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COMMENT

CAN AFFIRMATIVE ACTION SURVIVE IN EDUCATION?

PART I. INTRODUCTION

In 1964, Congress enacted the Civil Rights Act of 1964¹ making it unlawful to discriminate against an individual based on race, sex, creed or color. Over thirty years have elapsed since the Civil Rights Act of 1964 was enacted, yet minorities and women still experience the same discrimination the Act was intended to prevent.² In order to combat this ongoing discrimination, many courts, employers, and institutions of higher education have instituted affirmative action plans that give preferential treatment to groups that have traditionally been discriminated against.³

Affirmative action refers to deliberate steps taken by businesses, employers, individuals, and colleges and universities "to promote equal opportunity and to ensure that discrimination [based on race, gender, etc.] will not recur."⁴ "The goal of affirmative action is to eliminate all non-legal barriers to equal employment opportunity, including intentional discriminatory practices and non-intentional (structural or systematic) discrimination."⁵

This comment will focus on the constitutionality of affirmative action plans used by colleges and universities, which include race-based scholarships to certain minority students. The constitutional issue of these affirmative action plans arises when the colleges and universities receive federal funds. Institutions that receive federal funds are subject to the restrictions of Title VI of the Civil Rights Act of 1964.⁶

Part II of this paper will provide the history of affirmative action as it has evolved since The Civil Rights Act of 1964 was enacted. Part III of this paper will focus on affirmative action plans in the educational

1. 42 U.S.C. §§ 2000e - 2000e-17 (1982). This Act is commonly referred to as Title VII.

2. See, Thomas F. Pettigrew, *New Patterns of Racism: The Different Worlds of 1986 and 1964*, 37 *RUTGERS L. REV.* 673 (1985); Maxine N. Eichner, *Getting Women's Work That Isn't Women's Work: Challenging Gender Biases in the Workplace Under Title VII*, 97 *YALE L.J.* 1397 (1988).

3. BRON R. TAYLOR, *AFFIRMATIVE ACTION AT WORK: LAW, POLITICS AND ETHICS* 11 (1991).

4. *Id.*

5. *Id.*

6. 42 U.S.C. § 2000d (1982). This is commonly referred to as Title VI.

setting under Title VI of the Civil Rights Act of 1964. Finally, part IV will discuss recent cases in Texas and Maryland that have dealt with the issue of Title VI and affirmative action and examine the potential effects of these decisions on affirmative action plans at colleges and universities across the United States.

PART II. THE HISTORY OF AFFIRMATIVE ACTION

A. *The Civil Rights Act of 1964*

"The Civil Rights Act of 1964 (hereinafter "Title VII") definitively prohibits discrimination in voting, public accommodations, public education, and employment."⁷ Title VII also provided for the establishment of the Equal Employment Opportunities Commission (hereinafter "EEOC"). The role of the EEOC is to ensure that private employers comply with the requirements of Title VII. The EEOC accomplishes this by assisting plaintiffs in initiating complaints of discrimination, handling mediation between plaintiffs and employers, and supporting litigation initiated by plaintiffs.⁸

In the years following the enactment of Title VII and the creation of the EEOC, there appeared to be a unified attempt around the country to promote the use of affirmative action plans to put an end to discrimination. First, in 1965, President Lyndon B. Johnson signed Executive Order 11246 which required federal contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, religion, or national origin."⁹

In 1971, six years after President Johnson's executive order, the Supreme Court of the United States decided *Griggs v. Duke Power*.¹⁰ This was the first time the Supreme Court was asked to interpret Title VII. In this case, the Court held that Duke Power's requirements for employment, which included a high school diploma and the passing of a standardized general intelligence test, where neither was shown to be significantly related to job performance, were prohibited under Title VII where they operated to exclude minority groups from employment.¹¹

In *Griggs*, African-American employees of Duke Power brought suit claiming Title VII violations. These employees challenged the company's policy that required employees to have a high school diploma in order to be employed in all departments except its labor

7. TAYLOR, *supra* note 3, at 19.

8. *Id.* at 20.

9. Exec. Order No. 11,246, 5 C.F.R. 720 (1965).

10. 401 U.S. 424 (1971).

11. *Id.*

department.¹² Not only was the labor department the only department where African-Americans were allowed to work, it was the only department which did not require a high school diploma.¹³

Duke Power lifted this hiring restriction on African-Americans in 1965 (the same year Title VII became effective). However, at the same time, Duke Power added a requirement that employees have a high school diploma to transfer between departments. This new requirement effectively prohibited African-Americans from employment in the other departments because most lacked a high school education. Prior to 1965, transfers between departments were based strictly on job seniority.¹⁴ After 1965, however, in addition to requiring a high school diploma, Duke Power required employees to pass two aptitude tests in order to be eligible for employment in all departments except the labor department.¹⁵

The Supreme Court found that neither of these aptitude tests allowed Duke Power to predict future job performance of its employees.¹⁶ The Court also found that the test requirement operated to exclude African-Americans from employment at a disproportionate rate, and thus was prohibited under Title VII.¹⁷ In making its decision, the Supreme Court looked to the intent of Congress. The Court found that "[t]he objective of Congress in the enactment of Title VII was plain from the language of the statute. Congress intended to achieve equality of employment opportunities and to remove barriers . . . favor[ing] an identifiable group of white employees over other employees."¹⁸

It is important to note that the Supreme Court also rejected the lower court's interpretation that "the Act (Title VII) only covered intentional discriminatory conduct after the Act became effective in 1965."¹⁹ The Court stated that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be manifested if they operate to 'freeze' the status quo of prior discriminatory employment practices."²⁰ This interpretation by the Court was essential if the Act was going to ensure that employers would not be able to

12. *Id.* at 427.

13. *Id.* Duke Power had five departments: labor, coal handling, operation, maintenance, and laboratory. The highest paying job in the labor department was lower than any of the other department's lowest paying salary.

14. *Id.*

15. *Id.* at 428. These tests were the Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test.

