PODBERESKY V. KIRWAN: THE DEFENSE OF A MINORITY SCHOLARSHIP AT THE UNIVERSITY OF MARYLAND AT COLLEGE PARK

Presenter:

JOHN K. ANDERSON
Assistant Attorney General
Chief Counsel for Educational Affairs
Maryland Attorney General's Office
Baltimore, Maryland

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John K. Anderson, Esq.
Richard A. Weitzner, Esq.
Assistant Attorneys General
Office of the Maryland Attorney General

Podberesky v. Kirwan: The defense of a Minority Scholarship at the University of Maryland at College Park.

I. 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 all present effects of its former 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.

II. 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.

III. Upon remand the District Court allowed the University time to conduct an administrative fact-finding process through which Croson findings would be made.

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.

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

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

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.

IV. Podberesky v. Kirwan, (Civ. No. JFM-90-1685 (D.Md. Nov. 18, 1993) ("Podberesky III")

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.

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 Croson 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 rages; 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 non-blacks -- 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.

V. Podberesky v. Kirwan 4th Circuit Court of Appeals Decision Issued 10/27/94 ("Podberesky IV")

A. The Court held that the District Court erred in holding that the University has presented sufficient evidence of present effects of past discrimination and in holding that the Banneker program is narrowly tailored to remedy the asserted present effects. The Court therefore remanded the case for entry of summary judgment in favor of Plaintiff.

1. Burden of proof: The Fourth Circuit declared that one defending a race exclusive remedial program is "burdened with a presumption that its choice cannot be sustained." The Court thus applied a strict scrutiny test which is substantially more difficult to meet than that applied by the District Court and prior precedents, e.g. Croson. While citing the Croson test, the Court rejected the deference that case allows to be paid to judicial, legislative, administrative findings of present effects where those findings are supported by a strong basis in evidence. The Court said that the proponent of the program "must, at a minimum", prove that the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program. It is not enough that the present effects rationale is supported by substantial evidence;

the Court must make its own finding that the effects alleged exist and are the result of past discrimination.

2. The Court then rejected all four of the present effects relied upon by the University.

a. The Court stated that a poor reputation in the African-American community and a campus climate perceived as being racially hostile could not suffice to justify race exclusivity in the Banneker program. The poor reputation reflects mere knowledge of historical facts, and the hostile climate was not shown to be connected to past discrimination as opposed to present societal discrimination. The Court adopted plaintiff's argument that hostile climates exist in northern institutions where de jure segregation never existed. The District Court had stated that de facto as well as de jure segregation could cause a hostile climate to exist. The Court of Appeals rejected that view, equating the lower Court's reference to de facto discrimination with reliance upon societal discrimination which is an insufficient basis for remedial race-based programs.

b. The Court then held that the University's other two present effects, underrepresentation of African-Americans in the student body and low retention and graduation rates among African-American students, were not proven to be the result of past discrimination. The Court said that the plaintiff had raised sufficient factual questions about the University's statistical evidence to preclude summary judgment under Rule 56. The Court's procedural ruling was supported by a review of the evidence in which the Court suggested that the retention and graduation rates reflected factors other than the University's

past discrimination, including past and present societal discrimination, and expressing skepticism that the University had used the correct reference pool when it generated the statistics showing underrepresentation. It stated that while the District Court had correctly held that general population statistics were not the appropriate comparison, it had not been sufficiently rigorous in determining the criteria defining the correct reference pool. In any event, the Court held that the factual disputes precluded entry of summary judgment.

3. The Court then held that even if the University had proved that past discrimination had caused underrepresentation and lower retention and graduation rates, the Banneker program is not narrowly tailored to remedy those effects. The Court only addressed whether the program "actually furthers a different objective from the one it claimed to remedy."

