AFFIRMATIVE ACTION UNDER STRICT SCRUTINY: ADMISSIONS AND FINANCIAL AID

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The national debate over affirmative action and several recent federal court cases have caused Universities across the country to reexamine their voluntary affirmative action programs. At least one University System, the University of California System, a leading advocate of affirmative action in higher education for over two decades, has moved to eliminate race as a factor in hiring, contracting and admissions. The action of the University of California Board of Regents followed the Governor of California's recent executive order dismantling portions of the state's affirmative action programs. While Congress has not voted to eliminate all race-based federal contract programs, and courts have not found race preferences in programs designed to remedy the effects of past discrimination or foster diversity per se unlawful, recent decisions regarding University admission procedures and minority restricted scholarship programs suggest that the use of racial preferences will continue to be an issue for colleges and universities around the country.

Since the 1978 decision of the United States Supreme Court in Bakke v Regents of the University of California, 438 U.S. 265 (1978), universities have justified their affirmative action programs on two grounds: achieving a diverse student body and eliminating the present effects of past discrimination. While the Supreme Court invalidated the special admissions program at the University of California Medical School at Davis that provided a specific quota of 16 places out of 100 for disadvantaged members of certain minority races, the 5-4 plurality decision recognized that race might be used for compelling governmental purposes. The opinion of Justice Powell, concurred in
by four other justices, found that there were circumstances under which a properly constructed race-conscious program could be valid. While the Court did not speak with one voice (the decision produced six separate opinions), a fundamental point present in each opinion was that racial and ethnic bases for distinctions among persons are viewed differently from other classifications. In other words, race is a suspect classification. The opinions differed on the level of scrutiny to be applied but the plurality opinion established that when race is to be used, judicial scrutiny must be more searching than when other less sensitive factors are employed. Judicial review under the equal protection clause must examine the objectives for any race-based distinction and the means chosen to attain those objectives.

Throughout the years following the Bakke decision, the United States Supreme court has debated the proper level of scrutiny for racial and ethnic preferences in a variety of contexts. No Supreme Court decision has produced a unanimous opinion on the standards that apply or the specific application of any standard to a given set of circumstances. Thus, the principles governing the constitutionality of race-based preferences must be gleaned from several plurality decisions issued during the last two decades, including the most recent 5-4 decision in Adarand v Pena, ___U.S.____ (1995). While Adarand clarifies certain legal principles regarding race-based preferences in governmental contracting programs, it leaves open other questions, including the application of such principles in the educational setting. The Court's decision this year to deny review of Podberesky v Kirwin, 38 F.3d 147 (4th Cir. 1994), also reserves many questions concerning the application of equal protection analysis to voluntary affirmative action programs in the educational context.

Currently, race-based affirmative action programs employed by state Universities are judged by a standard of strict scrutiny. Podberesky v Kirwin, supra; Hopwood v State of Texas, 861 F.
Supp. 551 (W.D. Tex. 1994). This standard requires proof that the program serves a compelling governmental interest and that it is narrowly tailored to serve such an interest. The manner in which this standard is applied, however, is still in debate as illustrated by the following two cases.

**Podberesky v. Kirwin**

This case involved the constitutionality of a race-restricted merit-based scholarship program established by the University of Maryland at College Park (UMCP or the University of Maryland). The lawsuit was filed in 1990 by Daniel Podberesky, a Hispanic student who had applied for and been denied a scholarship that was available only to African-Americans. Podberesky claimed that the University's program discriminated against him in violation of federal law and the United States Constitution.

The University of Maryland defended the case arguing that the Banneker Scholarship Program served a compelling state interest and was narrowly tailored to serve that interest. The University asserted two compelling state interests: 1) remedying the lingering effects of past discrimination at the University and, 2) fostering diversity in its student body. With regard to remedying the present effects of past discrimination, the University pointed to the state's long history of *de jure* segregation and repeated findings from 1969 through 1985 by the Office of Civil Rights that Maryland had not eliminated all present effects of its formerly segregated system of higher education. The trial court took a very deferential view toward the University's position. It found that the University had

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The case has an interesting procedural history. It produced four separate opinions, two from the United States District Court and two from the United States Court of Appeals for the Fourth Circuit. In May of this year the United States Supreme Court denied a petition for certiorari supported by amicus briefs from approximately 25 institutions of higher education including the University of Texas and The Texas A&M University System. The difference in approach between the trial court and the Court of Appeals illustrates the current lack of legal agreement in terms of the application of a strict scrutiny standard to voluntary race-based affirmative action programs in the educational setting.
produced overwhelming evidence of past discrimination and that it was premature to find no present effects of such past discrimination since the OCR had not yet found the University's in compliance with its obligations under federal law. The Court did not address the University's diversity rationale.

