

**MONDAY, FEBRUARY 14, 1994**  
**2:15 - 3:45 p.m.**

**CONCURRENT SESSION TWO**

**The Issues of Reverse Discrimination:  
An Analysis of *Podberesky v. Kirwan* and Its Impact**

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**DEFENSE OF MINORITY  
SCHOLARSHIP PROGRAMS:  
*PODBERESKY v. KIRWAN***

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**DEFENSE OF MINORITY SCHOLARSHIP PROGRAMS: PODBERESKY V. KIRWAN**

**I. Background.**

1. Long History of de jure segregation in Maryland public higher education until Brown v. Board of Education.

2. Office of Civil Rights ("OCR") of federal Department of Health, Education and Welfare (now Education) notified Maryland in 1969 that it had not removed the vestiges of the former dual system of higher education.

3. Negotiations between Maryland and OCR over an acceptable desegregation plan: 1969 - 1985.

4. 1985-89 Desegregation Plan accepted by OCR -- required each public institution to develop a minority recruitment plan. One component of the University of Maryland College Park's ("UMCP") plan was the Banneker scholarship, a scholarship for academically talented African American students.

**II. Podberesky v. Kirwan, 764 F.Supp. 364 (D.Md. 1991) ("Podberesky I"): The Initial Challenge.**

**A. Summary of Argument.**

1. Brought by hispanic student who applied for but did not receive a race-neutral scholarship for academically talented students. Suit, brought under Title VI of the Civil Rights Act of 1964 (barring recipients of federal aid from discrimination on the basis of race), §1981 and §1983, alleged reverse discrimination.

2. UMCP's primary defense followed City of Richmond v. J.A. Croson, 488 U.S. 469 (1989): voluntary race-based programs must serve a "compelling state interest" and be "narrowly tailored to the achievement of that goal."

a. Banneker program serves the "compelling" goal of remedying the effects of past discrimination at UMCP. Under Croson, UMCP had to show "a strong basis in evidence for [a] conclusion that remedial action is necessary."

b. the "strong basis in evidence," UMCP argued, were "findings" made by OCR beginning in 1969 and as recent as 1985 that the State had not eliminated the vestiges of segregation. Such "findings" could be relied upon under Croson: "for the governmental interest in remedying past discrimination to be triggered 'judicial, legislative or administrative findings of constitutional or statutory violations' must be made." Because OCR made such findings, it was not necessary for court to make additional findings in order to remedy past discrimination.

c. Under standards set forth in United States v. Paradise, 480 U.S. 149 (1987), which identified four criteria by which to judge the nexus between a remedial plan and the interest it purports to serve, UMCP argued that scholarship was narrowly tailored to serve the compelling interest of remedying the present effects of past discrimination.

3. UMCP also argued that the scholarship was permissible on the ground of attaining student diversity. See Regents of University of California v. Bakke, 438 U.S. 265 (1978).

#### **B. The District Court Decision.**

1. Court concluded that UMCP "produced an overwhelming compilation of historical evidence, replete with administrative findings, protracted litigation, and continuing OCR review of UMCP's efforts. ... "If ever there was an administrative record demonstrating past discrimination, this is it."

Court further found that "the effects of longstanding discrimination are pervasive, and there is ample evidence in the record...to support the view of UMCP officials that it is premature to find that there are no present effects of past discrimination at [UMCP]. OCR has not yet certified that UMCP is finally in compliance with Title VI, and it is prudent for the University's officials to let OCR's evaluation run its course."

Finally, Court found that the program was narrowly tailored.

2. The Court did not address UMCP's diversity argument.

### **III. Podberesky v. Kirwan, 956 F.2d 52 (4th Cir. 1992) ("Podberesky II"): The Appeal**

#### **A. No Sufficient Showing Of Present Effects of Past Discrimination.**

The 4th Circuit agreed that there was sufficient evidence of past discrimination. However, it disagreed with the district court's conclusion that OCR's findings could be relied upon to show the present effects of that past discrimination, primarily because those findings, according to the court, were made too long ago.

The Court held that the District Court did not make specific new findings concerning the present effects of past discrimination. It therefore remanded the case back to district court, directing it to make a determination as to the present effects of past discrimination. Court did not decide whether or not Banneker was "narrowly tailored" remedy.

**B. Diversity.**

In a footnote, Court quickly disposed of diversity argument by noting first its belief that UMCP did not establish Banneker to increase diversity but rather to assist in its desegregation efforts, and second that under Bakke, race-exclusive programs (as opposed to programs where race is a "plus factor") were not permissible for reasons of diversity.