16. *Id.*

17. *Id.*

18. *Id.* at 429.

19. *Id.*

20. *Id.* at 430.

180 NORTH CAROLINA CENTRAL LAW JOURNAL [Vol. 22:177]

hide discriminatory practices by arguing that their employment practices were not intended to discriminate; particularly when such practices worked repeatedly to exclude certain minority groups from employment opportunities.

B. *The Equal Employment Act of 1972*

Following the lead of President Johnson and the Supreme Court of the United States, Congress made amendments to Title VII in 1972. By passing the Equal Employment Opportunity Act of 1972,²¹ Congress gave the EEOC more power to enforce the regulations of Title VII. This Act allowed the EEOC to actually initiate litigation for Title VII claims instead of just being able to support litigation by issuing right to sue letters to plaintiffs. These amendments to Title VII made it clear that "Congress intended to improve the economic status of blacks"²² by using affirmative action.

While President Johnson, the Supreme Court of the United States, and Congress all showed approval of a movement towards the use of affirmative action plans from 1964 to 1972, it was unclear whether private employers could voluntarily adopt affirmative action plans until the Supreme Court decided *United Steelworkers of America v. Weber*²³ in 1979. The Supreme Court in *Weber* answered this question when it held that a private employer could use affirmative action without violating Title VII if the plan was justified by a manifest imbalance in traditionally segregated job categories.²⁴

In *Weber*, the United Steelworkers of America (USWA) and Kaiser Aluminum and Chemical Corporation (Kaiser) entered into a collective bargaining agreement that included "an affirmative action plan designed to eliminate conspicuous racial imbalances in Kaiser's then almost exclusively white craftwork forces."²⁵ The plan included reserving fifty percent of in-plant training programming positions for blacks until the percentage of blacks employed by Kaiser equaled the percentage of the black population in the Gramercy, Louisiana area.²⁶ During the first year the plan was in place, Brian Weber filed suit alleging that the plan violated the provisions of Title VII because it

21. 92 U.S.C. 261 (1972).

22. TAYLOR, *supra* note 3, at 23.

23. 443 U.S. 193 (1979).

24. *Id.* at 197.

25. *Id.* at 198. Until this 1974 agreement, Kaiser only hired persons with craft experience. Since so few blacks were able to gain experience in the field due to discrimination, blacks were virtually excluded from Kaiser's work force.

26. *Id.* The percentage of blacks in the Gramercy area at this time was 39%.

gave preferential treatment to blacks, thus discriminating against Weber and other white employees because of their race.²⁷

The district court held that Kaiser's plan violated Title VII, and granted a permanent injunction that prohibited Kaiser and the USWA from continuing to use the affirmative action plan.²⁸ On appeal, the district court holding was affirmed by the Fifth Circuit Court of Appeals,²⁹ which reasoned that even if the affirmative action plan that gave employment preferences to blacks was bona fide (a legitimate attempt to end discrimination), the plan still violated Title VII's prohibition against racial discrimination in employment.³⁰

In reversing the district court and the court of appeals, the Supreme Court of the United States found that the "purposes of the Kaiser-USWA plan mirror those of the statute."³¹ Both Title VII and the Kaiser plan were designed to put an end to past discrimination and to open employment opportunities for blacks.³² Specifically, the Court held that "Title VII's prohibition . . . against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans."³³ For the first time, the Supreme Court made it abundantly clear that private employers could use voluntarily adopted affirmative action plans without violating the provisions of Title VII. As long as the plan was designed to remedy the effects of past discrimination, the Court would uphold the plan under Title VII. By reaching this conclusion, the Court sent the message that discriminatory practices must come to an end. If employers were willing to take voluntary action towards ending discrimination, the Supreme Court was willing to support these efforts.

The question of whether voluntarily adopted affirmative action plans violated Title VII was again presented to the Supreme Court eight years after *Weber* when the Court decided *Johnson v. Transportation Agency, Santa Clara County, California*.³⁴ Once again, the Court held that affirmative action plans, voluntarily adopted by employers, which effected a gradual improvement in the representations of minorities and women in the work force, followed the intent of Title VII's enactment, and thus did not violate Title VII provisions.³⁵

27. *Id.* at 199.

28. *Weber v. Kaiser Aluminum & Chemical Corp.*, 415 F. Supp. 761 (E.D. La. 1976).

29. 563 F.2d 216 (5th Cir. 1977).

30. *Id.* at 226.

31. *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979).

32. *Id.*

33. *Id.*

34. 480 U.S. 616 (1987).

35. *Id.*

182 NORTH CAROLINA CENTRAL LAW JOURNAL [Vol. 22:177]

In *Johnson*, the plaintiff challenged the promotion of a female applicant over him when gender was used as a factor in the promotion decision.³⁶ The Transportation Agency (Agency) had adopted an affirmative action plan that allowed consideration of the gender of a qualified applicant when making promotions in job classifications in which women had been significantly underrepresented in the past.³⁷ Johnson filed a complaint with the EEOC claiming a violation of Title VII, alleging that he was denied a promotion because of his gender. After the EEOC issued Johnson a right to sue letter, he filed suit in the United States District Court for the Northern District of California. The Agency was found to be in violation of Title VII.³⁸

The Ninth Circuit Court of Appeals rejected the lower court's finding that a Title VII violation had occurred and reversed the lower court's order of retroactive promotion and pay raise to Johnson.³⁹ The court reasoned that the plan did not violate Title VII because it "was a lawful effort to remedy an entrenched pattern of manifest imbalance."⁴⁰ On appeal, the Supreme Court affirmed the decision of the Ninth Circuit.⁴¹

In making its decision, the Court again focused on Congress' intent when it enacted Title VII. In the majority opinion, Justice Brennan wrote "we must be mindful of this Court's and Congress' consistent emphasis on the value of voluntary efforts to further the objectives of [Title VII]."⁴² The Court then reasoned that "affirmative action plan[s] that represent a moderate, flexible, case by case approach to effectuating a gradual improvement in the representations of minorities and women . . . [are] fully consistent with Title VII."⁴³

The Supreme Court decisions in *Weber* and *Johnson* show that the Court was willing to accept the use of affirmative action plans under Title VII. Affirmative action plans arising out of conscious efforts to remedy the effects of past discrimination by society as a whole were repeatedly upheld under Title VII by the courts. When ruling on challenges to affirmative action plans, the Court correctly looked at Congress' intent when it enacted Title VII. Congress intended to provide minorities and women with a means to achieve the goal of ending years of discrimination. The Supreme Court decisions in *Weber* and *Johnson* are consistent with this goal.