The case was appealed to the United States Court of Appeals for the Fourth Circuit. While the appellate court agreed there was sufficient evidence of past discrimination, it disagreed with the district court's conclusions that the OCR's findings of discrimination were sufficient to show current effects of past discrimination. In the appellate court's view, OCR's findings were in the too distant past. The case went back to the District Court for further determination of whether there was sufficient evidence to support the continued existence of effects of past discrimination.

On remand, the District Court allowed the University time to develop administrative findings that effects of past discrimination continued to exist at the University. A Presidential Review Committee held public hearings and recommended that the program be continued because it served to eliminate the present effects of past discrimination and facilitate the diversity goals of the University. The evidence amassed by the Committee was presented to the District Court which again upheld the University's program. The Court found that the University had presented a strong evidentiary basis to conclude that four present effects of past discrimination existed at the University: 1) the University's poor reputation in the African-American community; 2) under-representation of African-Americans in the student body; 3) disproportionately low retention and graduation rates of African-American students; and 4) the existence of a hostile climate at the University. The Court also decided that the University's program was narrowly tailored, considering the necessity for relief and the efficacy of alternative race neutral remedies, the flexibility and duration of the relief, the relationship of numerical goals to the relevant reference pool, and the impact of the program on the
rights of third parties.

The case was once again appealed to the Fourth Circuit which found that the District Court erred in holding that the University had presented sufficient evidence of present effects of past discrimination and that its program was narrowly tailored to remedy those effects. The court stated that the proponent of any race-exclusive remedial program "must, at a minimum, prove that the effect it proffers is caused by its past discrimination and that the present effects rationale is supported by substantial evidence." (Emphasis added.) No deference was given to the University's findings. The Court looked closely at all four current effects of past discrimination proffered by the University and rejected each. Poor reputation in the African-American community and a campus climate perceived as racially hostile to African-Americans were held to be insufficient justification for the University's racially exclusive program as a matter of law. Furthermore, the evidence did not show that these conditions were caused by the University's own past discrimination. While acknowledging that racial conflicts exist in the United States and on college campuses, the Court found such facts to be the result of general societal discrimination which is a legally insufficient basis for a race-based remedial program.

Under-representation and low retention and graduation rates among African-American students also were not proven to be the effects of past discrimination. The Court took issue with the District Court's failure to select the proper pool from which the under-representation statistics were drawn, i.e. high school graduates eligible for admission, and noted that factors unrelated to past discrimination could explain some statistical disparities. Additionally, the Court held that the Banneker program was not narrowly tailored to achieve its asserted goal of remedying the current effects of past discrimination. Among other criticisms, the court faulted the University for operating
a program which aimed at high achieving African-Americans because such a group was not the group against which the University had discriminated in the past. For the same reason, the Court also criticized the program as it benefitted non-residents of Maryland. Based on what it found to be non-probative statistical evidence, the Court held that the University's program resembled "outright racial balancing" (similar to a set-aside or quota) rather than a narrowly tailored remedy. The Court also criticized the University's failure to consider the efficacy of other alternative solutions.

The standards set by the Fourth Circuit Court of Appeals are extremely high and many commentators have opined that it will be extremely difficult to sustain race-based scholarship programs based upon remedying the current effects of past discrimination. It should be noted, however, that the Podberesky decision is based upon the particular facts presented by the University of Maryland and the decision also did not address the additional objective of fostering diversity. Whether other courts will adopt the Fourth Circuit's view in applying strict scrutiny to race-based remedial programs or to programs designed to foster diversity remains to be seen.