The Court held that because its recipients are high achieving African-American students, the program "could not be sustained. High achievers, whether African-American or not, are not the group against which the University discriminated in the past." Similarly, the Court stated that contrary to the District Court's holding, awarding scholarships to non-Maryland residents means that the program is not narrowly tailored to the goal of increasing the number of qualified African-American Maryland residents that attend the University, which it took to be the University's goal.

Finally, the Court held that the program is not narrowly tailored because the University's selection of a reference pool was so flawed that its measurements of underrepresentation were

almost certainly inflated, and provided no reliable target for eliminating underrepresentation. Without reliable measurement of the effects of past discrimination, remedial programs cannot be held to be narrowly tailored to achieve the elimination of those effects. In addition to restating its concerns about the correct reference pool, the Court also suggested that factors unrelated to past discrimination could explain statistical disparities, e.g. the choice of black students to attend Historically Black Institutions, or to postpone college for economic reasons.

Because it held that the Banneker program is not narrowly tailored, the Court not only reversed the entry of summary judgment for the University, but also ordered that summary judgment be entered for the Plaintiff.

VI. Petition for Writ of Certiorari

In November 1994 the University filed a petition for rehearing arguing that the Fourth Circuit panel erred in failing to apply the Croson standard in weighing the legality of the Banneker program, determining that a poor reputation and the perception of a hostile climate could not as a matter of law serve to justify affirmative action, attributing various actions and conditions to societal discrimination in the face of much evidence of specific past discrimination in public higher education, and in holding that awarding scholarships to high achievers and non-Maryland residents was inconsistent with a narrowly tailored remedy. The University's Petition was denied in December. The University is preparing to petition for a Writ of Certiorari from the Supreme Court.

VII. Considerations Regarding the Present Effects Rationale for Race-Base Scholarships.

A. Underrepresentation may be an effect of past discrimination, but the choice of a statistical pool is critical, and may be subjected to rigorous review by the courts.

B. Reputation and campus climate have been held to be effects of past discrimination, but the U.S. Court of Appeals for the Fourth Circuit flatly rejected these phenomena as valid present effects as least in the context of defending race-exclusive scholarships.

C. Can colleges located in states with no history of de jure segregation show present effects of past discrimination? The District Court wrote as follows:

> "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." However, the Fourth Circuit Court of Appeals is quick to find that societal discrimination, not discrimination specific to the institution, is the cause of alleged effects.

D. Does the assertion of present effects of past discrimination risk "liability for current violation of Title

VI? 34 C.F.R 100.3(b)(6) requires that institutions that previously discriminated take affirmative action to overcome the effects of prior discrimination. (Even absent prior discrimination an institution may take affirmative action "to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.") Where there has been a finding of prior discrimination, remedial affirmative action is clearly required. The Plaintiff in Podberesky argued that the Banneker program is not required under Title VI, and therefore it is not allowed by either Title VI or the Equal Protection Clause of the Fourteenth Amendment.

Voluntary affirmative action has long been upheld in both employment and education cases, and ought to be encouraged. The Croson standard for such action explicitly falls short of requiring the program proponent to confess liability for violation of Title VI. That is why the strong basis in evidence test has been held to be something less than a preponderance of evidence. The Fourth Circuit's restatement of the Croson standard requires proof of past discrimination and its causal link to the present effects intended to be remedied. If those effects, not only justify voluntary remedial action, but also give rise to current liability, institutions will be unlikely to voluntarily initiate affirmative action programs.

A suggestion that the existence of present effects alone does not create liability is found in United States v. Fordice. At footnote 4 the Court seems to say that the continuing existence of effects of past discriminatory policies and

practices is not by itself enough to constitute a violation of Title VI. Footnote 7 addresses 34 C.F.R. 100.3(b)(6)(i), saying that Title VI is no broader than the Equal Protection Clause of the Fourteenth Amendment. This suggests that present effects sufficient to justify voluntary affirmative action are not necessarily sufficient to implicate the requirements of the regulation. See also United States v. Yonkers, 833 F. Supp. 214 (S.D.N.Y. 1993).

