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## AFFIRMATIVE ACTION IMPLICATIONS FOR COLLEGES AND UNIVERSITIES BEYOND THE SCHOLARSHIP AND STUDENT ADMISSIONS AREAS

*In Podberesky v. Kirwan, the Fourth Circuit held that a University of Maryland scholarship designated for African-American students violated the Constitution's Equal Protection Clause. In so holding, the court contributed to the recent tradition of dismantling affirmative action programs in higher education. This Note explores the implications of Podberesky for other university settings, particularly faculty hiring and endowment programs. The first part of the Note's analysis concentrates on ways in which the Podberesky rationale may be extended to university programs other than scholarships and student admissions. The Fourth Circuit's employment of a narrow set of factors in reviewing the scholarship program, the court's restrictive narrowly tailored analysis, and its refusal to recognize the importance of distinguishing the educational from the employment context for affirmative action purposes are examined and then applied to faculty programs. The second part of the Note examines possible ways to distinguish Podberesky's factual basis from other university affirmative action programs. This Note concludes that Podberesky will provide a means to limit further affirmative action in all areas of university administration, and, therefore, any attempts to increase diversity on a campus should focus more broadly on diverse subject areas and courses rather than on specific faculty appointments and endowed chairs.*

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### INTRODUCTION

During the past several years, affirmative action programs have been under fire, and in some contexts they have been either reduced in scope or removed altogether. Despite support from the Clinton administration<sup>1</sup> and from most higher education leaders for affirmative action programs,<sup>2</sup> oppo-

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<sup>1</sup> See Pierre Thomas, *Reno Vows to Expand Vigilance on Civil Rights*, WASH. POST, Jan. 16, 1997, at A9 ("The president and I will continue to oppose—at every step of the way—any wholesale ban on affirmative action in federal law.") (quoting Attorney General Janet Reno).

<sup>2</sup> Rene Sanchez, *Colleges Compete for Minority Students by Helping Them Achieve*,

nents of the programs have made inroads to eliminating them. For example, in 1995 in *Adarand v. Peña*,<sup>3</sup> the Supreme Court overruled its 1990 decision in *Metro Broadcasting, Inc. v. FCC*<sup>4</sup> by holding that affirmative action programs of any government actor, whether local, state, or federal, are subject to strict scrutiny.<sup>5</sup> That same year, the Regents of the University of California voted to abolish completely affirmative action programs.<sup>6</sup> The following year, California's voters approved "Proposition 209," which abolished affirmative action programs in contracts, employment, and education in that state.<sup>7</sup> In April 1996, Texas suspended a statewide scholarship program for minority students.<sup>8</sup> In response, a spokeswoman for the American Association of State Colleges and Universities noted that "[t]here's a lot more apprehension out there now about trying to preserve affirmative action."<sup>9</sup>

A Fourth Circuit ruling on a race-based scholarship at the University of Maryland continues this recent tradition of reducing the allowable scope of affirmative action. In *Podberesky v. Kirwan*,<sup>10</sup> the Fourth Circuit upheld a challenge to a scholarship program reserved for African-American students.<sup>11</sup> The court used a very confining strict scrutiny standard,<sup>12</sup> thus

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WASH. POST, Dec. 28, 1996, at A1.

<sup>3</sup> 515 U.S. 200 (1995).

<sup>4</sup> 497 U.S. 547, 564-65 (1990) (holding that minority preference policies of the Federal Communications Commission do not violate Equal Protection principles).

<sup>5</sup> This holding changed the Court's prior decision in *Metro Broadcasting*, in which it held that the FCC's minority ownership policies could be analyzed under intermediate, rather than strict, scrutiny. *Id.* at 564-65.

<sup>6</sup> See generally Tom Hayden & Connie Rice, *California Cracks Its Mortarboards*, NATION, Sept. 18, 1995, at 264; Arleen Jacobius, *Affirmative Action on Way Out in Calif.*, A.B.A. J., Sept. 1995, at 22; Carl C. Jorgensen, *The Consequences in California*, CHRON. OF HIGHER EDUC., Aug. 11, 1995, at B1.

<sup>7</sup> See Judith Havemann, *Limit On Affirmative Action Wins in California*, WASH. POST, Nov. 6, 1996, at B12. A district court, however, later issued an injunction against the measure, reasoning that it probably violates the Fourteenth Amendment. See William Claiborne, *Judge Extends Ruling Against California Ban on Affirmative Action*, WASH. POST, Dec. 24, 1996, at A4.

<sup>8</sup> See Rene Sanchez, *Worried Texas Officials Suspend Program for Minority Scholarships*, WASH. POST, April 17, 1996, at A3. Texas cited a fear of possible legal challenges based on the Fifth Circuit ruling in *Hopwood v. Texas*, 84 F.3d 720 (5th Cir.), cert. denied, 116 S. Ct. 2580 (1996), which forbade public universities from using race-based admissions policies to achieve a diverse student body. See Sanchez, *supra*, at A3.

<sup>9</sup> Sanchez, *supra* note 8, at A3.

<sup>10</sup> 38 F.3d 147 (4th Cir. 1994), cert. denied, 514 U.S. 1128 (1995).

<sup>11</sup> *Id.* at 161-62.

<sup>12</sup> The Fourth Circuit applied the test promulgated by the Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), rather than the test used in *United States v. Paradise*, 480 U.S. 149 (1987), which permits consideration of a wider variety of factors. See *Recent Cases—Constitutional Law—Equal Protection—Fourth Circuit*

creating concerns over what other types of affirmative action programs might fall to equal protection challenges. Specifically, the court found inadequate support for the University of Maryland's contentions that it suffered from present effects of past discrimination<sup>13</sup> and that African-American students had lower representation and higher attrition rates.<sup>14</sup> The Fourth Circuit held that the program was not narrowly tailored to the extent that it could withstand a constitutional challenge by a student ineligible for a scholarship because of his race.<sup>15</sup>

The Fourth Circuit in *Podberesky* reduced the role of affirmative action in the college and university context. The effects of *Podberesky* may be far-reaching. In the student admissions area, for example, about two-thirds of colleges and universities in the United States reserve some scholarship money exclusively for minority students.<sup>16</sup> *Podberesky* could fundamentally alter the way American colleges and universities allocate financial aid.<sup>17</sup> On a larger scale, *Podberesky* might cause a reexamination of some assumptions about college and university admissions programs.<sup>18</sup>

This Note examines *Podberesky*'s implications on college and university policies other than those regarding student admissions and scholarships, such as college and university endowments and faculty hiring. Part I examines the specific holding in *Podberesky*, and Part II traces briefly the history of judicial scrutiny of equal protection challenges to affirmative action programs in both the college and university and the employment settings and analyzes current trends in this area. Part III explores the Fourth Circuit's reasoning in *Podberesky* and how it could limit affirmative action in other college and university contexts. Finally, Part IV discusses the remaining constitutionally permissible justifications for affirmative action programs and the methods colleges and universities may use to create diversity that may be permissible under the Fourth Circuit's opinion.

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*Finds University of Maryland Minority Scholarship Program Unconstitutional*, 108 HARV. L. REV. 1773 (1995) [hereinafter *Recent Cases*].

<sup>13</sup> *Podberesky*, 38 F.3d at 154 (finding insufficient present effects in the University's asserted poor reputation in the African-American community and campus climate hostile to African-Americans).

<sup>14</sup> *Id.* at 156.

<sup>15</sup> *Id.* at 161. The court noted that a scholarship aimed at correcting underrepresentation does nothing to solve that problem when the scholarship is awarded to high-achieving African-American students who have not suffered from past discrimination. *Id.*

<sup>16</sup> See Joseph P. Shapiro, *How Much Is Enough?*, U.S. NEWS & WORLD REP., Feb. 13, 1995, at 38.

<sup>17</sup> See *infra* Part III (discussing *Podberesky*'s possible effects).

<sup>18</sup> See Peter Schrag, *Affirmative Action's California Afterlife*, AM. PROSPECT, Fall 1995, at 84.

I. BACKGROUND: *PODBERESKY V. KIRWAN*

Until 1994, the University of Maryland at College Park maintained two separate merit-based scholarship programs for admitted students.<sup>19</sup> One, the Francis Scott Key Scholarship, was open to all admitted students.<sup>20</sup> The other, the Benjamin Banneker Scholarship, was open only to African-American students.<sup>21</sup> In *Podberesky v. Kirwan*,<sup>22</sup> Podberesky, an Hispanic/white student sued the University, challenging the constitutionality of the Banneker Scholarship.