**Hopwood v State of Texas**

This case involves the validity of race based preferences in admissions. The lawsuit was filed against the State of Texas in 1992 by four white applicants who claimed they were unlawfully discriminated against when they were denied admission to the University of Texas Law School. The decision of the United States District Court for the western district of Texas was issued prior to the Fourth Circuit's final decision in Podberesky and takes a more deferential view toward the use of racial preferences to remedy past discrimination. The District Court essentially upheld the University's affirmative action policy but found a constitutional defect in one of its admissions procedures. The case has been appealed and involves many of the same issues litigated in
Podberesky. Thus, it provides an opportunity for the Fifth Circuit Court of Appeals to give more guidance to Texas institutions on the standards to be applied when race based preferences are used both for remedying past discrimination and for attaining diversity in the University community.

The affirmative action program at the University of Texas in 1992 used different cut off scores for black and Mexican-American students than for non-minorities, and a separate committee to evaluate minority and non-minority applicants. The admission process sorted applicant files by use of the Texas Index, a composite score calculated from the applicant's SAT score and their undergraduate GPA. Based on the Texas Index, applicants fell into three categories: a presumptive admit, a presumptive denial, and a discretionary zone. The presumptive admit and presumptive denial scores varied between non-minorities and minorities. In the spring of 1992, the presumptive admit scores for resident non-minorities were 199/87 while the scores for Mexican-American and black applicants were 189/78. The presumptive denial scores for non-minorities was 192/80 and for blacks and Mexican-Americans 179/69. After decisions were made to admit or deny based upon the relevant Texas Index, all other applicants were considered in the discretionary zone. Based upon the different cut off scores for minorities and non-minorities the discretionary zone contained black and Mexican-American applicants with lower scores than non-minorities. Additionally, the process employed a separate minority subcommittee to review minority files in the discretionary zone and make recommendations to the full admission committee about which minority applicants would be admitted. In the discretionary zone, factors other than the Texas Index were considered, such as letters of recommendation or a personal statement of the applicant. The applicant's entire file was considered in making the decision. In its overall process, the law school attempted to meet the targeted goals set by the OCR and the Texas Plan of ten percent Mexican-American students and five percent black
students in the entering class.

The plaintiffs took issue with the use of any race-based preference in admissions and invited the court to declare all race-based affirmative action unconstitutional. The Court declined to do so because of the substantial body United States Supreme Court precedent affirming the use of racial preferences for legitimate purposes. Instead the court looked to the legal standards set by prior decisions and examined whether the procedure employed by the law school in 1992 could pass constitutional muster. The court applied a strict scrutiny standard, rejecting the argument of the law school that an intermediate level of scrutiny was appropriate.\(^2\) Among a number of objectives proffered by the law school, the court found only two would pass muster under the Equal Protection Clause: seeking the educational benefits that flow from having a diverse student body, and addressing the present effects of past discrimination.

The diversity goal received little analysis as the court accepted diversity as a legitimate compelling state interest based on the long standing Bakke decision. While the plaintiff argued that recent court decisions in other contexts have cast doubt on the continued viability of diversity as a compelling state interest, the Court was not prepared to overrule Bakke based on cases outside the educational context.\(^3\) The Court accepted the testimony of the law school that it derived substantial

\(^2\) The law school relied upon the Supreme Court decision in Metro Broadcasting v. FCC, 497 U.S. 547 (1990) which held that affirmative action plans adopted pursuant to federal mandates are subject to intermediate scrutiny, i.e. whether the plan serves an important governmental objective and whether it is substantially related to the achievement of the objective. Metro Broadcasting was overruled recently by Adarand v. Pena, supra.

\(^3\) Justice Stevens' dissenting opinion in Adarand v. Pena, supra, notes that prior to Metro Broadcasting, the government's interest in diversity had been mentioned in a number of Supreme Court opinions but the current Court had not yet decided whether such an interest was of sufficient magnitude to justify a racial classification. While the Court in Adarand overruled Metro Broadcasting which had sustained the government's interest in broadcast diversity under an intermediate scrutiny test, the decision from Justice Stevens' viewpoint did not undermine the proposition that fostering diversity may provide a sufficient interest to justify a race-based program. Metro Broadcasting was overruled on the grounds that its holding was inconsistent with the finding in Adarand that "strict scrutiny applies to benign racial classifications promulgated by the Federal Government."
educational benefit from the presence of a diverse student body and without affirmative action it would not have been able to achieve this goal. Regarding the use of remedial race-based preferences, the court found a compelling state interest in remedying the current effects of past discrimination. While the plaintiffs argued that the past discrimination serving to support the present effects of past discrimination occurred so long ago that it had no present effects, the court did not agree. It found sufficient evidence of three current effects: the law school's lingering reputation in the minority community, under representation of minorities in the student body, and some perception that the law school is a hostile environment for minorities—the same three effects rejected by the Fourth Circuit Court of Appeals in Podberesky.