36. *Id.* at 619. Both the plaintiff and Diane Joyce applied for a promotion to road dispatcher for the Agency.

37. *Id.* at 620-21.

38. This opinion is unreported.

39. *Johnson v. Transp. Agency, Santa Clara County, California*, 770 F.2d 752 (9th Cir. 1985).

40. *Id.* at 759.

41. *Johnson v. Transp. Agency, Santa Clara County, California*, 480 U.S. 616 (1987).

42. *Id.* at 640. (citations omitted)

43. *Id.* at 642.

C. *Affirmative Action and the Equal Protection Clause of the Fourteenth Amendment*

When a challenge to an affirmative action plan is brought under the Equal Protection Clause of the Fourteenth Amendment,⁴⁴ the highest level of scrutiny, strict scrutiny,⁴⁵ is applied by the courts. This strict judicial scrutiny analysis was established by the United States Supreme Court in *City of Richmond v. J.A. Croson Co.*⁴⁶ The first prong of this test requires that the governmental proponent of an affirmative action plan show a compelling governmental interest in remedying the present effects of its own past discrimination.⁴⁷ The second prong requires that the remedial measure be narrowly tailored to meet its remedial goal.⁴⁸

In *Croson*, the City of Richmond implemented an affirmative action plan that required prime contractors who had been awarded city construction contracts to subcontract at least thirty percent of the contract amount to Minority Business Enterprises (MBE's).⁴⁹ This plan was challenged by local contractors. The Court determined that both prongs of this two-tiered strict scrutiny analysis had to be met in order for affirmative action plans to be deemed constitutional when challenged under the Equal Protection Clause. The Court reasoned that there must be some identifiable compelling governmental interest in order to "smoke out illegitimate uses of race" . . . and to ensure that "the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."⁵⁰

The Court found that the City of Richmond failed to meet the first prong of the strict scrutiny test. The Court reasoned that the City of Richmond failed to provide any evidence that it was involved in any past discrimination in the construction industry.⁵¹ The Court stated that "a [mere] lack of opportunities for black entrepreneurs . . . stand-

44. U.S. CONST. amend. XIV. The amendment provides that all persons born or naturalized in the United States shall not have their privileges and immunities as citizens of the United States abridged by any State, nor shall any State deprive a person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

45. In situations involving the deprivation of rights guaranteed by the United States Constitution, courts will apply the highest level of scrutiny and in order to be deemed constitutional, there must be some compelling governmental interest that deserves to outweigh the rights of the individual.

46. 488 U.S. 469 (1989).

47. *Id.* at 497.

48. *Id.* at 507.

49. *Id.* at 477. Minority Business Enterprises are businesses in which minorities make up 50% or more of the ownership.

50. *Id.* at 493.

51. *Id.* at 499.

ing alone cannot justify a rigid racial quota in the awarding of public contracts"⁵² In addition, "[any] generalized assertion that there has been past discrimination in an entire industry cannot justify the use of an unyielding racial quota, since it provides no guidance . . . to determine the precise scope of the injury it seeks to remedy and would allow race-based [remedies] . . . limitless in scope and duration."⁵³

The Court found that the affirmative action plan also failed the second prong of the strict scrutiny test,⁵⁴ which requires that the remedial measure be narrowly tailored⁵⁵ to meet its remedial goal. The Court determined that since Richmond's goal was to remedy the effect of past discrimination in the Richmond area, the plan was not narrowly tailored since it entitled Black, Hispanic, or Asian entrepreneurs from all over the United States, not just in the Richmond area, an absolute preference over other citizens.⁵⁶ The Court also found that there was "absolutely no evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons,"⁵⁷ and including these groups in the plan "strongly impugns the city's claim of remedial motivation."⁵⁸ Because the Richmond plan failed to identify the need for remedial action in its procedure for awarding public construction contracts, the plan was held unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.⁵⁹

D. Summary

When Congress enacted the Civil Rights Act of 1964, a movement began in the United States to use affirmative action plans to put an end to discrimination against minorities and women. In 1979, the United States Supreme Court explicitly indicated that private employers could voluntarily adopt affirmative action plans without violating Title VII, when such plans were necessary to remedy manifest imbalances in traditionally segregated job categories. Once a Title VII violation is alleged, the proponent of an affirmative action plan need only show that the plan is an attempt to remedy the effects of past discrimination by society as a whole.

52. *Id.*

53. *Id.* at 470.

54. *Id.* at 506.

55. *Id.* at 493. In order for the plan to be considered narrowly tailored, it must be found to be the least intrusive on the rights of those affected outside the "preferred group."

56. *Id.* at 507-08.

57. *Id.* at 506.

58. *Id.*

59. *Id.* at 511.

Once a plaintiff alleges a violation of the Equal Protection Clause of the Fourteenth Amendment, the proponent of the plan must then pass the two-pronged strict scrutiny test adopted by the United States Supreme Court in *Croson*. First, the proponent must show the affirmative action plan is an attempt to remedy the effects of its *own* past discrimination thus serving a compelling governmental interest. The proponent must then show that this remedial plan is narrowly tailored to achieve its remedial goal. Clearly, when the violation is alleged under the Fourteenth Amendment, the proponent of an affirmative action plan has a much more difficult burden to overcome than when there is an allegation that Title VII is being violated.