The federal district court in Maryland that heard the *Podberesky* case ruled that the Banneker Scholarship was constitutionally permissible.<sup>23</sup> Podberesky appealed, and the Fourth Circuit remanded the case and required that the district court make specific findings concerning the present effects of past discrimination against African-American students at the University of Maryland.<sup>24</sup>

To aid the district court, the University independently explored whether the Banneker Scholarship program should continue.<sup>25</sup> Aided by the University's study, the district court found several present effects of past discrimination that supported continuing the Banneker program. Specifically, it noted the following: the University's poor reputation within the African-American community, particularly among parents, high school counselors, and prospective students;<sup>26</sup> the underrepresentation of African-American students within the student body;<sup>27</sup> a disproportionately high attrition rate for African-Americans;<sup>28</sup> and a perception at the University that its campus climate is hostile to African-Americans.<sup>29</sup>

At the conclusion of its opinion, the district court discussed the appropriate standard of review of affirmative action programs in the college and university context.<sup>30</sup> Noting that the current standard of review "finds its

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<sup>19</sup> *Podberesky v. Kirwan*, 38 F.3d 147, 152 (4th Cir. 1994).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Podberesky v. Kirwan*, 764 F. Supp. 364 (D. Md. 1991), *rev'd.*, 956 F.2d 52 (4th Cir. 1992), *on remand*, 838 F. Supp. 1075 (D. Md. 1993), *vacated*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995).

<sup>23</sup> The federal district court ruled that the Banneker Scholarship was constitutionally permissible because it served the compelling governmental interest of remedying the present effects of past discrimination and it was "narrowly tailored" to serve this interest. *Id.* at 371-76.

<sup>24</sup> *Podberesky*, 956 F.2d at 57.

<sup>25</sup> *Podberesky*, 838 F. Supp. at 1076.

<sup>26</sup> *Id.* at 1084.

<sup>27</sup> *Id.* at 1087.

<sup>28</sup> *Id.* at 1091.

<sup>29</sup> *Id.* at 1092.

<sup>30</sup> *Id.* at 1097.

genesis in the context of employment discrimination,"<sup>31</sup> the district court asserted that the employment standard fails to take into account the particularly offensive nature of discrimination in education.<sup>32</sup> Citing both precedent<sup>33</sup> and relevant, common sense factors,<sup>34</sup> the district court suggested a new strict scrutiny analysis designed for the educational context.<sup>35</sup> The court suggested additional factors for consideration in the educational context, including whether school officials engaged in an open decisionmaking process,<sup>36</sup> whether officials provided the reasoning for their conclusion that a problem requiring correction existed,<sup>37</sup> and whether the chosen remedy minimally impacted the rights and interests of those not benefited.<sup>38</sup>

When the Fourth Circuit reviewed the district court's amended order, it rejected both the lower court's findings of present effects of past discrimination and its promulgation of a modified standard of review.<sup>39</sup> The Fourth Circuit rejected the justifications based on the school's poor reputation within the African-American community and its allegedly racially hostile campus climate, finding those factors "tied solely to knowledge of the University's discrimination before it admitted African-American students."<sup>40</sup> Further, according to the Fourth Circuit, "mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy."<sup>41</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> The court noted that the Supreme Court previously has recognized that discrimination in an educational context is more detrimental than in other contexts. *Id.* at 1097 (citing *United States v. Fordice*, 505 U.S. 717 (1992) (illustrating that education's importance leads the Court to consider broad remedies encompassing a state's entire system, rather than just a single school); *Keyes v. School. Dist. No. 1*, 413 U.S. 189 (1973) (noting that, based on education's societal importance, the Court has created affirmative duties in the desegregation area); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (discussing the fundamental importance of education in society)).

<sup>34</sup> *Id.* at 1098. The court noted the role of public education in forming social values, the history of discrimination and prejudice, the naivete in the assertion that centuries of bigotry could be erased with twenty years of corrective measures, and the irony in the premise that the current generation can't cure racism's effects because "we, not our parents and grandparents," are their source. *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* The court's analysis included three other relevant factors: whether a nucleus of facts existed that could be interpreted as evidence of racism's effects, whether members of the benefitting race controlled the decisionmaking body, and whether provision for periodic review had been made. *Id.*

<sup>39</sup> *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995).

<sup>40</sup> *Id.* at 154.

<sup>41</sup> *Id.* The Fourth Circuit found another flaw in the University's assertion of a hostile campus climate—it had failed to show a connection between that effect and past dis-

The Fourth Circuit asserted several reasons for rejecting the district court's conclusions regarding the underrepresentation and higher attrition rates for African-American students. First, it faulted the district court's grant of summary judgment to the University, holding that a material issue of fact existed regarding the cause of the disproportionate numbers.<sup>42</sup> Because the plaintiff offered evidence that tended to show that the statistics regarding African-American students resulted from economic factors, the defendant was not entitled to summary judgment.<sup>43</sup>

The Fourth Circuit found further error with the reference pool that the lower court used in its analysis.<sup>44</sup> Although the district court correctly rejected the use of a pool consisting of all graduating high school seniors, the Fourth Circuit noted that the court wrongly attempted to resolve a factual question—what constitutes an effective minimum admissions criteria.<sup>45</sup> The appellate court stated that the program's goal disallowed lowering the effective minimum criteria for purposes of determining the applicant pool.<sup>46</sup>

Finally, the Fourth Circuit found that the Banneker program was not narrowly tailored.<sup>47</sup> The court agreed with the district court's finding that the program successfully attracted high-achieving African-American students, thus improving representation and retention rates.<sup>48</sup> Yet, because high achievers were not the group against whom the University had discriminated in the past, the program was not sustainable under that rationale.<sup>49</sup> Furthermore, awarding Banneker scholarships to nonresident African-American students prevented the program from accomplishing its stated goal of assisting "qualified African-American high school students [from] Maryland."<sup>50</sup> The Fourth Circuit also took issue with the district court's reasoning that admitted, high-achieving African-American students would remedy the problems in representation by serving as role models and mentors to other African-American students.<sup>51</sup> That rationale, the court noted, has been impermissible since the Supreme Court's decision in *Wygant v. Jackson Board of Education*.<sup>52</sup>

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crimination. *Id.*

<sup>42</sup> The Fourth Circuit stated that "it is not enough for the district court to determine that the moving party has the winning legal argument." *Id.* at 156.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 156-57.

<sup>46</sup> *Id.* at 157.

<sup>47</sup> *Id.* at 161.

<sup>48</sup> *Id.* at 158.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 159.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 152 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion)).

## II. SUPREME COURT SCRUTINY OF AFFIRMATIVE ACTION PROGRAMS

In *Brown v. Board of Education*,<sup>53</sup> the Supreme Court first announced the end of segregated educational systems in its holding that "separate but equal" education violates the Equal Protection Clause.<sup>54</sup> When the Court revisited *Brown* the following year,<sup>55</sup> it ordered the dissolution of segregated public school education,<sup>56</sup> yet recognized that difficulties in integrating schools would not be immediately corrected.

The first significant affirmative action case since *Brown* was *Regents of the University of California v. Bakke*,<sup>57</sup> which dealt with minority preferences in university admissions. Bakke, a twice-rejected nonminority applicant to the University of California at Davis medical school, challenged the school's reservation of sixteen percent of its admission spaces for minorities.<sup>58</sup> Although the Court agreed that the medical school's admissions program failed to withstand strict scrutiny, Justice Powell's plurality opinion included a much-analyzed line indicating that one's status as a minority could not be a determinative factor in college and university admissions but could be permissibly considered, along with other factors, as a "plus."<sup>59</sup>

Two years later, in *Fullilove v. Klutznick*,<sup>60</sup> the Court upheld an affirmative action program in the employment context. At issue was the Minority Business Enterprise provision of the Public Works Employment Act,<sup>61</sup> which dictated that recipients of federal funds for state and local building projects must spend ten percent of those funds on purchases of goods and services from minority-owned businesses.<sup>62</sup> The Court found the requirement narrowly tailored to further a valid Congressional objective: redressing past Congressional discrimination in contracting.<sup>63</sup>

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<sup>53</sup> 347 U.S. 483 (1954).