As to the low enrollment of minorities in the law school, the court found because of the history of past discrimination in the State of Texas educational system, a generation of blacks and Mexican-Americans who are the parents of students of law school age were deprived of meaningful opportunities for higher education. This denial was seen as a causal connection to the diminished attainment of present generation students. Also contributing to the disproportionately smaller pool of minority applicants was the substantial degree of racial and ethnic segregation in primary and secondary schools during the time most law school applicants were in attendance. In the court's view such evidence was sufficient to establish present effects of past discrimination. The court did not entertain the same analysis as did the Fourth Circuit Court of Appeals in Podberesky, i.e. requiring the University to eliminate those factors unrelated to past discrimination that might affect the statistics relied upon to support under representation. It further did not view poor reputation and hostile climate as insufficient bases to support remedial affirmative action as a matter of law.
In examining whether the program was narrowly tailored to achieve the goals of diversity and overcoming the effects of past discrimination, the Court found that it would not have been possible to achieve a diverse student body and remedy the effect of past *de jure* segregation "without an affirmative action program designed to seek to admit and enroll minority candidates." It did not scrutinize closely whether alternatives other than the program in question would have been effective. Instead, it concentrated on the TI scores of those who had applied in 1992 and the fact that, had the same cut off scores been used for the presumptive admit and discretionary zones as were used for white applicants, at most nine blacks and eighteen Mexican-Americans would have been admitted to an entering class of 500 students. Looking to flexibility and duration of the program, the court found no rigid quotas as the number of blacks and Mexican-Americans accepted each year varied. The program was limited in duration as the law school had acted to close the gap between the credentials of minority and non-minority students as the applicant pool improved. In addition, in contrast to the Fourth Circuit's decision in *Podberesky*, the court found that the law school could continue its affirmative action program without offending the Constitution until the OCR finds Texas in compliance with Title VI and until the gap of minority and non-minority credentials has narrowed so the state will be in compliance without the need for affirmative action.

Finally, the Court examined the impact of the program on non-minorities. While upholding the law school's affirmative action program, which gave race a plus in the evaluation process, the court invalidated the use of a separate committee to evaluate the credentials of minority applicants. It found this aspect of the program did not survive strict scrutiny because it used a procedure that did not measure each individual applicant against every other applicant. Since the separate cut off scores for minorities did not affect the plaintiffs, this aspect of the program was not directly before the court.
The Court noted, however, that if it had been, the procedure would have been invalid for the same reasons.

**Summary and Conclusion**

These two cases along with several United States Supreme Court cases indicate that the law is unsettled regarding the parameters of voluntary affirmative action, particularly as it applies in the educational setting. However the following conclusions may be drawn.

A. Affirmative action in the form of race-based remedial programs and programs designed to foster diversity are not per se unlawful provided that they are narrowly tailored to achieve their stated objective. What constitutes narrow tailoring is still an open question.

B. Universities must be prepared to sustain their asserted objectives with sufficient supportable evidence. What constitutes sufficient evidence is still an open question.

C. For remedial programs designed to overcome the effects of past discrimination, Universities may be required to show not only a substantial record of past discrimination but also current effects which have been caused by that discrimination.

1. The more recent the past discrimination, the more likely it is that present effects may be found. It may also be necessary for past discrimination offered in support of the program to be directly attributable to the proponent of the program. Arguably, statewide discrimination in education may suffice for public institutions of higher education which draw the majority of students from their state.

2. It is debatable whether University findings of present effects of past discrimination will be sufficient evidence. Judicial, legislative, or administrative findings of an agency charged with jurisdiction to oversee compliance with the law may be required as a necessary
predicate.

3. Statistics of under representation alone may not be sufficient to support the present effects of past discrimination without eliminating statistical disparities which may be the result of non-discriminatory factors.

4. Identification of the appropriate reference pool for statistical comparisons of under representation of minorities is an issue. For admissions purposes, it appears that the appropriate reference pool would be graduating high school seniors meeting the minimum criteria for admission from the area within which the University reasonably seeks to recruit its students.

