1995

Fourth Circuit Finds University of Maryland Minority Scholarship Program Unconstitutional, Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994)

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RECENT CASES

CONSTITUTIONAL LAW — EQUAL PROTECTION — FOURTH CIRCUIT FINDS UNIVERSITY OF MARYLAND MINORITY SCHOLARSHIP PROGRAM UNCONSTITUTIONAL. — *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994).

The use of minority scholarships to create a diverse student body and to remedy past discrimination has been the subject of considerable controversy in recent years.[1] Although such scholarships constitute a small percentage of financial aid for higher education,[2] opponents of minority scholarships argue that they unfairly discriminate against non-minority students on the basis of race.[3] In *Podberesky v. Kirwan*,[4] the Fourth Circuit held that the University of Maryland at College Park (UMCP) denied Daniel Podberesky, a Hispanic/white student, equal protection of the laws by excluding him from consideration for the race-based Benjamin Banneker Scholarship Program. The program, the court held, was not narrowly tailored to remedy past discrimination at the University.[5] In its analysis, however, the court applied only a portion of the applicable legal standard. A proper analysis of the program using the factors set forth in *United States v. Paradise*[6] would have demonstrated that the program was narrowly tailored to address the racial problems of the University.

In the fall of 1990, Daniel Podberesky applied for a Benjamin Banneker scholarship, a merit-based scholarship awarded to African American students at UMCP. The University did not consider him for a scholarship, because he is not African American. Podberesky filed suit in federal district court, challenging the Banneker program at UMCP as a violation of Title VI and 42 U.S.C. §§ 1981 and 1983.[7] Based on a historical record that made it "abundantly clear that there is a history of past discrimination at UMCP,"[8] the district court granted summary judgment to UMCP, because it found that there existed sufficient evidence of present effects of past discrimination to

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[1] *See* U.S. GEN. ACCOUNTING OFFICE, HIGHER EDUCATION: INFORMATION ON MINORITY-TARGETED SCHOLARSHIPS 1 (1994).

[2] *See id.*

[3] *See* Mary Jordan, *Minority Scholarship Rules Relaxed*, WASH. POST, Feb. 18, 1994, at A16.

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

[5] *See id.* at 161.

[6] 480 U.S. 149 (1987).

[7] *See* Podberesky v. Kirwan, 764 F. Supp. 364, 366, 368 (D. Md. 1991); Brief for the United States as Amicus Curiae at 3, *Podberesky*, 38 F.3d 147 (No. 93-2527). Because Title VI is coextensive with the Equal Protection Clause, *see* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 610–11 (1983) (Powell, J., concurring in the judgment), the district court considered whether the program denied Podberesky equal protection of the laws. The court ruled against Podberesky on the §§ 1981 and 1983 claims. *See Podberesky*, 764 F. Supp. at 376–77.

[8] *Podberesky*, 764 F. Supp. at 372.

merit an affirmative action program and that the program was narrowly tailored to "serve[] the compelling interest of remedying" those present effects.[9] On appeal, the Fourth Circuit reversed and remanded for findings of fact on the existence of present effects of past discrimination at UMCP.[10] On remand, the district court upheld the Banneker program as constitutional.[11] The district court found that a long history of pervasive discrimination at the University[12] resulted in four present effects of discrimination: the University's poor reputation in the African American community, the present perception of a hostile campus climate for African American students, underrepresentation of African Americans in the student body, and a disproportionately high attrition rate among African American students.[13]

A three-judge panel of the Fourth Circuit reversed.[14] Judge Widener, writing for the panel, ruled that the district court erred in finding that "the University had sufficient evidence of present effects of past discrimination to justify the program" and in finding that the program was narrowly tailored to achieve its objectives.[15] The court entered judgment in favor of Podberesky, because it found that the program was not narrowly tailored to achieve its goals.[16] The Fourth Circuit rejected the district court's findings of four present effects of past discrimination, concluding that they were either insufficient as a matter of law or insufficiently demonstrated as a matter of fact. First, the court stated that neither the University's poor reputation in the African American community nor the perception of racial hostility on campus was "sufficient, standing alone, to justify the single-race Banneker Program."[17] Judge Widener also rejected the district court's resolution of factual disputes concerning the underrepresentation and high attrition rates of African American students on summary judgment.[18]

The court next found that even if it was "assumed that the University had demonstrated that blacks were underrepresented at the University and that the higher attrition rate was related to past discrimination," the Banneker program was not narrowly tailored to remedy these problems.[19] The court based this holding on four find-

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[9] *Id.* at 375.

[10] *See* Podberesky v. Kirwan, 956 F.2d 52, 57 (4th Cir. 1992).