<sup>54</sup> *Id.* at 495.

<sup>55</sup> *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (*Brown II*).

<sup>56</sup> *Id.* at 301.

<sup>57</sup> 438 U.S. 265 (1978).

<sup>58</sup> *Id.* at 276-78.

<sup>59</sup> *Id.* at 317. Numerous writers have analyzed this line. See, e.g., Michael K. Braswell et al., *Affirmative Action: An Assessment of Its Continuing Role in Employment Discrimination Policy*, 57 ALB. L. REV. 365, 380-81 (1993); Eric Hilbritton, Recent Development, *Hopwood v. Texas: Affirmative Action Encounters a Formidable and Fatal Match*, 71 TUL. L. REV. 303, 309-10 (1996); Robert A. Sedler, *The Constitution and Racial Preference in Law School Admissions*, 75 MICH. BUS. L.J., 1160, 1160-61 (1996); Barbara Phillips Sullivan, *The Song That Never Ends: New Verses About Affirmative Action*, 23 S.U. L. REV., 157, 166-70 (1996).

<sup>60</sup> 448 U.S. 448 (1980).

<sup>61</sup> 42 U.S.C. § 6701 (1994).

<sup>62</sup> 448 U.S. at 454.

<sup>63</sup> *Id.* at 492.



In another employment case,<sup>64</sup> the Court upheld a court-ordered minority preference implemented to redress prior discrimination by a union.<sup>65</sup> The Court based its holding on the trial court's finding of pervasive and continuing discrimination by the union.<sup>66</sup>

The Court's next landmark affirmative action decision was *Wygant v. Jackson Board of Education*,<sup>67</sup> in which it struck down a collective bargaining agreement that afforded more lay-off protection for minority school teachers than for their nonminority colleagues. Several aspects of this case are particularly applicable to the current inquiry into college and university affirmative action programs. First, the Court required a strong evidentiary basis as a condition for remedial action; a showing of broad societal discrimination is insufficient.<sup>68</sup> Second, the Court held that one of the educational board's primary asserted justifications for affording greater protection to minority teachers—that minority teachers served as role models for minority students—did not shield the agreement from an equal protection claim.<sup>69</sup> Finally, and significantly for any type of affirmative action case, the Court stated explicitly that strict scrutiny applies to equal protection review of programs that benefit minorities, just as it applies to programs that discriminate against them.<sup>70</sup>

In *United States v. Paradise*,<sup>71</sup> the Court upheld a court-ordered, numerically based hiring goal as a remedy for past discrimination.<sup>72</sup> In contrast, in *City of Richmond v. J.A. Croson Co.*,<sup>73</sup> the Court rejected a municipi-

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<sup>64</sup> Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986).

<sup>65</sup> *Id.* at 444-47.

<sup>66</sup> *Id.* at 445.

<sup>67</sup> 476 U.S. 267 (1986).

<sup>68</sup> *Id.* at 277-78. The Court did not elaborate on this evidence requirement. Rather, it merely stated that the ultimate burden lies with the employees to demonstrate the unconstitutionality of an affirmative action program. *Id.* at 278. The lower court had concluded that any statistical disparities in the racial composition of the faculty resulted only from general societal discrimination, as opposed to prior discrimination by the school board. *Id.* at 278 (citing *Wygant v. Jackson Bd. of Educ.*, 546 F. Supp. 1195 (1982), *aff'd*, 746 F.2d 1152 (1984), *rev'd*, 476 U.S. 267 (1986)). This finding by the lower court was particularly easy to uphold because the school board had denied allegations of prior discriminatory hiring practices when confronted with earlier litigation. *See id.*

<sup>69</sup> *Id.* at 276. Rejecting the role model theory, the Court expressed concern that allowing affirmative action programs to be justified by the need to provide role models for minority students would have no terminus. *Id.* at 274-75. The Court noted that such programs would extend beyond legitimate remedial goals if faculty hiring goals were tied to the percentage of minority students. *Id.*

<sup>70</sup> *Id.* at 279-80.

<sup>71</sup> 480 U.S. 149 (1987).

<sup>72</sup> *Id.* at 185-86; *see infra* Part III (discussing the factors the Court employed).

<sup>73</sup> 488 U.S. 469 (1989); *see infra* Part III (discussing *Croson*).

pal minority business set-aside similar to that in *Fullilove*. The Court distinguished *Croson* from *Fullilove* by noting that "Congress, [not the Richmond City Council] . . . has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment."<sup>74</sup> Thus, the holding appeared to rest in part upon a separation of powers rationale and the Court's interest in deferring to Congress. In addition, the Court faulted the program in *Croson* for being based on generalized past discrimination rather than on specific findings.<sup>75</sup>

Finally, in *United States v. Fordice*,<sup>76</sup> the Court recognized a state's affirmative duty to dismantle prior dual school systems,<sup>77</sup> including those in the higher education domain.<sup>78</sup> Moreover, the Court found that although higher education involves a larger element of student choice,<sup>79</sup> a state's adoption and implementation of race-neutral policies alone is insufficient<sup>80</sup>—the state must also ensure that a student's choice is truly free.<sup>81</sup> To ensure this result, the Court required states to dismantle de jure segregated school systems and to remove any remnants of the prior system that fostered de facto dual systems.<sup>82</sup>

### III. *PODBERESKY'S* POSSIBLE LIMITATIONS ON OTHER COLLEGE AND UNIVERSITY PROGRAMS

The Fourth Circuit had several opportunities in *Podberesky* to weigh in on current debates about affirmative action and the role it should play in college and university settings. Specifically, it analyzed whether the Banneker Scholarship was narrowly tailored, and it rejected the idea that educational and employment contexts must be treated differently.<sup>83</sup> The court's adoption of a "narrowly tailored" standard in *Podberesky* may cause institutions to structure other programs to conform with that difficult standard.

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<sup>74</sup> *Id.* at 490.

<sup>75</sup> *Id.* at 496-97.

<sup>76</sup> 505 U.S. 717 (1992).

<sup>77</sup> *Id.* at 727.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 728-29.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 742-43.

<sup>82</sup> *Id.* at 728-30. In *Fordice*, for example, the Court identified discriminatory admissions standards and duplicative academic programs at historically segregated state colleges and universities as some of the remnants of the prior segregated system. *Id.* at 733.

<sup>83</sup> *Podberesky v. Kirwan*, 38 F.3d 147, 153 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995).

A. *Using the Croson Factors Instead of the Paradise Test*

In *Podberesky*, the Fourth Circuit applied the two-prong test that the Supreme Court promulgated in *Croson*.<sup>84</sup> *Croson* involved a challenge to Richmond's "Minority Business Utilization Plan" based on the plan's requirement that at least thirty percent of the value of city contracts be subcontracted to minority businesses.<sup>85</sup> The Court reaffirmed its commitment to place under strict scrutiny any race-based preference programs, whether remedial or not. The Court noted that the standard of review under the Equal Protection Clause<sup>86</sup> "is not dependent on the race of those burdened or benefited by a particular classification."<sup>87</sup> The Court struck down the minority business set-aside program because the city showed only a generalized discrimination in the construction business rather than specific, past discrimination in the city's construction contracts awarding process.<sup>88</sup> The generalized discrimination that the city proffered failed to demonstrate a compelling governmental interest.<sup>89</sup> The Court also rejected the plan on the grounds that it was not narrowly tailored.<sup>90</sup>

The Fourth Circuit limited its review to these factors from *Croson* rather than considering the wider variety of factors analyzed in *United States v. Paradise*.<sup>91</sup> In *Paradise*, the Supreme Court upheld a court-ordered requirement that African-Americans receive fifty percent of new promotions in the Alabama state police force until either the force achieved a desegregated minority percentage or the troopers adopted a new promotion plan that conformed with prior court orders and decrees.<sup>92</sup>

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<sup>84</sup> *Id.* at 153-54 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)).

<sup>85</sup> *Croson*, 488 U.S. at 477-78.

<sup>86</sup> U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

<sup>87</sup> *Croson*, 488 U.S. at 494 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279-80 (1985)).