PART III. AFFIRMATIVE ACTION AND EDUCATION

Similar to public and private employers, colleges and universities around the United States have also implemented a variety of affirmative action plans to encourage minority enrollment at their schools. These higher education institutions, like employers, have also been subjected to several challenges to their affirmative action plans.

A. *Title VI of the Civil Rights Act of 1964*

In the educational setting, the constitutional challenge is usually brought under the Equal Protection Clause of the Fourteenth Amendment⁶⁰ and a statutory challenge is brought under Title VI of the Civil Rights Act of 1964 (hereinafter Title VI).⁶¹ Title VI provides that “[n]o person in the United States shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving *Federal financial assistance*.⁶²

The leading case in the area of Title VI and affirmative action is *Regents of University of California v. Bakke*.⁶³ In *Bakke*, a white male applicant who was twice denied admission to the Medical School of the University of California at Davis (hereinafter “Davis”) filed suit against Davis claiming violations of the California State Constitution, Title VI, and the Equal Protection Clause of the Fourteenth Amendment.⁶⁴

Davis instituted a special admission program effective for the class entering in 1973. The program was designed to “increase the repre-

60. U.S. CONST. amend. XIV; See also *supra* text accompanying note 44.

61. 42 U.S.C. § 2000d (1988).

62. *Id.* (emphasis added).

63. 438 U.S. 265 (1978).

64. 553 P.2d 1152 (Cal. 1976), *aff'd in part*, 438 U.S. 265 (1978).

sensation of 'disadvantaged' students in each Medical School class."⁶⁵ In essence, the plan provided that sixteen of 100 spots in each entering class would be reserved for disadvantaged minorities.⁶⁶ The evidence submitted to the Court indicated that students admitted under this special admissions program in 1973 and 1974, the years that Bakke was denied admission, scored significantly lower than Bakke in all categories used by Davis in making its admission selections.⁶⁷ The record also showed that although several white students requested that their applications be considered under the special admission program, no white students were admitted under the plan.⁶⁸

The trial court found that Davis' program was unconstitutional, but refused to order the university to admit Bakke. On appeal, the California Supreme Court affirmed the lower court's conclusion that, although the program served a compelling state interest of integrating the medical profession, the program was not the least intrusive means of achieving this goal and as such, was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.⁶⁹ The court also ordered Davis to admit Bakke into the medical school.⁷⁰

The Supreme Court of the United States upheld the California court's decision that the Davis program was unconstitutional, and ordered Davis to admit Bakke to the medical school.⁷¹ More importantly, the Court reversed the lower court's ruling that race could not be used as a factor in Davis' admission selections.⁷² This is important because it shows the Court's awareness that the main reason for the enactment of the Civil Rights Act of 1964 was to assist minorities. If employers and colleges had not taken race into account in such discriminatory manner in the past, there would have been no need for the Civil Rights Act of 1964. However, as our recent history and even the present has shown us, race is still taken into account in a discriminatory fashion in some instances.

Although neither the trial court nor the California Supreme Court addressed the Title VI violations alleged by Bakke, the Supreme Court felt it useful to look to this statute in making its decision. The

65. *Bakke*, 438 U.S. at 272. (citations omitted). Not one of the opinions provides a complete description of the special admission program as distributed by Davis with its admission applications.

66. *Id.* at 274-75.

67. *Id.* at 277.

68. *Id.* at 276.

69. *Regents of the University of California v. Bakke*, 553 P.2d 1152 (Cal. 1976), *aff'd in part*, 438 U.S. 265 (1978).

70. *Id.* at 1172.

71. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

72. *Id.* at 272.

Court primarily focused on the legislative intent in enacting Title VI.⁷³ In the opinion written by Justice Powell, the *Bakke* Court indicated that “[e]xamination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution.”⁷⁴ The Court further noted that “[a]lthough isolated statements of various legislators taken out of context, can be marshaled in support of the proposition that [Title VI] enacted a clearly color-blind scheme . . . [t]he problem confronting Congress [in enacting Title VI] was discrimination against Negro citizens”⁷⁵ As one legislator emphasized in introducing the bill:

The bill would offer assurance that hospitals financed by Federal money would not deny adequate care to Negroes. . . . It would *assure Negroes the benefits now accorded only to white students in programs of higher education financed by Federal funds* It would, in short, assure the existing right to equal treatment in the enjoyment of Federal funds⁷⁶

The Supreme Court concluded that “in view of [this] clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection component of the Fifth Amendment.”⁷⁷ Thus, Title VI challenges are held to the same level of scrutiny as constitutional challenges under the Fourteenth Amendment. As we saw in *Bakke* and eleven years later in *Croson*, in order for an affirmative action plan subject to Title VI regulations to meet a constitutional challenge, the plan must be necessary to serve a compelling state interest, and it must also be narrowly tailored to achieve this goal.

B. Summary

The United States Supreme Court decision in *Bakke* implies that affirmative action plans implemented by institutions receiving federal assistance can be held constitutional under Title VI. However, when these plans employ classifications based solely on race or gender, they face a higher level of scrutiny than used with Title VII affirmative action plans that are voluntarily adopted by private employers.

Under Title VI, not only must the proponent of the affirmative action plan show some evidence of prior discrimination, but the discrimination must be perpetuated by this particular college or employer. If

73. 110 Cong. Rec. 1519 (1964).

74. *Bakke*, 438 U.S. at 284.

75. *Id.* at 284-85.

76. *Id.* (quoting Rep. Cellar, Chairman of the House Judiciary Committee and floor manager of the legislation in the House) (emphasis added).

77. *Id.* at 287.

the college or employer is able to show this prior discrimination, it must then show that the plan is narrowly tailored to achieve this goal. The proposed plan must be a "tight fit"⁷⁸ with the intended goals of this particular proponent in remedying the present effects of past discrimination.