E. The District Court voiced the opinion that the Croson 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."

This view was categorically rejected by the Court of Appeals and in fact was regarded as evidence that the District Court Judge lacked conviction in finding that the Croson standard was met.

VIII. Diversity: An Alternative Rationale for the Consideration of Race in Awarding Student Financial Aid.

Diversity was a secondary defense for the Banneker scholarships throughout the Podberesky litigation. The "attainment of a diverse student body"--diversity--is a constitutionally permissible goal for an institution of higher education. In Regents of University of California v. Bakke, 98 S.Ct. 2733, 2759-2763 (1978), former Justice Powell of the United States Supreme Court first articulated the view that an institution of higher education has a compelling interest under the First Amendment of the Constitution to "make its own judgments as to ... the selection of its student body." Id, at 2759. As Justice Powell recognized, "[t]he atmosphere of 'speculation, experiment and creation'--so essential to the quality of higher education--is widely believed to be promoted by a diverse student body." ... [I]t is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of peoples." Id. (citations and notes omitted). In so finding, Justice Powell approved a policy adopted by Harvard College that considers an applicant's race as a factor in the admissions decision. Id, at 2761-62. (A copy of the "Harvard Plan," as appended to the Court's decision in Bakke, is attached for your review.)

A majority of Justices have since held that "a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated...." Metro

Broadcasting, Inc. v. F.C.C., 110 S.Ct. 2997, 3010 (1990). See also Id., at 3028 (Stevens, J. concurring); Davis v. Halpern, 768 F. Supp. 968, 981 (E.D.N.Y. 1991).

A diversity-based program should not be confused with programs to remedy vestiges of past discrimination or to correct "underrepresentation" of certain minority populations at the University. The University should not attempt to merge the goal of diversity, "whose intent is to cultivate a richer academic environment, with that of the remedial consideration of race and ethnicity, which ... [may] be directed at addressing ... inadequate minority representation...." Davis, 768 F. Supp. at 980. "Bakke makes clear that in the absence of prior discrimination by the university the consideration of race (at least as one factor among many) by a university admissions process is constitutional only so far as it seeks to procure for the university the educational benefits which flow from having a diverse student body." Id, at 981.

The City University of New York School of Law (CUNY) confused these two goals in adopting an admissions policy which took race and ethnicity into account. In Davis, a U.S. District Court in New York found that while CUNY considered as one of its goals the assembly of a racially and ethnically diverse student body, it also considered racial or ethnic criteria for another reason: "the low number of minority members of the bar and the manifestly low proportion of minority lawyers in a city in which minority populations are in dire need of legal services." Davis, 768 F. Supp. at 980. While the court agreed that race could be a factor in assembling a diverse student body, it held that because

the CUNY admissions program arguably contained a "remedial" component, it could only be justified by a proper showing of discrimination. Id, at 982. Since CUNY did not provide any evidence that it had discriminated against the targeted minorities, the court held that a "triable issue of fact" existed as to whether CUNY's admission policy utilized minority status in a way which violated the Constitution. Id.

Case law limits a university's use of race as the sole or predominant factor in a diversity program. As Justice Powell remarked: "Ethnic diversity ... is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded." Bakke, 98 S.Ct. at 2760-61. Justice Powell rejected the University of California's plan of setting aside 16 slots for minority students, even under the diversity rationale, because its admissions program was focused solely on ethnic diversity:

> It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Id., at 2761.

The key to a Constitutionally permissible program based on diversity, according to Justice Powell, is that consideration of race or ethnicity not serve to insulate individuals from

comparison with all other candidates for the scholarship. In other words, the scholarship "program treats each applicant as an individual in the [scholarship] process." Id., at 2762.

> The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration...." Id. (Emphasis added)

Additional factors that may be considered include but are not limited to geographical location, academic major, unusual interests, and socio-economic background. See also Hopwood v. Texas, 861 F. Supp. 551 (W.D. Texas, 1994).