<sup>88</sup> *Id.* at 499-501.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 508. Specifically, the city had made no attempt to employ race-neutral remedies for increasing minority contract participation. The Court listed as an example of a race-neutral institution a race-neutral program of city financing for small businesses. This remedy would be preferable if minority business enterprises simply lacked the capital to bid on contracts. The record contained no evidence that any race-neutral alternatives had been considered. Additionally, the 30% figure stipulated in the city's plan was based on the overall minority representation in the population, and it incorrectly assumed that an equivalent proportion of minorities participated in the construction industry. *See id.* at 507-08.

<sup>91</sup> 480 U.S. 149 (1987); *see Recent Cases*, *supra* note 12, at 1775-76.

<sup>92</sup> *Paradise*, 480 U.S. at 149. The court imposed this requirement in response to past discrimination by the Department in its entry-level hiring and promotion practices. *Id.* at 163.

The Court considered a broad array of factors.<sup>93</sup> These factors, which encompass those considered in *Croson*,<sup>94</sup> included the necessity for relief, the efficacy of alternative remedies, the flexibility and duration of relief, including available waiver provisions, the availability of numerical goals to the relevant labor market, and the impact of relief on third-parties' rights.<sup>95</sup>

The Fourth Circuit provided two reasons for declining to employ the *Paradise* factors. First, the court noted that unlike the program at issue in *Paradise*, the Banneker program did not involve a quota requirement.<sup>96</sup> Second, the court highlighted the similarity between *Croson* and the Banneker program: although *Croson* involved a quota,<sup>97</sup> it also examined the present effects of past discrimination.<sup>98</sup>

If the *Podberesky* analysis had included all of the *Paradise* factors, the Banneker program might have survived the challenge.<sup>99</sup> For example, the necessity of the scholarship program could have been predicated on Title VI regulations, which require federal funding recipients to use affirmative action to remedy prior discrimination.<sup>100</sup> Further, it is possible that the Banneker program guidelines, which required a reevaluation of the program every three years, was adequately flexible,<sup>101</sup> had goals that bore a proper relationship to the relevant student population,<sup>102</sup> and placed only a minimal burden on third parties.<sup>103</sup>

If the Banneker program would have survived an equal protection challenge under *Paradise*'s five-factor test, then it is likely that other college and university affirmative action programs also would benefit from *Paradise*'s broad inquiry. Tenure-track hiring goals, for example, can be limited in duration and periodically reevaluated to accommodate *Paradise*'s flexibility. Decisions regarding endowed chairs may be made after annual faculty hiring, thereby minimizing possible effects on third parties. Race-neutral hiring attempts foreseeably could fail to attract a sufficient number

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<sup>93</sup> *Id.* at 171.

<sup>94</sup> *Id.* at 149.

<sup>95</sup> *Id.* at 171.

<sup>96</sup> *Podberesky v. Kirwan*, 38 F.3d. 147, 158 n.10 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* While declining to use the broader *Paradise* inquiry, the court nevertheless stated that the Banneker program also would have failed had such factors been employed. *Id.*

<sup>99</sup> *Recent Cases*, *supra* note 12, at 1776.

<sup>100</sup> *Id.* at 1776-77. The Comment notes that the existence of the Banneker Scholarship was a condition to the approval of the University of Maryland's plan to comply with federal affirmative action regulations. *Id.*

<sup>101</sup> *Id.* at 1777.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

of minority professors, necessitating alternative race-conscious remedies. For the above reasons, the Fourth Circuit's decision to follow *Croson*, in which the Supreme Court "did not conduct a full 'narrowly tailored' analysis,"<sup>104</sup> likely will result in future harm to both university scholarship programs and to faculty hiring affirmative action programs.

#### B. *A More Narrow Narrowly Tailored Analysis*

Another way in which the Fourth Circuit restricted its narrowly tailored analysis was through its focus on the scholarship's recipients.<sup>105</sup> In the court's estimation, one of the Banneker program's flaws that prohibited the court from finding the program narrowly tailored was that although it was structured to remedy problems such as low retention and representation rates among minority students, the scholarship recipients were high-achieving African-American students.<sup>106</sup> These students, the court determined, were not the group against whom the college or university had previously discriminated.<sup>107</sup> The question left unanswered after *Podberesky* is whether a college or university's affirmative action program can ever constitutionally redress a harm previously suffered.

The court's focus on the group previously discriminated against may be easily extended to the faculty setting.<sup>108</sup> Robert Simon argues, for example, that candidates for faculty positions are not considered victims, despite their minority group membership. Rather, they are advantaged relative to the general population.<sup>109</sup> Simon further argues that members of this group, who have been successful in academic settings, probably have already benefited from some sort of preference and so already have received some compensation for past harms.<sup>110</sup>

A similar argument has been made that affirmative action programs assist a few minorities at the expense of a great number of minorities who need more help.<sup>111</sup> Others counter that affirmative action programs should

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<sup>104</sup> *Id.* at 1776.

<sup>105</sup> *Podberesky v. Kirwan*, 38 F.3d 147, 158 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> See Robert L. Simon, *Affirmative Action and the University: Faculty Appointment and Preferential Treatment*, in *AFFIRMATIVE ACTION AND THE UNIVERSITY* 48, 58 (Steven M. Cahn ed., 1993).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Drew S. Days, III, *Reality*, 31 *SAN DIEGO L. REV.* 169, 190 (1994). The author attributed this idea to Professor Richard Epstein and found his argument wholly speculative. *Id.*

redress past discrimination<sup>112</sup> rather than address the current problems of impoverished African-Americans.<sup>113</sup> Recalling that affirmative action programs attempt to remove discrimination based upon race,<sup>114</sup> the two counter-arguments thus conflict over the appropriate scale of past discrimination in determining the correct group to receive the benefits of affirmative action.

Many courts have not subscribed to the notion that affirmative action programs exist to redress broad discriminatory effects. Rather, as the Fourth Circuit held, because the University of Maryland had identified high-achieving students as the typical Banneker Scholarship recipients, the program did not meet its asserted goal of remedying past discrimination.<sup>115</sup> Therefore, by deeming the Banneker program to be too broad, the Fourth Circuit weighed in on the debate concerning how to measure the scale of past discrimination.

*Podberesky* invites the argument that minority candidates for faculty positions are well-situated relative to a majority of their race. Moreover, *Podberesky* arguably allows other extensions to the faculty setting, thus preventing the hiring of a diverse faculty. As noted above,<sup>116</sup> Simon argues that faculty candidates have already benefited from affirmative action policies, and thus have been compensated.<sup>117</sup> This reasoning is dangerous to minorities. First, it assumes that without these programs, minorities would never have been situated so as to attempt to gain spaces on a college or university faculty. Inferentially, this reasoning also assumes that a minority candidate with weaker credentials should be rejected not only because hiring decisions should be merit-based but also because that applicant did not deserve even those weaker credentials. Nevertheless, it is difficult to determine when an African-American who has suffered specific discriminatory harm in the past has been fully compensated for that harm.

### C. Refusing to Distinguish the Education from the Employment Setting

The district court in *Podberesky* proffered another argument for permitting continuation of the scholarship program: educational affirmative action programs should be considered under different standards (although still adhering to strict scrutiny) from those used in the employment setting.<sup>118</sup>

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<sup>112</sup> *Id.* at 191.

<sup>113</sup> Days asserts that the disparity between middle-class and poor African-Americans may more properly be traced to the absence of social programs designed to improve the conditions that leave them at the margins of the American economy. *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Podberesky v. Kirwan*, 38 F.3d 147, 158 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995).

<sup>116</sup> See *supra* text accompanying notes 108-11.

<sup>117</sup> Simon, *supra* note 108, at 58.

<sup>118</sup> *Podberesky v. Kirwan*, 838 F. Supp. 1075, 1097 (D. Md. 1993).

Although it is admittedly not the orthodox view of affirmative action scrutiny,<sup>119</sup> the Fourth Circuit's swift rejection of that thesis imperils a view that may be necessary for the continuation of affirmative action programs in student admissions. Moreover, the Fourth Circuit's refusal to recognize such a distinction between the education and employment contexts is another important factor from *Podberesky* that will certainly extend the limitations of affirmative action programs beyond the student admissions context. The college and university context is highly unusual, and perhaps should be treated differently.<sup>120</sup> In support of the need to treat universities differently is the fact that a college faculty member's role differs from roles in other employment settings in that it involves dissemination of viewpoints and perspectives.