PART IV. AFFIRMATIVE ACTION AND EDUCATION TODAY

Two recent federal court decisions focused on affirmative action plans in the higher educational setting. The first case involved white students challenging an affirmative action plan implemented by the University of Texas School of Law. The second case involved an Hispanic student's challenge to a scholarship program instituted solely for the benefit of African-American students at the University of Maryland at College Park. Although the courts were presented with sufficient evidence of past discriminatory practices by both institutions that gave rise to some present effects of discrimination, both plans were deemed unconstitutional by their respective courts.

A. *Hopwood v. Texas*

Since the 1978 Supreme Court decision in *Bakke*, several plaintiffs have challenged affirmative action plans at colleges and universities in the United States. More recently, the United States District Court for the Western District of Texas decided *Hopwood v. Texas*.⁷⁹ In *Hopwood*, white students who were denied admission to the University of Texas School of Law filed suit to challenge the law school's affirmative action plan giving preferential treatment to minorities. The students alleged that the plan "discriminated against them by favoring less qualified Black and Mexican American applicants . . . through the use of a quota system."⁸⁰

In determining whether the affirmative action plan could survive the two-tiered strict scrutiny test, the court first examined Texas' prior discriminatory history to ascertain if there was a compelling governmental interest that justified remedial measures. The court noted that "Texas [had a] long history of discrimination against blacks and Mexican Americans in public education that [was well documented]"⁸¹ and found that "the effects of the state's past de jure segregation"⁸² was

78. See *United States v. Paradise*, 480 U.S. 149, 171 (1987) (listing factors considered by the court when determining whether an affirmative action plan is a tight fit with the remedial goal).

79. 861 F. Supp. 551 (W.D. Tex. 1994).

80. *Id.* at 553.

81. *Id.* at 572.

82. BLACK'S LAW DICTIONARY 425 (6th ed. 1990) (de jure segregation is segregation that is intended or mandated by law).

reflected in the low enrollment of minorities in professional schools, including the law school.”⁸³ Having found this strong evidence of present effects of past discrimination, the court determined that the law school’s affirmative action program did serve a compelling governmental objective.⁸⁴

Next, the court examined whether the plan could survive the second prong of the strict scrutiny test. The court concluded that the plan was constitutionally infirm because of the school’s method of making its selection comparisons.⁸⁵ The plan failed because it did not afford each individual applicant a comparison with the entire applicant pool, and allowed some minority applicants to be admitted solely because of race.⁸⁶ The court held “this is the aspect of the procedure that is flawed, and must be eliminated.”⁸⁷ Although the court found there was a compelling governmental interest to remedy the effects of past discrimination in Texas, the law school’s plan was not narrowly tailored to achieve its remedial goal.

Hopwood follows a long line of cases that challenged the constitutionality of affirmative action plans under Title VI of the Civil Rights Act of 1964.⁸⁸ Courts have consistently applied the strict scrutiny analysis used in *Bakke* and *Croson* to determine whether these plans are constitutional. Recently, there has been a movement to abolish affirmative action plans all together.⁸⁹ Many individuals feel there is no longer a need for preferential treatment for minorities because discrimination is no longer present in the United States, and there are no present effects from past discrimination. However, as the facts revealed in *Hopwood* and in a recent Maryland case, *Podberesky v. Kirwan*,⁹⁰ these beliefs could not be further from the truth.

83. *Hopwood*, 861 F. Supp. at 572.

84. *Id.* at 573.

85. *Id.* at 578-79.

86. *Id.* at 579.

87. *Id.*

88. See also *Washington Legal Found. v. Alexander*, 984 F.2d 183 (D.C. Cir. 1993) (white college and law students challenged race-based scholarships under Title VI); *Geir v. Alexander*, 801 F.2d 799 (6th Cir. 1986) (challenge to racial quota preferring minority students); *Davis v. Haipern*, 768 F. Supp 968 (E.D.N.Y. 1991) (white student not admitted to State University of New York Law School challenged affirmative action plan under Title VI and Equal Protection Clause of the Fourteenth Amendment).

89. See Sonya Ross, *Dole Bill Takes On Affirmative Action*, THE DURHAM HERALD SUN, July 28, 1995, at A7. Over the past year, several articles have appeared in major newspapers and legal magazines and journals that call for a complete prohibition against affirmative action in all areas, including education. The Board of Regents of California recently abolished affirmative action in state-run colleges and universities. In the author’s opinion, much of this anti-affirmative action has come about since the Republicans have gained control of Congress led by House Speaker Newt Gingrich.

90. 38 F.3d 147 (4th Cir. 1994).

B. *Podberesky v. Kirwan*

In *Podberesky*, Daniel Podberesky enrolled as a freshman at the University of Maryland, College Park (hereinafter "University") in 1990.⁹¹ Before entering the University, Podberesky applied for two different scholarship programs available at the University, The Banneker Scholarship and the Francis Scott Key Scholarship.⁹² Since Podberesky failed to meet the eligibility requirements for the Key program, it will not be discussed in this comment.

The Banneker Scholarship was a four-year scholarship awarded to African-American high school seniors based on merit.⁹³ The scholarship entitled the recipient to full tuition, room, board, and other mandatory fees.⁹⁴ At that time, the minimum eligibility requirements to be considered for a Banneker scholarship were a 900 on the Scholastic Achievement Test (SAT) and a 3.0 grade point average.⁹⁵ This program was implemented by the state of Maryland as part of a six-year plan used by the State to bring its higher education institutions in compliance with Title VI.⁹⁶ Because Podberesky was Hispanic, he was not considered for the scholarship.

After being denied a scholarship, Podberesky filed suit claiming a violation of Title VI of the Civil Rights Act of 1964.⁹⁷ Podberesky claimed that because he met all the academic requirements for a Banneker scholarship, he was discriminated against because he was not an African-American.⁹⁸ The University argued that this affirmative action plan was implemented by the State, in conjunction with the Office of Civil Rights, to bring the higher education system in Maryland in compliance with Title VI.⁹⁹ The school articulated that "[t]he aim of the program was to increase the representation of historically under-represented racial groups at public higher education institutions in Maryland."¹⁰⁰

The district court granted summary judgment for the University, and Podberesky appealed the decision to the Fourth Circuit Court of Appeals.¹⁰¹ The court of appeals remanded the case for further findings as to whether there was sufficient evidence of present effects of

91. *Id.* at 152.