5. Race-based preferences must further the objectives sought to be achieved as opposed to furthering different objectives.

6. It is possible that a poor reputation in the minority community or a perceived hostile environment for minorities on campus will not suffice to support a race based remedial program. Thus, other factors should be present to support the program. The most persuasive evidence is likely to be statistical. The Supreme Court has not accepted as proper justification for racial or ethnic preferences remedying societal discrimination, maintaining racial balance, providing role models for students, increasing the number of minorities in a profession, or increasing the number of professionals practicing in underserved areas.

D. Programs aimed at fostering diversity may be easier to sustain than remedying the present effects of past discrimination because it does not require a demonstrable link between historical and current campus conditions. However, recent litigation indicates that plaintiffs are challenging whether diversity is a sufficiently compelling interest for purposes of supporting race-based preferences. The
law may continue to change as these cases are argued.

1. Diversity under Bakke was tied to the First Amendment. Thus, Universities must be prepared to sustain this rationale by establishing that diversity contributes to the "robust exchange of ideas" that is so essential to the University's educational mission.

2. Diversity under Bakke was defined broadly to include a variety of factors of which race is just one. The use of race was permitted as a plus factor but not the sole factor. A University may assign greater weight to race than to other factors but the more weight that is assigned to race, the greater the risk that it will be seen as the sole factor. Other factors include socio-economic background, musical or athletic ability, leadership potential, etc. The weight to be attributed to each factor should vary depending upon the mix of diversity sought to be achieved each year. OCR's guidelines governing the use of financial aid in federally funded programs permit race to be the sole factor in a financial aid program if the University can establish that the program is necessary to achieve diversity and "does not unduly restrict access to financial aid for students who do not meet the race based eligibility criteria." The department's guidelines go beyond Bakke and have not yet been the subject of any legal challenge. The Hopwood case appears to support the Department's approach. Arguably in the financial aid context the rights of non-minorities are not as directly affected as in other contexts.

3. Any program based upon diversity objectives must operate in a fashion which does not exclude individuals from comparison with each other on an individual basis. Thus separate committees and separate cut off scores are not permitted. It is also clear that a University may not use numerical quotas.
E. Whether affirmative action is based upon remediaying the effects of past discrimination or fostering diversity, it must be narrowly tailored to achieve the stated objectives. Courts look to four factors to determine whether a program is narrowly tailored: "the necessity for relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waivers; the relationship of the numerical goals to the relevant market; and the impact of the relief on the rights of the parties." United States v Paradise, 480 U.S. 149, 171 (1987).

1. Showing that alternative remedies to achieve the articulated objective have been ineffective make it more likely that the program will survive analysis. It is debatable whether mere reliance on the ineffectiveness of enhanced recruitment in admissions or use of race neutral need based programs in financial aid programs will be sufficient to pass this requirement. The Court in Podberesky appeared to be unimpressed with such arguments while they were accepted by the Court in Hopwood. Universities should also consider whether a less extensive or intrusive use of race in its affirmative action program is or would be ineffective in achieving its goal.

2. Any program should be flexible, limited in duration and subject to periodic evaluation as to the achievement of its objectives. In Hopwood, the program was seen to meet these criteria as the number of minorities admitted each year varied and the program was evaluated periodically with its objectives in mind, although no absolute time frame for the program existed.

3. The impact on third parties must also be assessed. This means that the program must be designed so as not to "unnecessarily trammel" the rights of non-minorities. In the admissions context this has been interpreted to mean using race as a plus factor and not as the
sole factor. *Bakke v Regents of the University of California System*, supra. In the financial aid context, this has been interpreted to mean that the percentage of funds targeted for minorities should relate to the percentage of minorities eligible to compete for them. *Flanagan v President and Directors of Georgetown College*, 417 F. Supp. 377 (D. D.C. 1976). A de minimus impact on resources available to non-minorities is also a relevant factor.

The national debate is far from over. In fact, it is more likely to escalate than to subside in the coming years. As one of the nation's largest and most diverse systems of higher education, The Texas A&M University System must remain abreast of the developments in this field. By doing so, it can act effectively to tailor its programs and policies to best serve the needs of students, faculty, staff, and taxpayers while complying with the current state of the law.