It is clear that a university may not use numerical quotas to pursue its goal of assembling a diverse student body. However, "Universities ... may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose. So long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process." See Id., at 2763 n. 53. And while Bakke requires that each applicant for a scholarship be placed on the same footing for consideration, the University may assign certain qualities or characteristics (such as race) different weights: "Indeed, the weight attributed to a particular quality may vary from year to

year depending upon the 'mix' both of the student body and the applicants for the incoming class." Id., at 2762.

Further, the Supreme Court has historically provided universities with wide discretion in matters relating to the composition of its student body, as a matter of academic freedom. See Id., at 2759-60 (discussing Sweezy v. New Hampshire, 77 S.Ct. 1203 (1957) and Keyishian v. Board of Regents, 87 S.Ct. 675 (1967)). Finally, Justice Powell recognized that racial or ethnic origin is an "important" element in achieving diversity. Bakke, 98 S.Ct. at 2761.

A university may assign a greater weight toward race than to other factors. However, it takes a risk in using race as the sole factor. As stated earlier, the Supreme Court rejected the University of California's admissions program because it utilized a quota in order to achieve diversity, while the Court endorsed the "Harvard Plan" because it expressly stated that it had not set "target-quotas." Clearly, a Constitutionally permissible diversity program may be held to be a discriminatory race-based quota system, if race is the sole factor, or is given disproportionate weight among various factors.

In Bakke, Justice Powell theorized that "[i]f an applicant can establish that the institution does not adhere to a policy of individual comparisons, or can show that a systematic exclusion of certain groups results, the presumption of legality might be overcome, creating the necessity of proving legitimate educational purpose." Id, at 2763 n. 53. In Davis v. Halpern, supra, plaintiff, in attempting to show that CUNY utilized just such a quota system, claimed that 49 of the 56 black and hispanic

students entering CUNY law school in 1986, 40 of the 48 entering in 1987 and 25 of 36 entering in 1988 had LSAT scores equal to or lower than plaintiff's highest score. Further, plaintiff contended that the percentage of minority students at CUNY was significantly greater than the percentage at three other New York area law schools, and higher than any other law school in the country with the exception of the four traditionally black law schools and the University of Hawaii. Finally, plaintiff submitted several internal CUNY memoranda reporting data regarding the percentage of minorities who applied for admission. The sum total of the evidence, plaintiff alleged, proved that CUNY's admissions plan utilized quotas. Davis, 768 F. Supp. at 973.

The Court held that plaintiff had "failed to produce a shred of material which genuinely supports a conclusion that a quota might be in use."

> The fact that his scores are better than many blacks or hispanics admitted to the law school is not circumstantial evidence that a quota is in use. Neither is evidence that the admissions committee is regularly apprised of the racial, demographic, and sexual composition of the applicants, acceptees and enrollees. And neither is the fact that the percentage of minorities enrolled at CUNY law school is higher than that at most law schools. That fact may reflect the composition of the applicant pool, the qualifications of those applicants, or the desire of minorities or women to attend CUNY law school. It is not evidence of the use of quotas. Id., at 981-82.

Although CUNY's evidence that a quota was not utilized (consisting of "emphatic" denials that it used a quota system, a description of the admissions process contained in the CUNY catalog which did not contain a reference to the term "quota," and an affidavit from the Admissions Director that CUNY's plan

was based on the "Harvard model") was "sparse", the court concluded that plaintiff must have "actual proof" or "solid circumstantial evidence" to support a claim that quotas were being used. Id.