**IV. UMCP's Options Following Podberesky II**

**A. Options:**

1. End scholarship program as presently constituted.
2. End scholarship program and create a new scholarship with "diversity" as its purpose and use race as a "plus factor" (Bakke).
3. End scholarship program and create a new scholarship with "diversity" as its purpose and scholarship restricted to African American students (extension of Bakke).
4. Proceed in district court and determine if there is sufficient new evidence of present effects of past discrimination.

**B. Considerations:**

1. Commitment to attaining UMCP's (and State's) affirmative action goals.
2. Impact on present scholarship recipients.
3. Prospect of UMCP self-criticism:
  - a. impact on recruitment of African American students and faculty.
  - b. impact on pending and potential civil rights litigation.
  - c. impact on OCR compliance review.

4. Lack of legal guidance:

- a. what is a "present effect of past discrimination?"
- b. what use can be made of pure statistical disparities?
- c. what is the burden of proof and who has it?
- d. impact of United States v. Fordice, 112 S.Ct. 2727

(1992)

5. Recent cases striking down voluntary affirmative action plans.

**C. UMCP's Decision.**

1. President met with legal counsel and other advisors and consulted with various legislative, State higher education and community leaders. Decision made to conduct an administrative examination of the Banneker Program to determine whether it should continue 1) as a way to eliminate the present effects of past discrimination, and/or 2) as a mechanism to attain student diversity on campus. Assuming that Banneker was found necessary to meet either or both of these goals, proceed in district court.

President (and the Board of Regents) felt strongly about the issues, the success of the Program, commitment to Banneker students and to community, and the need to obtain more judicial guidance in this area of law.

2. Several current and prospective Banneker recipients intervened as defendants in the litigation.

**V. UMCP's Administrative Review Mechanism**

**A. Administrative Process.**

1. Review Committee headed by UMCP President.

2. Review submissions by parties to litigation; public also invited to make submissions.

3. Public hearing.

4. Chinese Wall: UMCP Administration represented by Executive Assistant and original litigation team. Review Committee advised by other lawyers from the Maryland Attorney General's Office.



**B. Evidence Reviewed By UMCP Administration.**

1. UMCP Administration gathered evidence and retained experts to conduct studies on the following issues:

- a. history of UMCP and State -- segregation and discrimination;
- b. enrollment, retention and graduation data of students by race;
- c. economic status of African Americans in Maryland;
- d. reputation of UMCP among the African American community;
- e. campus climate for African Americans attending UMCP;
- f. opinions of campus officials and students and others about Banneker program;

2. Specific studies conducted included:

- a. focus groups of current white and African American students about racial climate and reputation;
- b. focus groups of African American parents of college-bound students in communities surrounding UMCP on UMCP's reputation;
- c. detailed interviews of local high school guidance counselors and leaders of the African American community on UMCP's reputation in the black community;
- d. a historian's report of discrimination against African Americans committed by the State of Maryland, dating to the days of slavery, with a focus on discrimination in primary, secondary and higher education;
- e. a report by an economist on the economic effects of discrimination against African Americans by the State, how economic variables affect the ability of African Americans to qualify, attend and graduate from colleges, and how merit based scholarship programs help reduce the economic disparities between African Americans and whites in Maryland;
- f. two reports by sociologists describing the history of the Banneker Program, and based on detailed interviews with African American and white students, faculty and staff, as well as a review of qualitative and quantitative data, an analysis of the benefits of the program, specifically, in improving campus climate, reputation, enrollment, retention and graduation.

g. a report on how campus climate and racism affects African American students' ability to navigate the campus, contributing to increased drop out rate. Based on data, suggests that SAT's are less effective in predicting African American student success.

h. Affidavits from respected academicians from around the country, including the Presidents of the University of Pennsylvania (now head of NEH), Clemson University, the University of Florida, UMBC, the Chancellors of U-Wisconsin (now Secretary of HHS) and Washington University, the President Emeritus of Johns Hopkins, the former Chancellor of the New Jersey Department of Higher Education, and the Commissioner of the South Carolina Higher Education Commission, on the need for and benefits of race exclusive scholarships.

### C. Review Committee's Findings.

1. UMCP Administration presented to President's Review Committee a 115 page memorandum, with 81 exhibits, urging the Committee to continue Banneker Program on the grounds that it eliminates present effects of past discrimination and helps to attain the important goal of diversity.

2. Other groups submitted written comments to Review Committee, including the American Council on Education, NAACP Legal Defense Fund, American Civil Liberties Union, the Washington Legal Foundation (Podberesky's legal counsel), and several colleges.

3. After a public hearing and extensive deliberations, the Review Committee issued its own 60 page report, with 69 exhibits, concluding that the Banneker Program was instrumental in helping UMCP to eliminate present effects of past discrimination and to attain its goals of student diversity.

