Education is different,” she says. “Education prepares students for all that lies beyond, and thus should be as broad-gauged and enriching as possible.”

Whether the U.S. Supreme Court agrees that “education is different” is a question that will almost certainly be decided soon.

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endnotes
2. Id. at 274-275.
3. Id. at 276-278.
4. Id. at 320. Bakke graduated from the Davis Medical School and practiced medicine in Rochester, MN. Peter Irons & Stephanie Guttman, May It Please the Court: Transcripts of 23 Live Recordings of Landmark Cases as Argued Before the Supreme Court 313-314 (1993).
5. The first opinion, by Justice Lewis F. Powell, Jr., was credited as having “announced the Judgment of the Court.” Bakke, 438 U.S. at 269. Justice William J. Brennan, Jr., wrote a concurring opinion in which he joined that part of Justice Powell’s opinion that reversed the California Supreme Court’s holding that the medical school could not consider race as a criteria for admissions for any purpose. Id. at 324-379. Justices Byron R. White, Thurgood Marshall and Harry A. Blackmun joined Justice Brennan’s concurrence. Id. at 372, n. 5. Justice John Paul Stevens wrote a separate opinion joined by Chief Justice Warren F. Burger, Potter Stewart and William H. Rehnquist, holding that the Davis medical school’s admissions policies violated the 1964 Civil Rights Act. Id. at 408-422. Justices White and Marshall also wrote opinions separate from Justice Brennan’s concurrence. Id. at 379-387, 387-408.
6. Writing that “the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color,” id. at 289-290, Justice Powell concluded that “when a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect.” Id. at 305.
7. Id. at 317.
8. Id. at 311-312.
9. Id. at 320.
10. Id. at 317.
12. See id. at 944 (“Justice Powell’s view in Belair is not binding precedent on this issue”).
13. Id. at 948.
15. Id. at 1200-1201.
16. Id. at 1200.
17. The University of Georgia’s admissions policy was declared to violate Title VI of the 1964 Civil Rights Act in Johnson v. Board of Regents of the University System of Georgia, 106 F. Supp. 1362, 1375 (S.D. Ga. 2000). District Court Judge B. Avant Ednenfield wrote that Justice Powell’s opinion in Bakke did not speak for the full Supreme Court and noted further that Justice Powell’s discussion of the diversity rationale was “mere dicta.” Id. at 1368-1369. The decision is on appeal before the Eleventh Circuit.
18. Cf. Gratz v. Bollinger, 122 F. Supp. 2d 811, 824 (E.D. Mich. 2000) (“This Court is persuaded, based on the record before it, that a racially and ethnically diverse student body produces significant educational benefits such that diversity, in the context of higher education, constitutes a compelling governmental interest under strict scrutiny.”) with Grutter v. Bollinger, 137 F. Supp. 2d 821, 849 (E.D. Mich. 2001) (“The Court concludes that the Supreme Court in Bakke did not recognize the achievement of racial diversity in university admissions as a compelling state interest. The court further concludes that under the Supreme Court’s post-Bakke decisions, the achievement of such diversity is not a compelling state interest because it is not a remedy for past discrimination.”).
19. See Nicholas Lemann, The Empathy Defense, The New Yorker, Dec. 18, 2000, at 46 (outlining the University of Michigan’s efforts to prove the benefits of diversity in higher education).
20. See, e.g., Gratz v. Bollinger, 122 F. Supp. 822-824 (setting forth the evidence presented by the University in support of the educational benefits of diversity, which evidence convinced the court in Gratz that diversity in higher education does serve a compelling governmental interest).
21. The University of Texas, for example, maintained an admissions system that differed from the Arizona law schools’ admissions policies in several important respects: (1) The numerical thresholds for presumptive admissions at Texas law school were lower for African American and Mexican American (not all persons of Latin American ancestry) applicants than they were for other applicants. Hopwood, 78 F.3d at 936. (2) The law school lowered the presumptive denial threshold for African American and Mexican American applicants. Id. (3) For the large number of applications that were neither presumptive admissions nor presumptive denials, the Texas law school empaneled a separate admissions subcommittee to review only applications from African American and Mexican American applicants. Id. at 937. (4) The Texas law school had established an “aspiration” to enroll classes that consisted of 10 percent students of Mexican American heritage and 5 percent of students who were African American. Id. Neither Arizona law school appears to have admissions policies with these four characteristics.
22. See Wash. Rev. Code § 49.60.400(1) (“The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public contracting.”). California amended its constitution to provide: “The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” Cal. Const. art. I § 31(a). Florida ended affirmative action by the executive order of Governor Jeb Bush, who replaced preferences in higher education in favor of his “One Florida” initiative. See Announcement of the One Florida Initiative, Nov. 9, 1999, available at www.myflorida.com/myflorida/government/learn/oneflorida/ (visited July 5, 2001).