On December 4, 1991, Secretary of Education Lamar Alexander stated that "[a] college president with a warm heart, some common sense, and a minimum amount of good legal advice can provide minority students with financial aid and may use financial aid to create campus diversity without violating Federal laws." Secretary Alexander's optimism is reflected in the Department's February 23, 1994 Final Policy Guidance on Nondiscrimination in Federally Assisted Programs (Federal Register, Vol. 59, No. 36, pages 8756-64, February 23, 1994) in which the Office of Civil Rights acknowledges the validity of diversity as a First Amendment interest, and states,

> "A college should have substantial discretion to weigh many factors--including race and national origin--in its efforts to attract and retain a student population of many different experiences, opinions, backgrounds, and cultures--provided that the use of race and national origin is consistent with the constitutional standards reflected in Title VI, i.e. that it is a narrowly tailored means to achieve the goal of a diverse student body.

OCR goes beyond Bakke in allowing race to be used as a condition of eligibility for a financial aid program if that approach can be shown to be necessary to achieve diversity and "does not unduly restrict access to financial aid for students who do not meet the race-based eligibility criteria." Bakke had rejected the set-aside--a fixed number of admissions for minorities--holding that that policy's use of race as a condition of eligibility violated the 14th Amendment rights of minorities,

but had stated that race and other factors could be assigned extra weight in a selection process aimed at achieving diversity. OCR's Policy Guidance allows financial aid set-asides where measures short of that do not enable it to enroll a sufficiently diverse student body. Further, it allows race-based financial aid for students in specific programs within a university where a diversity is lacking in those programs.

In OCR's view, its positions are logically consistent with Bakke's holdings. They do, however, represent an extension of those holdings as articulated by Justice Powell. OCR's policy appears to rely on its view that race-targeted financial aid programs are inherently less burdensome on non-minorities than are racial set-asides of admissions such as the Bakke Court addressed. This is true, according to OCR, because (1) race-targeted financial aid does not "in and of itself" keep a student from attending a university, and (2) the amount of financial aid available to students is not fixed, as are the number of admission places, so the availability of race-targeted aid need not limit in any way, the availability of aid for non-minorities.

The "presumption of good faith" that Justice Powell would accord to diversity programs, the judicial deference accorded to CUNY in Davis, and the views of the Department of Education Policy Guidance may provide sufficient support for many diversity-based uses of race in the award of financial aid. Nevertheless, the hostility to race-conscious programs manifest in some courts (e.g. the Forth Circuit Court of Appeals) provides cause for serious doubt that universities will always enjoy a meaningful presumption of good faith or a perceptible judicial

deference to university decisions regarding diversity goals and how to achieve them.

Most likely to meet the narrowly-tailored requirement would be a program precisely following the Bakke-endorsed format: a single scholarship program designed to help achieve a student body with a variety of backgrounds, cultures, experiences, talents, and opinions in which each student is compared to all other students, with a wide variety of plus factors of which race is only one. In designing the selection process for such a program, a university could establish initial criteria (e.g. academic achievement) which are objective and uniform for all students, through which a pool of eligible students would be defined. Thereafter recipients could be selected through the application of academic criteria combined with publicized diversity criteria, such as race or ethnicity, socio-economic background, unique experiences, musical or athletic ability, leadership potential, etc. The weights attributed to each factor could vary, depending upon the student "mix" sought to be achieved. One committee should select all recipients to assume the "individual comparisons" called for by Justice Powell. Even such race-exclusive financial aid programs to foster diversity must be narrowly tailored to serve that compelling interest.

In addition to the use of diversity as the stated rationale for the use of race in awarding financial aid, the goal of diversity may also be served by financial aid programs relying on alternative legal rationales, including programs designed to remedy present effects of past discrimination, programs authorized by Congress, aid which is given by a private donor

directly to students on the basis of race or national origin, and race-neutral aid programs targeted at students who are economically, educationally, or socially disadvantaged.

According to OCR's Policy Guidance:

> "A college may make awards of financial aid to disadvantaged students, without regard to race or national origin, even if that means that these awards go disproportionately to minority students."

Suggested race-neutral criteria include students from low-income families, students with school districts with high drop-out rates, students from single-parent families, or students from families in which few or no members have attended college.

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