## VI. Podberesky v. Kirwan, (Civ. No. JFM-90-1685 (D.Md. Nov. 18, 1993) ("Podberesky III"): New Hope For Race-Exclusive Scholarship Programs?

### A. Motions for Summary Judgment.

1. All parties filed motions for summary judgment. UMCP's was based on findings of present effects of past discrimination made by Review Committee.

2. Amicus Briefs were filed in support of the Banneker Program by the U.S. Department of Education and the Mexican American Legal Defense and Education Fund.

## **B. District Court's Decision.**

"It is worthy of note that the University is (to put it mildly) in a somewhat unusual situation. It is not often that a litigant is required to engage in extended self-criticism in order to justify its pursuit of a goal that it deems worthy. All other matters aside, UMCP administrators are to be commended for the moral courage that they have demonstrated in undertaking this self-examination with an admirable degree of candor."

1. On Burden of Proof: UMCP must show a "strong evidentiary basis" of "some" present effects of past discrimination at UMCP. UMCP's burden is to produce something less than the preponderance of the evidence.

2. Court held that UMCP had "strong basis in evidence" for finding that there exist four present effects of past discrimination:

a. UMCP's bad reputation in the African American community;

b. Underrepresentation of African Americans in student body at UMCP;

c. African Americans have disproportionately low retention and graduation rate at UMCP; and

d. existence of a hostile racial climate at UMCP.

"To the extent that reasonable minds may differ over whether these conditions exist or whether they are linked to UMCP's past discrimination, it is important to remember what UMCP's burden is. They need not prove these present effects of past discrimination beyond a reasonable doubt, by clear and convincing evidence, or even by a preponderance of the evidence. The standard they must meet is less than a preponderance of the evidence. To require any greater a standard would be in explicit contradiction of the Court's requirement in Crosby that the burden of persuasion remain with the plaintiff in reverse discrimination cases."

3. On selection of an appropriate reference pool: "The question of underrepresentation requires, of course, the selection of a reference pool of eligible candidates against which the level of representation can be measured."

"[T]he admissions process contains too many variables to define the reference pool by inflexible objective criteria which, in fact, are not mechanically applied by

UMCP. Moreover, use of a pool defined exclusively by a high school gpa and SAT results would itself disguise the fact that the substandard, segregated education of many parents of the current generation of African American students directly impacts the gpa's and SAT scores of umcp's current black applicants. Education is a continuous and expanding process in which knowledge, skills and attitudes toward learning are communicated from one generation to another. Unfortunately, we still live in a time when many African-Americans of college age are disadvantaged in this respect because their forbears received an inferior education under Maryland's segregated school system, of which UMCP stood at the top."

Court did not select just one pool, but rather a "sliding scale reflecting at least some of those variables" because that is more "reasonable and appropriate."

17.9% = percentage of African Americans meeting general course requirements;

22% = percentage of African Americans taking SAT;

13% = percentage of incoming African American freshmen, resulting in "gross" deviations based on standard deviation analysis.

4. Disproportionate retention rates as "present effect of past discrimination."

a. Even controlling for SAT scores, black retention and graduation rates are lower than white retention rates; given a group of people with the same SAT scores, a higher percentage of blacks drop out than whites.

If no effects of past discrimination remained, one would expect the relative retention and graduation rates of blacks and non-blacks to approximate one another. ... Even assuming [that the disparity can be attributed to an economic disparity between African Americans and whites], it is not only financial hardship that leads students to leave college before graduation. In given cases an absence of commitment to the school because of its poor reputation in the community from which a student comes, the lack of shared experience with family members to help the student through the arduous process of higher education, the absence of African American members of the faculty to serve as mentors and the existence of a hostile racial atmosphere on campus are other significant contributing factors. These conditions are directly attributable to Maryland's history of segregated

education of which UMCP was an integral part.

5. Court found that Banneker Program was narrowly tailored to remedy present effects of past discrimination:

a. Improves reputation in the African American community because it demonstrates UMCP's active commitment to African American students.

b. Challenges negative stereotypes of underachieving African Americans as being interested in only sports and/or music.

c. Increases numbers of peer mentors and role models available to African American students.

d. Directly or indirectly facilitates the enrollment of at least twice as many African American students in high-achievement range.

e. Improves recipients' academic performance (many of whom go into the sciences, where African Americans are underrepresented), and graduate at rates equivalent to their white counterparts.

f. SAT scores of African Americans have risen since Banneker (much higher than rise in SAT scores of African Americans in Maryland and nationally) and overall African American graduation rate has dramatically increased;

g. Less restrictive alternatives unsuccessful:

i. Few African Americans qualify for UMCP's race-neutral merit-based scholarship program;

ii. Need-based awards do not bring Banneker profile students needed;

h. Banneker Program limited in duration-- to be reviewed by UMCP every 3 years.

i. number of recipients small -- less than 1% of incoming freshmen receive it.

j. minimal impact on nonblacks -- awarded only after admissions decisions are made, and consumes only 1% of the total financial aid budget at UMCP.