92. *Id.*

93. *Podberesky v. Kirwan*, 764 F. Supp. 364, 366 (D. Md. 1991).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 367.

100. *Id.*

101. *Podberesky v. Kirwan*, 956 F.2d 52 (4th Cir. 1992).

past discrimination that required remedial measures.¹⁰² On remand, the district court again found that the Banneker program was necessary to remedy the effects of past discrimination, and that the plan was narrowly tailored to achieve this goal.¹⁰³ The court found four present effects of past discrimination, any one of which standing alone would warrant remedial measures.¹⁰⁴ These four present effects were: 1) the University's poor reputation in the African-American community; 2) African-American underrepresentation at the University; 3) low retention rate of African-Americans who did enroll; and 4) the hostile environment towards African-Americans on the University's campus.¹⁰⁵

Podberesky again appealed the district court's decision to the Fourth Circuit Court of Appeals. The court of appeals, applying the *Croson* strict scrutiny analysis,¹⁰⁶ reversed the district court's decision. The court first questioned whether a compelling governmental interest in remedying the effects of past discrimination existed, and whether this plan was narrowly tailored to meet its goal. It concluded that the district court erred in determining that the University met its burden of proof on both prongs of the strict scrutiny test.¹⁰⁷

The court of appeals determined that in order "[t]o have a present effect of past discrimination sufficient to justify the program, the party seeking to implement the program must . . . prove that the effect . . . [was] caused by past discrimination and [was] of sufficient magnitude to justify the program."¹⁰⁸ The court looked at the present effects articulated by the University to determine if these effects were actually present and warranted remedial measures.¹⁰⁹

Of the four factors articulated by the University as providing evidence of effects of past discrimination, the court of appeals determined that the lower court erred in finding that the first and fourth factors, standing alone, gave rise to a compelling governmental interest in seeking remedial measures.¹¹⁰ The first factor was the University's poor reputation in the African-American community, and the fourth factor was a racially hostile climate on the campus. The court reasoned that "mere knowledge of [the] historical fact [of past dis-

102. *Id.* at 53.

103. *Podberesky v. Kirwan*, 83 F. Supp. 1075 (D. Md. 1993).

104. *Id.* at 1076.

105. *Id.*

106. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). In *Croson*, the Supreme Court adopted the plurality opinion of the Court in *Wygant v. Jackson Board of Educ.*, 476 U.S. 267 (1987).

107. *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995).

108. *Id.* at 153.

109. *Id.* at 154.

110. *Id.*

192 NORTH CAROLINA CENTRAL LAW JOURNAL [Vol. 22:177]

crimination by the University] is not the kind of present effect that can justify a race-exclusive remedy.”¹¹¹ In addition, the court found no connection between the hostile-climate effect and the past discrimination.¹¹²

The court also determined that the second and third factors articulated by the University as effects of past discrimination, underrepresentation and low retention rates, fell short of providing a compelling governmental interest.¹¹³ However, the court of appeals reversed the lower court’s summary judgment on these two factors.¹¹⁴ Podberesky offered evidence to show that these effects were the result of economics rather than past discrimination.¹¹⁵ Under Rule 56 of the Federal Rules of Civil Procedure, the facts must be considered in a light most favorable to the non-moving party and cannot, as a matter of law, be granted when there is a genuine issue of material fact. Here, the evidence provided by Podberesky created a genuine issue of material fact and thus, as a matter of law, summary judgment should not have been granted.

Even though the court of appeals found the University’s plan failed the first prong of the strict scrutiny test, it also determined that the second prong was not met as well. The court found that the program was not narrowly tailored because out-of-state residents were also eligible for the Banneker scholarship.¹¹⁶ In order to be narrowly tailored, the court reasoned that the Banneker program should only be available to African-Americans in the Maryland area.¹¹⁷ In addition, the court found that the program was geared towards attracting “high achievers,” and as such it was not narrowly tailored because “[h]igh achievers, whether African-American or not, are not the group against which the University discriminated in the past.”¹¹⁸

The court of appeals held that the Banneker plan was unconstitutional.¹¹⁹ In addition, the court ordered the University to remove the African-American descent requirement for the Banneker scholarship, and required the University to reconsider Podberesky’s eligibility for that scholarship.¹²⁰ The United States Supreme Court recently denied writ of certiorari on this case.¹²¹

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 155.

115. *Id.* at 156.

116. *Id.* at 158.

117. *Id.* at 159.

118. *Id.* at 158.

119. *Id.* at 162.

120. *Id.*

121. *Podberesky v. Kirwan*, 115 S. Ct. 2001 (1995).

C. *Past Supreme Court Decisions on Affirmative Action*

In making its decisions in cases involving affirmative action under the Civil Rights Act of 1964, the Supreme Court always emphasized the importance of looking to Congress' intent in passing the Act. In *Weber*, the Court clearly indicated that affirmative action plans can survive in the face of Title VII. In that decision, the Court specifically stated that "Title VII's prohibition . . . against racial discrimination *does not* condemn all private, voluntary, race-conscious affirmative action plans."¹²²

Some years later, the Supreme Court in *Johnson* indicated how important it was "[to] be mindful of the Court's and Congress' consistent emphasis on the value of voluntary efforts to further the objectives of [Title VII]."¹²³ Most importantly, the Supreme Court in *Bakke* indicated that "[a]lthough isolated statements of various legislators taken out of context, can be marshaled in support of the proposition that [Title VI] enacted a clearly color-blind scheme . . . [t]he problem confronting Congress [in enacting Title VI] was discrimination against Negro citizens"¹²⁴ As indicated in the opinions by the Supreme Court and by the intent of Congress, the goal of Title VII and affirmative action was to assist African-Americans in their battle against racial discrimination.