A district court decision in Texas also indicated that the educational situation should be treated differently from other affirmative action contexts.<sup>121</sup> In *Hopwood v. Texas*,<sup>122</sup> several nonminority applicants to the University of Texas Law School challenged the school's affirmative action program for student admissions after the school denied their applications.<sup>123</sup> Although the district court found that the University of Texas program failed to meet strict scrutiny requirements,<sup>124</sup> it rejected the plaintiff's argument that the review of past acts of discrimination must be confined to the law school and could not encompass the University of Texas system.<sup>125</sup> Instead, noting the Supreme Court's recent opinion in *Fordice*,<sup>126</sup> the district court found that "it appears the Supreme Court has recognized that the restrictions it has applied in ascertaining the present effects of past discrimination in the employment context . . . are not appropriate in the educational context."<sup>127</sup>

On appeal, the Fifth Circuit rejected the district court's reasoning but affirmed its ruling for the plaintiffs.<sup>128</sup> Although the Fifth Circuit did not directly address whether the educational forum should receive special treatment, it rejected any notion that attainment of a diverse student body could

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<sup>119</sup> See *Podberesky*, 38 F.3d at 153.

<sup>120</sup> See, e.g., *Hayden & Rice*, *supra* note 6, at 264 ("Diversity is an especially weighty educational value for a public university.").

<sup>121</sup> *Hopwood v. Texas*, 861 F. Supp. 551, 571 (1994), *aff'd.*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 553.

<sup>124</sup> *Id.* at 578, 579 (finding the law school admission process not narrowly tailored because it compared each applicant not with the entire pool of applicants but rather with only those of his or her race).

<sup>125</sup> *Id.* at 571-72.

<sup>126</sup> *United States v. Fordice*, 505 U.S. 717 (1992).

<sup>127</sup> *Hopwood*, 861 F. Supp. at 571.

<sup>128</sup> *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

be a compelling state interest: "We agree with the plaintiffs that any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment."<sup>129</sup>

Like the Fifth Circuit, the Fourth Circuit chose not to endorse the assertion that affirmative action scrutiny should differ between the college and university and employment contexts. In *Podberesky*, the Fourth Circuit readily dismissed the district court's suggestion that a different test should be applied in the educational context.<sup>130</sup> Rather than considering the district court's suggestion of a separate standard for educational settings,<sup>131</sup> the Fourth Circuit noted the lower court's "restlessness in complying with that standard,"<sup>132</sup> and decided that the district court opinion indicated an unspoken belief that the Banneker program was unable to withstand strict scrutiny analysis.<sup>133</sup>

#### IV. WHAT'S LEFT? OR, HOW TO CONTINUE AFFIRMATIVE ACTION IN OTHER UNIVERSITY CONTEXTS

##### A. *Diversity in Areas Other Than Student Admissions and Scholarships*

Courts can justify treating affirmative action programs in educational contexts differently from those in other contexts on the grounds that diversity is still a permissible goal for universities to pursue.<sup>134</sup> The diversity rationale has greater importance on college campuses than in the workplace.<sup>135</sup> "Diversity should not justify the use of racial classifications in any context other than education because no other social institution has such a dramatic effect on one's life."<sup>136</sup>

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<sup>129</sup> *Id.* at 944. The Supreme Court denied certiorari, leaving in place the statements rejecting educational diversity as a compelling interest. Justices Breyer and Ginsberg, however, released a statement suggesting that the refusal "was based on procedural grounds and should not be interpreted as a sign of how the high court eventually would rule on whether it is constitutional for colleges to use race in deciding whom to admit." Joan Biskupic, *Justices Decline to Hear Campus Diversity Case; Ruling Against Race-Based Admissions Stands*, WASH. POST, July 2, 1996, at A1.

<sup>130</sup> *Podberesky v. Kirwan*, 38 F.3d 147, 153 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995). The Fourth Circuit wrote only, "[W]e reject the district court's contention that its proposed analysis is the correct one." *Id.* at n.1.

<sup>131</sup> *Podberesky v. Kirwan*, 838 F. Supp. 1075, 1097 (D. Md. 1993), *vacated*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995).

<sup>132</sup> *Podberesky*, 38 F.3d at 153.

<sup>133</sup> *Id.*

<sup>134</sup> See *infra* notes 139-58 and accompanying text.

<sup>135</sup> See *infra* notes 191-201 and accompanying text.

<sup>136</sup> Krista L. Cosner, Note, *Affirmative Action in Higher Education: Lessons and*



Professor Richard Delgado wrote a hypothetical trial court opinion based on a claim that a white male brought against a school that had denied him a faculty position because the law school sought minority candidates.<sup>137</sup> Delgado's essay includes some of the testimony heard in the fictional case, which provided several reasons for diversity's continued importance in affirmative action faculty hiring programs. Among those reasons were that law school students benefit from exposure to the ideas and viewpoints of women and minorities; that law students in particular benefit from exposure to minority professors because, as role models, minority professors foster client sensitivity; and that a diverse faculty encourages minorities to pursue legal careers.<sup>138</sup>

Professor Sheila Foster offers an additional reason to support the diversity rationale.<sup>139</sup> Foster argues that the diversity rationale operates to include individuals whose differences have created a basis for systematic disadvantage and exclusion.<sup>140</sup> Although this focus is more remedial<sup>141</sup> than achievement of campus diversity, it considers that the value of diversity derives from the inclusion and participation of formerly excluded and disempowered individuals.<sup>142</sup> This rationale has the advantage of answering critics who argue that diversity programs force women and minorities to conform to expected viewpoints and attitudes in exchange for their presence on campus.<sup>143</sup> Another advantage of Foster's rationale is that courts are more likely to recognize remedial goals than goals of diversity for diversity's sake.<sup>144</sup>

Foster drew support for her diversity rationale from two Supreme Court opinions. Foster contrasts *Metro Broadcasting*<sup>145</sup> with Justice Powell's opinion in *Bakke*.<sup>146</sup> Justice Powell's opinion represents the Court's holding at least to the extent that it interpreted Title VI.<sup>147</sup> Calling Powell's di-

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*Directions from the Supreme Court*, 71 IND. L.J. 1003, 1024 (1996).

<sup>137</sup> Richard Delgado, *Five Months Later (The Trial Court Opinion)*, 71 TEX. L. REV. 1011 (1993).

<sup>138</sup> *Id.* at 1015.

<sup>139</sup> Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity,"* 1993 WIS. L. REV. 105, 141-42.

<sup>140</sup> *Id.* at 141.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 142. That argument, however, lacks merit when the reason for promoting diversity depends not on diversity of viewpoint but on diversity of social background.

<sup>144</sup> See, e.g., *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (holding that racial classifications must be reserved for remedial purposes).

<sup>145</sup> *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990), *overruled by Adarand v. Peña*, 515 U.S. 200 (1995).

<sup>146</sup> *Regents of Univ. of Ca. v. Bakke*, 438 U.S. 265 (1978).

<sup>147</sup> See *id.* at 269-324 (opinion of Powell, J.); Gabriel Chin, *Bakke To The Wall: The Crisis of Bakkean Diversity* 4 WM. & MARY BILL RTS. J. 881, 885 (1996).

iversity paradigm "forward-looking," Foster first noted that Powell's opinion rested on a free speech rationale, that it largely ignored the broader equality concerns, and that it is therefore an ill-suited means for analyzing diversity and equality issues.<sup>148</sup> The *Metro Broadcasting* opinion, in contrast, is a hybrid: it incorporates Powell's forward-looking paradigm with the Court's backward-looking equal protection jurisprudence.<sup>149</sup> *Metro Broadcasting* may also be considered backward-looking because it generally addresses only past discrimination rather than recognizing a future value in diversity.<sup>150</sup> Although *Metro Broadcasting* was overruled,<sup>151</sup> Foster might argue that her diversity rationale remains valid because it is based upon a remedy for past harms rather than on creation of a racially and ethnically diverse faculty.