6. Court did not address issue of diversity.

7. Plaintiff has appealed again to the Fourth Circuit Court of Appeals.

## VII. Considerations Raised By Podberesky III

### A. Underrepresentation May Be An Effect of Past Discrimination.

Statistical Pool is critical:

1. Podberesky III suggests that if college does not have hard and fast admissions criteria, such as minimum gpa and/or SAT score, other pools may be appropriate.

2. Other problems in defining pool: If public institution, may define pool as number of African American SAT-takers in State, or number of African Americans in State who meet minimum curriculum standards. But what if private college that recruits from a wide region, or nationally?

### B. Reputation and Campus Climate May Be Effects of Past Discrimination.

### C. Can Colleges Located In States With No History Of De Jure Segregation Show Present Effects of Past Discrimination?

"While northern states did not have de jure segregation, the admissions policies of nearly every northern college and university excluded African-Americans from college campuses almost as effectively as the legal requirements of segregation in southern states. ... In fact, the vast majority of predominantly white colleges did not begin admitting African Americans until after World War II. Even after the second world war, northern colleges admitted only a tiny quota of black students each year."

The Court then discussed evidence of hostile atmosphere for African Americans on many northern campuses, concluding that "there is no reason to assume that, considering their history of discrimination, northern universities are not themselves now experiencing the present effects of past discrimination."

### D. Implications of Critical Self-Examination.

1. Is college willing to critically examine its history and the current state of race relations on campus? UMCP's experience has been that there was no adverse reaction to self-examination, either on campus, or in terms of recruiting African American students. Press coverage has been mostly positive.

2. Decision in Podberesky III implies a distinction between voluntary affirmative action efforts to eliminate present effects of past discrimination (Croson analysis), and those remedial measures that southern states with a history of segregation are required to take to remove any vestiges of segregation traceable to

present policies and practices (Fordice analysis). The existence of this distinction is denied by the Plaintiff, who seeks a ruling that if an affirmative action program is not required, then it is not allowed.

**E. Diversity.**

1. Podberesky III does not address issue, although it may be addressed by 4th Circuit. Fourth Circuit's previous pronouncement not helpful -- repeats the Bakke line on race only as plus factor. However, there are compelling arguments distinguishing admissions from financial aid decisions. Still Untested.

2. Issues to consider: What does "diversity" mean? How do you know when "diversity" has been attained? Recommend report by Troy Duster and the Diversity Project from the University of California, Berkeley.

**F. Is A New Standard For Reviewing Affirmative Action Programs In An The Education Context Called For?**

1. Court found that sufficient evidence to uphold the Banneker Program using the Croson standard. The Judge concluded, however, that this standard may not be appropriate in the education context:

"The standard that the 4th circuit and I have heretofore used in this case -- that there must exist a strong basis in evidence of present effects of past discrimination -- finds its genesis in the context of employment discrimination. Reflexive use of the same standard in the education context fails to acknowledge that the Supreme Court has consistently recognized that discrimination in schooling is the most odious form of discrimination."

The Supreme Court's prohibition against remedying the effects of societal discrimination appear inappropriate in the education context where the effects of past discrimination are obviously societal in scope:

"A fire department's discriminatory hiring practices have little or no effect on the society at large. But discrimination in the nation's educational institutions has created a ripple effect that necessarily affects every aspect of our economy and society. Accordingly, it seems entirely proper that in order to cure these effects, legislatures and educational administrators be given more leeway in fashioning remedies that take into account the vast extent of the damage that has been done by our shameful legacy of involuntary segregated education."

2. The Court in Podberesky III advocated a NEW STANDARD:

"Strict scrutiny is a process, not a mere quantum of proof or other mechanical test. In the education context, it should involve asking the following questions:

1) Does a nucleus of fact exist which can reasonably be interpreted as evidencing the effects of racism?;

2) Did the officials responsible for addressing the problem engage in an open and deliberative decision-making process?;

3) Did they articulate the reasons for their conclusion that a problem requiring correction exists?;

4) Did they adopt a narrowly tailored remedy that has minimal impact upon the rights and interests of persons not benefitted by the remedy?;

5) Was the decision-making body controlled by members of a race benefitted by the remedy?; and

6) Has provision been made for regular periodic review to determine the continued necessity and efficacy of the chosen remedy?"