D. *Analysis of the Hopwood and Podberesky Decisions.*

In 1994, thirty years after the Civil Right Act of 1964 was passed and fourteen years after the *Bakke* decision, our judicial system was faced with deciding *Hopwood* and *Podberesky*. In both cases, the respective courts properly determined that the application of the two-pronged strict scrutiny analysis used by the United States Supreme Court in *Bakke* was necessary. However, both courts erred to some degree in their analysis and application of the facts to the strict scrutiny test.

1. Compelling Governmental Interest

In order to pass the first prong of the strict scrutiny test, the proponent of an affirmative action plan must show a compelling governmental interest in remedying the present effects of its own past discrimination.¹²⁵ The proponents of the affirmative action plans in *Hopwood* and *Podberesky* both presented evidence of present effects

122. *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979) (emphasis added).

123. *Johnson v. Transp. Agency, Santa Clara County, California*, 480 U.S. 616 (1987).

124. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 284-85 (1978) (emphasis added).

125. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 470 (1989).

194 NORTH CAROLINA CENTRAL LAW JOURNAL [Vol. 22:177]

of past discrimination in higher education by their respective state. Unlike the court in *Podberesky*, the *Hopwood* court found that the University met the first prong of the *Croson* strict scrutiny test.

In *Hopwood*, the United States District Court for the Western District of Texas took notice of "Texas' long history of discrimination against blacks and Mexican Americans in public education"¹²⁶ that was well documented. It found that "the effects of the state's past de jure segregation [were] reflected in the low enrollment of minorities in professional schools, including the law school."¹²⁷ Noting Texas' long history of discrimination, it is fair to say that more than a handful of minority students had been turned away from this law school in the past, not because of sub par academic qualifications, but simply because of the color of their skin. Given the magnitude of Texas' discriminatory past, the court properly held that the law school's plan was necessary to serve a compelling governmental interest of integrating Texas' educational system.

In *Podberesky*, the University also presented to the court competent evidence of present effects of past discrimination. The discrimination in Maryland's higher education system was similar to that found in *Hopwood* because both states maintained racially separated school systems.¹²⁸ In particular, the University of Maryland at College Park articulated four present effects of past discrimination: poor reputation in the African-American community, underrepresentation, low retention rate of African-Americans, and a hostile environment on the University's campus.¹²⁹

The Banneker program had been implemented by the State of Maryland after the Office of Civil Rights determined that Maryland's higher educational system was not in compliance with Title VII and threatened to initiate formal proceedings against the University.¹³⁰ This determination came in 1980,¹³¹ over fifteen years after the Civil Rights Act of 1964 was passed. The scholarship was part of an overall plan to ensure that Maryland was in compliance with Title VII regulations.

126. *Hopwood v. Texas*, 861 F. Supp. 551, 572 (W.D. Tex. 1994).

127. *Id.*

128. *Id.* at 554. The court discussed Texas' long history of discrimination in higher education against minorities and noted that the state constitution and statutes required separate schools. See also *Podberesky v. Kirwan*, 956 F.2d 52, 54 (4th Cir. 1992) (indicating the state of Maryland maintained separated higher education institutions where blacks were limited to attending one of four black colleges, Bowie State, Coppin State, Morgan State, and the University of Maryland, Eastern Shore).

129. *Podberesky v. Kirwan*, 956 F.2d 52, 53 (4th Cir. 1992).

130. *Id.*

131. *Id.*

Podberesky argued there was no compelling governmental interest requiring remedial measures because the present effects articulated by the University were not due to discrimination, but to economic factors such as unemployment and low paying jobs.¹³² A more logical reason for the school's poor reputation in the community would be that those African-Americans who suffered from bad experiences at the University of Maryland relayed this information to others. In addition, some of the unemployment and low wage positions in the African-American community could be attributed to discriminatory practices at the University.

Where did this poor reputation come from? It did not arise due to some low economic status as Podberesky would have us believe. It is more probable that the poor reputation was gained from those African-Americans who enrolled at the University in the past only to be met with the hostile environment that lingered from past discriminatory practices. This in turn would lead to fewer individuals attending the University, and the school's lower retention rates for African-American students.

The *Podberesky* court failed to examine the totality of the circumstances, which undoubtedly played a major role in the *Hopwood* decision. Maryland, as well as many other states, perpetuated a pattern of discrimination against minorities long after the emancipation of slaves. As noted by the court, this Banneker plan was implemented by the State of Maryland only after a finding of noncompliance with Title VI regulations promulgated by the Office of Civil Rights. The Office of Civil Rights determined that for years African-Americans had been denied employment, promotions, entrepreneurial opportunities, and education in Maryland simply because they were African-American. This is the type of discrimination Congress intended to remedy in passing the Civil Rights Act of 1964, and the Banneker scholarship was just another means of accomplishing this goal. As the *Hopwood* court and the United States Supreme Court have found,¹³³ present effects of past discrimination do give rise to a compelling governmental interest which deserves remedial measures. Thus, the *Podberesky* court erred in determining that the University failed to meet the first prong of the strict scrutiny test.

It is important to note that the present effects articulated by the University of Texas School of Law and the University of Maryland were found in 1994, over *thirty years* after the passage of the Civil

132. *Podberesky v. Kirwan*, 38 F.3d 147, 156 (4th Cir. 1994).

133. See *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 369 (1978) (Blackmun, J., concurring in the judgment in part and dissenting in part stated, "We therefore conclude that Davis' goal of admitting minority students disadvantaged by the effects of past discrimination is sufficiently important to justify the use of race-conscious admission criteria.")

Rights Act of 1964. Those individuals who argue there is no longer a need for affirmative action for minorities and women in our society should take a closer look at the facts presented in *Hopwood* and *Podberesky*.