Foster found additional support for a forward-looking diversity rationale in Justice Stevens's opinion in *Wygant v. Jackson Board of Education*.<sup>152</sup> Stevens's opinion noted that "race is not always irrelevant to sound government decisionmaking"<sup>153</sup> and also recognized the special benefits of a racially diverse school faculty.<sup>154</sup>

The district court opinion in *Hopwood v. Texas*<sup>155</sup> also cited diversity as a compelling interest. In *Hopwood*, the district court rejected the plaintiffs' argument that the only remaining compelling interest in the affirmative action context is remedying the effects of past discrimination.<sup>156</sup> The court refuted this proposition in part because the cases that the plaintiffs cited were in the employment context, not education, and thus did not focus on the unique role of education.<sup>157</sup> The court concluded that unless the Supreme Court overrules *Bakke*, "the educational benefits that flow from a racially and ethnically diverse student body remain[] a sufficiently compelling interest to support the use of racial classifications."<sup>158</sup>

The Fifth Circuit affirmed the district court in *Hopwood* by granting relief to the plaintiffs,<sup>159</sup> but it questioned the district court's use of the di-

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<sup>148</sup> Foster, *supra* note 139, at 122.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 123.

<sup>151</sup> See *Adarand v. Peña*, 515 U.S. 200 (1995).

<sup>152</sup> 476 U.S. 267 (1986) (Stevens, J., dissenting).

<sup>153</sup> *Id.* (Stevens, J., dissenting).

<sup>154</sup> Foster, *supra* note 139, at 114.

<sup>155</sup> 861 F. Supp. 551, 570-71 (1994), *aff'd*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996). The Fifth Circuit rejected the diversity rationale. See *supra* notes 155-59 and accompanying text.

<sup>156</sup> *Hopwood*, 861 F. Supp. at 570-71.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 571.

<sup>159</sup> *Hopwood v. Texas*, 78 F.3d 932, 935 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

versity rationale.<sup>160</sup> The Fifth Circuit stated that any consideration of race by a law school for the purposes of achieving a diverse student body was not a compelling state interest.<sup>161</sup> Although the Fifth Circuit noted that Supreme Court decisions on education have recognized only remedial state interests as compelling,<sup>162</sup> the court relied primarily on *Croson*,<sup>163</sup> which was not an education case, in its rejection of the diversity standard.<sup>164</sup>

In rejecting the diversity rationale, the Fifth Circuit quoted Justice O'Connor's dissent in *Metro Broadcasting*: "Modern equal protection has recognized only one [compelling state] interest: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest."<sup>165</sup> The Fifth Circuit, however, deemphasized an earlier comment by Justice O'Connor that "a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest."<sup>166</sup> Justice O'Connor's statements, read together, indicate a possible willingness by members of the Court to reject a diversity rationale in other contexts but to accept it in education.<sup>167</sup> Therefore, the district court in *Hopwood* may have been correct to wait for an explicit statement from the Supreme Court regarding the death of diversity in the educational context.<sup>168</sup> Furthermore, diversity as a goal beyond the makeup of a student body<sup>169</sup> may be distinguishable from stu-

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<sup>160</sup> *Id.* at 941-45.

<sup>161</sup> *Id.* at 945.

<sup>162</sup> *Id.* (noting that although *Bakke* recognized diversity as a compelling interest, that portion of the opinion did not express a majority view and thus is questionable as binding precedent).

<sup>163</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>164</sup> *Hopwood*, 78 F.3d at 944. The Fifth Circuit said that recent Supreme Court precedent shows that diversity cannot satisfy strict scrutiny and noted that the diversity rationale in *Croson* survived only because it was analyzed under intermediate scrutiny. *Id.* The Fifth Circuit went on to cite language from *Croson* that suggests a belief that racial classifications must be reserved for the remedial setting. *Id.*

<sup>165</sup> *Hopwood*, 78 F.3d at 945 (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 612) (O'Connor, J., dissenting)).

<sup>166</sup> *Id.* at 945 n.27 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986)). The Fifth Circuit minimized Justice O'Connor's earlier statement by explaining it had been "purely descriptive" and did not express her approval or disapproval of diversity as a compelling interest. *Id.* Justice O'Connor's statement, although not necessarily her personal opinion, could be interpreted as her belief in the current state of the law.

<sup>167</sup> See David Schimmel, *Is Bakke Still Good Law? The Fifth Circuit Says "No" and Outlaws Affirmative Action Admissions*, 113 Educ. L. Rep. 1052, 1060 n.56 (Dec. 26, 1996).

<sup>168</sup> *Hopwood v. Texas*, 861 F. Supp. 551, 570-71.

<sup>169</sup> *Hopwood*, 861 F. Supp. at 570-71.

dent admissions limitations.

Commentators have opposed, on several grounds, the diversity rationale as a valid reason for promoting affirmative action policies in schools. For example, the need for minority scholarships is frequently questioned.<sup>170</sup> Others question the value of the minority perspective altogether.<sup>171</sup> Professor Delgado, for example, takes issue with allowing increased minority admissions under the diversity rationale because such admissions are prefaced upon the minority students' value to the majority.<sup>172</sup> The result, Professor Delgado fears, will be that minority students will be treated as ornaments and curiosities.<sup>173</sup>

#### B. *Distinguishing Faculty Affirmative Action from Student Admissions Affirmative Action*

There are several practical reasons for adopting different analytical approaches to the different affirmative action programs in higher education contexts. Using different approaches, one may distinguish endowment programs and faculty hiring preferences from affirmative action in admissions and scholarship programs and thereby render *Podberesky* inapplicable to those areas. The goals are distinct—a diverse student body may result in interaction among groups that might not otherwise be in the same forum, but a diverse faculty is more likely to expose students to diverse philosophies and viewpoints and generally to produce different contributions to scholarship.<sup>174</sup>

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<sup>170</sup> In 1991, for example, the Department of Education's Assistant Secretary for Civil Rights announced that race-based scholarships violated the Civil Rights Act. See Cosner, *supra* note 140, at 1015; see also Editorial, *A Special Editorial on Affirmative Action: An Uneven Playing Field*, ATLANTA J. AND CONST., Feb. 11, 1996, at G6 (discussing the plans of State Representative to the General Assembly Earl Ehrhart to introduce a constitutional amendment to end all programs, including scholarships, that help minorities).

<sup>171</sup> U.S. Court of Appeals Judge Richard A. Posner, for example, differentiates between hiring African-American professors and hiring female professors to gain different viewpoints, noting that although feminism is an identifiable approach, race is not, and "not all blacks are culturally black and therefore do not add anything to diversity goals." Richard A. Posner, Comment, *Duncan Kennedy on Affirmative Action*, 1990 DUKE L.J. 1157, 1160-61.

<sup>172</sup> Carlos J. Nan, *Adding Salt to the Wound: Affirmative Action and Critical Race Theory*, 12 LAW & INEQ. J. 553, 567 (1994) (quoting Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 570 n.46 (1984)).

<sup>173</sup> See *id.*

<sup>174</sup> See, e.g., Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 715 (advocating expansion of a commitment to cultural diversity and minority hiring because it produces work "not otherwise avail-

Professor Paul Carrington argues that affirmative action is more detrimental when applied to the faculty selection process than when used in student admissions.<sup>175</sup> First, he argues that meritocratic considerations should be entitled great weight in faculty hiring decisions.<sup>176</sup> Calling attention to the skill required in teaching law, he finds it significant that "[t]here are others in some degree dependent on the technical skill with which the job is performed."<sup>177</sup> Because of affirmative action programs in faculty selection, students could have less-qualified instructors.<sup>178</sup>

Professor Carrington finds further support for eliminating affirmative action programs in faculty hiring by comparing faculty selection and the tenure process with student admissions.<sup>179</sup> Because instructors' peers perform tenure inquiries and because these peers are presumably well-acquainted with the individual both personally and professionally, it is difficult to ask faculty members making the selection decisions to isolate any single factor, such as race.<sup>180</sup>

Finally, Professor Carrington asserts that the problem of minority underrepresentation among law faculty will eventually correct itself as more minority students enroll in law school and choose to pursue careers in legal education.<sup>181</sup> Accepting this argument, however, not only might prompt a limiting of affirmative action in the sphere of faculty hiring but might actually necessitate affirmative action in student admissions as a means of avoiding affirmative action programs in the faculty setting.

Professor Carrington's argument assumes, perhaps incorrectly, that current measures of "merit" are just. Arguably, beliefs about "merit" were formed when minorities were excluded from the developing of such standards.<sup>182</sup> There may also be value in particular minority experiences, such as challenging past discrimination.<sup>183</sup> Programs that seek to increase diversity in the faculty setting may seek to include excluded ideals in what is considered meritorious, rather than discard merit as a hiring basis altogether.

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able.")

<sup>175</sup> Paul D. Carrington, *Diversity!*, 1992 UTAH L. REV. 1105, 1145 (1992).