2. Narrowly Tailored

The second prong of the strict scrutiny test requires that the remedial measure be narrowly tailored to meet its remedial goal.¹³⁴ In both *Hopwood* and *Podberesky*, the affirmative action plans used race conscious remedies in order to combat the effects of past discrimination in each state's higher education system. The University of Texas plan gave preferential treatment to African-Americans and Hispanics, while the University of Maryland plan gave preferential treatment to African-Americans only. For the following reasons, both courts erred in their determinations that these affirmative action plans were not narrowly tailored to achieve their remedial goal.

In order to be narrowly tailored, the plan must have a "tight fit" with the remedial goal. In *Hopwood*, the University of Texas' goal was to combat the years of constitutional and statutory discrimination perpetuated by the state against minorities in higher education. The same was true in *Podberesky*, where the state of Maryland implemented its plan in order to combat the effects of documented discriminatory practices against African-Americans. In order to achieve these goals, the only effective alternative was some type of race conscious remedy. As the Supreme Court has consistently stated in decisions regarding remedial measures for past discrimination, "racially neutral remedies for past discrimination [are] inadequate where consequences of past discriminatory acts influence or control present decisions."¹³⁵ In both the *Hopwood* and *Podberesky* cases, past discriminatory acts influenced current decisions.

Although both courts held that the affirmative action plans were not narrowly tailored, in neither case would a race-neutral solution have been as effective as the plans implemented by the schools. The district court in *Hopwood* did not provide any race neutral alternatives that would justify its conclusion that the law school's plan was not narrowly tailored.¹³⁶ One possible reason for this omission is that no effective race-neutral remedy exists.

134. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 470 (1989).

135. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 312 F. Supp. 503 (W.D.N.C. 1970); *Davis v. School Comm'rs of Mobile County*, 402 U.S. 33 (1971); *McDaniel v. Barres*, 402 U.S. 39 (1971); *North Carolina Bd. of Educ. v. Swann*, 402 U.S. 43 (1971).

136. *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994). The *Hopwood* court did not provide any reasons to explain its decision that the law school's plan was not narrowly tailored

In *Podberesky*, the court articulated two reasons why the University's plan failed the second prong of the strict scrutiny test. First, the court found that the Banneker plan was geared towards attracting "high achievers," and as such, it was not narrowly tailored because "[h]igh achievers, whether African-American or not, are not the group against which the University [has] discriminated in the past."¹³⁷ This statement is equivalent to saying that African-Americans are usually not high achievers, and that the plan, by seeking out "high achieving" African-Americans, furthers a different objective than its claimed remedy. It would appear that the court itself harbors some stereotypical ideas regarding the intelligence of African-Americans.

The court's holding in *Podberesky* also implies that African-Americans with good academic standing had been accepted on a regular basis by the University in the past. The facts, as they were presented, indicate quite the contrary. The evidence depicted a pattern of blatant racial discrimination against *all* African-Americans by the University, regardless of grade point average and standardized test scores. One can readily conclude that a number of "high achieving" students, who happened to be African-American, were turned away by Maryland's higher education institutions in the past simply because of their race. The Banneker plan would have been an effective means for the University to achieve its remedial goal. The plan was narrowly tailored because it was designed to attract quality African-American students, a group that traditionally has been discriminated against.

The second reason supplied by the *Podberesky* court also fails to support the conclusion that the Banneker scholarship was not narrowly tailored. The court reasoned that because the University's goal was to remedy the effects of past discrimination against African-Americans in Maryland, the plan overreached its goal by allowing out-of-state students access to the scholarship.¹³⁸ Once again, the court's perception has gone awry.

Most universities attract individuals from across the United States as well as abroad. Therefore, it is unlikely that the University had a policy of discriminating against African-Americans from Maryland, and not those from other states or countries. By allowing all African-American students to apply for the Banneker scholarship, the University furthered its objective of remedying the effects of past discrimination against all African-Americans in Maryland's higher education system.

because race may be the sole factor in admission of some minorities. The court felt this alone made the plan unconstitutional.

137. *Podberesky*, 38 F.3d at 158.

138. *Id.* at 159.

It appears that the *Podberesky* court was determined to find the Banneker Scholarship plan unconstitutional in any event. However, the reasons articulated by the court simply cannot support such a conclusion. For hundreds of years, African-Americans have been discriminated against solely because of their race. During this time, whites in America have had an advantage in all aspects of life. If we are ever to achieve equality among the races, the scales must be tipped in favor of minorities for more than just a few decades. As the late Justice Thurgood Marshall wrote in his dissent in *Bakke*:

It is because of a legacy of unequal treatment that we must now permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. *If we are ever to become a fully intergrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors. I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible.*¹³⁹

Justice Marshall penned this statement seventeen years ago, yet the wisdom of these words still holds today. Race neutral remedies cannot effectuate the intended goal of Congress in passing the Civil Rights Act of 1964. However, race conscious affirmative action plans overcoming strict scrutiny are effective in bringing about a remedial goal, and should never be deemed impermissible.

PART V. CONCLUSION

When Congress enacted the Civil Rights Act of 1964, it was clear that its intent was to assist minorities in ending years of discrimination in employment and education. It has been over thirty years since the Act was passed, but the effects of past discrimination are still prevalent in our society. The use of affirmative action has been the single most effective tool employed by businesses, schools, and individuals to combat discrimination and its effects. The author would gladly welcome the day when individuals are judged not by the color of their skin, but by their skills and qualifications. However, I do not believe this will come about in my lifetime.

For those individuals who say there is no longer a need for affirmative action, I can only point them to the *Hopwood* and *Podberesky* cases. These decisions make it abundantly clear that even though Congress outlawed discrimination in 1964, the effects of years of dis-

139. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 401-02 (1978) (Marshall, J., dissenting) (emphasis added).

crimination are still apparent some thirty years later. It is not my position that we should have blanket affirmative action in every city, town, or state; however, there should be a case-by-case analysis to determine if affirmative action is necessary. In situations like those examined in *Hopwood* and *Podberesky*, affirmative action is clearly a must. The white majority has had an overall advantage in the United States for hundreds of years; therefore, the United States as a whole should continue to take "affirmative" steps to completely close the gap.

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