<sup>176</sup> *Id.* at 1152.

<sup>177</sup> *Id.* at 1153.

<sup>178</sup> Although Professor Carrington argues this point while referring to legal scholars and law students, presumably the same argument extends to both undergraduate and other graduate programs as well.

<sup>179</sup> "Teachers, in contrast, are hired one at a time, and much is known about them as individuals." Carrington, *supra* note 175, at 1145.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 1153.

<sup>182</sup> Yxta Maya Murray, *Merit Teaching*, 23 HASTINGS CONST. L.Q. 1073, 1075 (1996).

<sup>183</sup> *Id.* at 1108.

er.<sup>184</sup>

Robert Simon notes the extremely high costs to nonminority faculty candidates that result from minority preferences in faculty selection.<sup>185</sup> He suggests that rejected faculty candidates have much more invested in both their careers and the selection process than do students who apply for admission at a college or university.<sup>186</sup> Therefore, the cost of rejection for faculty candidates is higher.<sup>187</sup> According to supporters of this theory, it is extremely difficult for a candidate for an academic position to receive an offer for even one desirable position<sup>188</sup> but a student denied admission is more likely to have other options from which to choose.<sup>189</sup>

The potential benefits of a diverse faculty, however, more than outweigh any risks inherent in affirmative action hiring practices.<sup>190</sup> Minority faculty are valuable as mentors and counselors.<sup>191</sup> Moreover, the value of minority scholarship is heightened because it was less available in the past.<sup>192</sup> Professor Delgado proposed a more unusual argument for promoting faculty affirmative action in his hypothetical trial court opinion.<sup>193</sup> In that opinion, Professor Delgado asserted that the practice of separating faculty applicants into two groups—minority and non-minority—actually helps non-minority candidates.<sup>194</sup> The reasoning behind this centers on current trends in education, which value diverse scholarship and “politically correct” ideas.<sup>195</sup> Professor Delgado’s trial court opinion recognizes that because of the school’s separation of minority and non-minority candidates, a non-minority candidate may avoid being engulfed by the smaller number of other candidates whose minority status is deemed an attractive and trendy quality.<sup>196</sup>

Arguably, minority scholarship contributes a valuable and different voice to scholarship on college and university campuses. This assertion is manifested in the “racial distinctiveness” thesis,<sup>197</sup> which holds that because mi-

<sup>184</sup> *Id.* at 1111.

<sup>185</sup> See Simon, *supra* note 108, at 52, 58.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> Henry Louis Gates, Jr., head of Harvard University’s Department of Afro-American Studies, hopes that a strong department in this area “will help the racists from the cultural and political right . . . to understand how important Afro-American studies is to an understanding of a multicultural America.” Jacqueline Trescott, *Harvard’s Dream Team*, WASH. POST, Feb. 26, 1996, at B1.

<sup>191</sup> See *supra* text accompanying note 138.

<sup>192</sup> See *supra* notes 175-84 and accompanying text.

<sup>193</sup> See Delgado, *supra* note 137.

<sup>194</sup> *Id.* at 1014.

<sup>195</sup> *Id.* at 1016.

<sup>196</sup> *Id.* at 1014.

<sup>197</sup> Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV.

nority scholars have experienced racial oppressiveness, they view the world with a different perspective, which eventually displays itself in valuable ways in their work.<sup>198</sup>

Professor Randall Kennedy also has advanced an "exclusion" thesis, which argues that at least in legal academia, the mainstream majority too often wrongfully ignores, or undervalues, the intellectual contributions of the minority scholars.<sup>199</sup> Professor Duncan Kennedy concurs with the conclusion that there is a special value in minority scholarship that mainstream scholarship cannot provide, and that this value springs from the unique character of minority work product.<sup>200</sup>

### *C. Department of Education Guidelines and the Public/Private Actor Distinction*

Generally, race-specific actions are not subject to judicial equal protection review.<sup>201</sup> This principle applies to single-race scholarships created by private entities.<sup>202</sup>

Although racial designations created by a private institution may not receive strict judicial scrutiny,<sup>203</sup> public colleges and universities attract that attention. Furthermore, the Department of Education ("DOE") has established policy guidelines to aid in distinguishing those scholarships that remain scrutiny-free based on private donation and those subject to scruti-

1745, 1746 (1989).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 1745-46; see also Murray, *supra* note 182, at 1075.

<sup>200</sup> See generally Kennedy, *supra* note 174.

<sup>201</sup> The equal protection clause is concerned only with state actors: "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV.

<sup>202</sup> This occurs frequently. One recent example is a scholarship designated for African-American students pursuing advertising careers, which was established at the University of Illinois at Champaign by the Foundation of the American Advertising Federation. *A New Scholarship for African-American Students*, N.Y. TIMES, Dec. 15, 1995, at D6. A more celebrated example is the African-American scholarship established by Osceola McCarty for the University of Southern Mississippi. At age 87, McCarty donated her life savings of \$150,000, which she earned as a laundress. Michael Kinsley, *Generous Old Lady, or Reverse Racist?*, TIME, Aug. 28, 1995, at 76.

<sup>203</sup> But see William H. Daugherty, Jr., *The Legal Nature of Academic Freedom in United States Colleges and Universities*, 25 U. RICH. L. REV. 233, 257 (1991) (discussing Justice Douglas' dissenting opinion in Board of Regents of State Colleges v. Roth, 408 U.S. 564, 581 (1972) (Douglas, J., dissenting)). Douglas referred to several "umbilical cords" connecting private colleges with the state, including federal funding, regulation, and student aid, which could serve to extend First and Fourteenth Amendment protections to private school faculty. *Id.*

ny.<sup>204</sup> The DOE intended its guidelines, published before *Podberesky*, to be the Department's final guidance regarding the limitations that Title VI<sup>205</sup> places on a school's ability to award financial aid based on race or national origin.<sup>206</sup> Title VI states that no one, on the basis of race or national origin, shall be denied the benefits of, be excluded from, or be discriminated under, any program that receives federal financial assistance.<sup>207</sup> The DOE stated that two principles from its policy govern the guidelines.<sup>208</sup> Principle Three permits a college or university to award financial aid on the basis of race or national origin if a strong evidential basis indicates that such action is necessary to overcome the effects of past discrimination.<sup>209</sup> Principle Four advises that a college or university may allow race-conscious financial aid awards if the action is both a necessary and narrowly tailored means of attaining a diverse student body.<sup>210</sup> Principle Five combines these two principles to address specifically private funds.<sup>211</sup> When public colleges administer and award privately donated funds, Title VI applies, and the DOE suggests that schools must comply with either Principle Three or Principle Four.<sup>212</sup>

The distinction that the guidelines make for private scholarships also may have significance for endowed chairs. If, for example, a private donor wished to establish a chair in African-American studies, designated for an African-American scholar, the degree of control the college retains in administration of the endowment may be significant. The nature of an endowment program, however, does not permit a college or university to cede control in favor of a private donor; hiring a faculty member is not as easy as selecting a scholarship recipient.

Private donors might attempt to retain some control over their gifts. Recently, for example, Lee M. Bass donated twenty million dollars to Yale University<sup>213</sup> to endow a new program in Western Civilization.<sup>214</sup> Con-

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<sup>204</sup> 59 Fed. Reg. 8756 (1997).

<sup>205</sup> Civil Rights Act of 1964, 42 U.S.C. § 2000d (1994).

<sup>206</sup> Interestingly, the DOE's attempts to establish these guidelines occurred during a different challenge to minority scholarships by Daniel Podberesky's attorney, Richard A. Samp. See *Washington Legal Found. v. Alexander*, 984 F.2d 483 (D.C. Cir. 1993). In that case, the plaintiffs brought a complaint against the DOE for failing to enforce college and university compliance with Title VI in awards of race-conscious financial aid. The court dismissed the case pursuant to the Administrative Procedure Act because the plaintiffs had not exhausted other remedies. *Id.* at 485.

<sup>207</sup> 42 U.S.C. § 2000d (1994).

<sup>208</sup> 59 Fed. Reg. at 8757.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> The DOE's guidelines recognize that Title VI does apply and thus it cannot prohibit private individuals or organizations from awarding race-based scholarships and other financial aid. *Id.*

<sup>212</sup> *Id.* at 8757-58.

<sup>213</sup> Although Yale University is a private school, similar events could occur at a pub-



flicts developed between the university and the donor, and Bass demanded that the school permit him to oversee both the subject matter of the gift and appointments to his endowed chairs.<sup>215</sup> Yale's policy, however, is to deny such requests.<sup>216</sup> Noting a long-standing tradition of uneasy relations between colleges and universities and their benefactors, one commentator wrote that "no amount of money would be worth countenancing Steinbrennerism in the academy."<sup>217</sup> Although the issue of control was not the only problem Yale had with Mr. Bass's gift, it was one of the factors that resulted in rescission of his donation.<sup>218</sup>

The Yale fiasco illustrates several important considerations. One point is that colleges and universities traditionally have kept the bulk of control over donated endowment funds.<sup>219</sup> If the DOE guidelines on private financial aid and the need for Title VI compliance apply in cases of race-conscious endowments, the implication is that a school similarly may need to comply with either Principle Three or Principle Four. Therefore, the Title VI policies might permit race-conscious endowments only upon a finding of necessity for the accomplishment of diversity goals or to remedy past discrimination. Further, that type of funding might come under similar court scrutiny.

When a public school deals with a private donor, the distinction between public and private actors blurs. One columnist noted that the public/private distinction is fairly illusory, given that state universities frequently administer private gifts, that business contributions to scholarships are presumably tax-free, and that the government's policy will be racially biased toward private discrimination because caucasian-only scholarships would violate the 1964 Civil Rights Act.<sup>220</sup> Despite the uncertain distinction between public and private actors, scholarships frequently are considered private. One might argue, therefore, that endowments are similar to scholarships. Thus, to avoid scrutiny, schools may be wise to leave as much control as possible in a donor's hand.

Of course, many endowments are not blatantly race-conscious. Even an

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lic school.

<sup>214</sup> Massimo Calabresi, *How to Lose \$20 Million*, TIME, Mar. 27, 1995, at 69.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> Andrew Delbanco, *Contract With Academia: The Culture War's Threat to the Education Social Compact*, NEW YORKER, Mar. 27, 1995, at 7 (referring to the micro-management techniques of New York Yankees owner George Steinbrenner).

<sup>218</sup> *Id.* This is apparently the largest rescinded donation in the history of American education. *Id.*

<sup>219</sup> Yale University's president struggled with the dean of Yale College because the president wanted to keep the bulk of the Bass endowment money within the university's core endowment. See Calabresi, *supra* note 214, at 69, who called the incident the "king of all fund-raising foul-ups."

<sup>220</sup> Kinsley, *supra* note 202, at 76.

endowment for an African-American studies program need not designate an African-American scholar as the required or preferred recipient. This creates another way in which endowments may increase diversity on campus, without warranting strict scrutiny. Schools and private donors could designate only the subject matter of the chair or new department, leaving open the criteria for the candidates. Given current educational trends, specifying only the subject matter of the endowment should increase diversity in both curricula and faculty composition. For example, Professor Delgado stated that current trends in education include multicultural classes.<sup>221</sup> Specifically, he noted that current "hot topics" in legal education include feminist legal theory and critical legal studies.<sup>222</sup> As Professor Delgado noted, it is possible that many nonminority professors simply do not desire to teach in these fields, and most radical feminist scholars are women and most critical race theory scholars are minorities.<sup>223</sup> Delgado concluded, "[L]aw schools are not required to ignore . . . that color, gender, and life experience sometimes matter."<sup>224</sup>

Another possible way to differentiate faculty selection from student admissions and *Podberesky* is to focus on the concept of academic freedom. "Academic freedom," as defined by the Supreme Court's concept of constitutional academic freedom, is the qualified right of an institution to be free from government interference in its core administrative activities.<sup>225</sup> There are several problems with the concept of academic freedom. One is the lack of an adequate analysis of the academic freedom that the Constitution protects.<sup>226</sup> Professor Peter Byrne identifies another problem with academic freedom—that "American law operates on an impoverished understanding of the unique and complex functions performed by our colleges and universities . . . [which] require legal provisions tailored to their own goals and problems."<sup>227</sup> Because of the nature of the faculty selection process (including tenure decisions), the courts are ill-equipped to discern whether such hiring decisions are constitutional.<sup>228</sup> According to Professor Byrne, "constitutional academic freedom cannot be violated by any personnel decision based upon professional competence," made in good faith, and on academic grounds.<sup>229</sup> Therefore, a court's only inquiry should be whether a contested faculty decision was made in good faith.<sup>230</sup>

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<sup>221</sup> Delgado, *supra* note 137, at 1013-14.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 1016.

<sup>224</sup> *Id.* at 1016.

<sup>225</sup> J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 311 (1989).

<sup>226</sup> *Id.* at 253.

<sup>227</sup> *Id.* at 254.

<sup>228</sup> *Id.* at 306.

<sup>229</sup> *Id.* at 306.

<sup>230</sup> *Id.* at 307. Justice Powell also championed certain aspects of academic freedom,

Based upon this support for institutional autonomy and academic freedom, affirmative action programs may survive challenge, even after *Podberesky*, if only because of judicial respect for the decisionmakers and an inability of courts to scrutinize the factors a faculty committee considered and weighed. Academic freedom seems to support, in particular, freedoms relating to endowment. If academic freedom requires deference to schools regarding curricula decisions,<sup>231</sup> a school's establishment of an endowed chair in a particular field of study should be granted equal deference.

When pitted against criticism<sup>232</sup> and an apparent trend in the Supreme Court to reject affirmative action programs,<sup>233</sup> even the academic freedom rationale does not seem strong enough, however, to save faculty hiring programs from challenges. Therefore, the extent to which courts will defer to schools regarding notions of academic freedom is uncertain.

## V. CONCLUSION

In *Podberesky*, the Fourth Circuit refused to strengthen affirmative action on college and university campuses. Certain portions of the Fourth Circuit's reasoning may be used to reduce further the role affirmative action plays in public colleges and universities. In several respects, the decision has possible negative implications in a scholastic setting beyond student admissions and financial aid programs. Rather than follow the less restrictive yet greater number of test factors enunciated in *Paradise*, the Fourth Circuit's test is more conducive to upholding affirmative action programs because it encompasses a broader variety of factors. The court also rejected the district court's view that education should be considered in a different light than employment affirmative action.

The Fourth Circuit's narrowly tailored analysis in *Podberesky* is fairly

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writing that he "approve[d] the pursuit by a democratically governed faculty of robust intellectual exchange achieved in part through racial and other forms of diversity." Carrington, *supra* note 175, at 1177 (citing *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 311-16 (1978) (Powell J.)).

<sup>231</sup> Byrne, *supra* note 225, at 257.

<sup>232</sup> Critics have many possible arguments against academic freedom. For example, tension occurs when the freedom protects the pursuit and teaching of ideas contrary to popular opinion, leading to complaints from those with different viewpoints. William H. Daugherty, Jr., *The Legal Nature of Academic Freedom in United States Colleges and Universities*, 25 U. RICH. L. REV. 233, 233-34 (1991). Others objected when some colleges and universities used it as a means to withhold documents issued in the tenure review process. *Id.* at 243. Following the Supreme Court's decision in *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990) (finding no evidentiary privilege in academic freedom when a rejected tenure applicant alleges impermissible discrimination), it seems discovery will trump academic freedom's claim of confidentiality in peer review. Daugherty, *supra*, at 246.

<sup>233</sup> See *supra* Part II.

restrictive. Although other courts have indicated that past harms may be considered broadly—for example, statewide rather than at specific colleges and universities—the Fourth Circuit required evidence of past harm to a specific type of individual to justify scholarship relief.

Finally, although many academics favor separate treatment of the faculty hiring process, little precedential supports this desire. Therefore, the logical extension of a holding that restricts affirmative action in student selection is to restrict similarly its effects on other aspects of colleges and universities. For all of these reasons, the Fourth Circuit's opinion should give college and university administrators a reason to fear invalidation of their other programs.

Schools may continue to take certain steps to save existing programs in the endowment and faculty selection areas. First, schools should argue that the endowment and faculty selection realms of the college or university are unlike student selection and thus should not be restricted by *Podberesky*. Creating new courses and departments in diverse areas and subjects also will increase diversity. Finally, colleges and universities may look to the notion of academic freedom, which should remove the courts from close scrutiny of core academic functions.

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