[11] *See* Podberesky v. Kirwan, 838 F. Supp. 1075, 1099 (D. Md. 1993).

[12] The court identified several manifestations of this pervasive discrimination. *See id.* at 1077–80.

[13] *See id.* at 1084–94.

[14] *See* Podberesky v. Kirwan, 38 F.3d 147, 151 (4th Cir. 1994). Judges Wilkins and Hamilton joined in Judge Widener's opinion.

[15] *Id.* at 151.

[16] *See id.* at 161.

[17] *Id.* at 154.

[18] *See id.* at 155–57.

[19] *Id.* at 157–58.

ings. First, because "[h]igh achievers, whether African-American or not, are not the group against which the University discriminated in the past,"[20] the court rejected the argument that a program that attempted to attract "high achieving" blacks to UMCP was narrowly tailored.[21] Second, because Banneker scholarships were awarded to non-Maryland residents, the program was not narrowly tailored to increase the representation or decrease the attrition rate of "qualified African-American high school students in Maryland," which was the group the University had identified as the relevant reference pool.[22] Third, the court criticized the district court for employing an arbitrary reference pool to determine the extent of underrepresentation at UMCP.[23] Finally, the court found that the University had not shown that it had attempted race-neutral solutions to remedy the lower retention rate of black students.[24]

The Fourth Circuit applied only a portion of the proper legal standard to the Banneker program to determine if the program was narrowly tailored.[25] Judge Widener analyzed the program according to the factors that the Supreme Court reviewed in *City of Richmond v. J.A. Croson Co.*,[26] but noted that the program could not withstand the

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[20] *Id.* at 158.

[21] *Id.*

[22] *Id.* at 159 (internal quotation marks omitted).

[23] *See id.*

[24] *See id.* at 161.

[25] The court also made several errors in its analysis of the program. The court's reasoning in rejecting the hostile-climate justification — that many universities in the North and the South could make similar claims — was a non sequitur. Judge Widener reasoned that such pervasive discrimination is "societal discrimination, which cannot be used as a basis for supporting a race-conscious remedy." *Id.* at 155. However, if universities discriminate against African Americans, their discrimination may be part of a larger pattern of societal discrimination. This possibility neither lessens nor excuses the insidiousness of each individual university's past actions or the present effects of that past discrimination such that affirmative action at the individual universities is unconstitutional. Furthermore, the *Podberesky* court's result is inconsistent with the Supreme Court's prior decisions, including City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). Although the Court has cautioned against programs aimed at remedying broad perceptions of societal discrimination, *see, e.g., id.* at 498–500, *Croson* clearly states that "[n]othing we say today precludes a state or local entity from taking action to rectify *the effects of identified discrimination* within its jurisdiction." *Id.* at 509 (emphasis added).

In addition, although the *Podberesky* court claimed that the program could not be narrowly tailored because it was designed to attract "high achieving" African Americans, if the University discriminated against African Americans, the fact that it did not single out "high achieving" African Americans for additional or heightened discrimination is irrelevant. As African Americans, the "high-achievers" are members of the group against which the University discriminated previously, and as such, are entitled to the benefits of the University's remedial actions. The Supreme Court has expressly rejected the idea that an affirmative action plan is invalid if it benefits those who were not the identified victims of discrimination. *See* Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 445 (1986).

[26] 488 U.S. 469 (1989).

test announced in *United States v. Paradise*.[27] In explaining why it would consider only the factors discussed in *Croson*, and not those set out in *Paradise*, the court emphasized two points. First, unlike the fifty-percent promotional requirement at issue in *Paradise*, the Banneker scholarship did not require racial quotas.[28] Second, in contrast to *Paradise*, both *Croson* and *Podberesky* dealt with claims involving present effects of past discrimination.[29] However, *Paradise* did involve a racial quota to remedy the present effects of past discrimination.[30] Furthermore, the Supreme Court did not revise or abandon the *Paradise* standard in *Croson*;[31] rather, the Court limited itself to "two observations" on the issue whether the promotional requirement was narrowly tailored, because the plan in *Croson* was not connected to "identified discrimination in any way."[32] Therefore, the Supreme Court did not conduct a full "narrowly tailored" analysis in *Croson*. Such an analysis, the Court explained, would be "almost impossible," because the City of Richmond had failed to demonstrate discrimination and thus lacked a compelling interest to justify the program.[33] Thus, the Court's ultimate holding in *Croson* was based on a lack of a compelling state interest;[34] the "two observations" of the Court were merely dicta.

To determine if the program was narrowly tailored, the *Podberesky* court should have examined the factors announced in *Paradise*, which encompass the factors analyzed in *Croson*. Under *Paradise*, a court should consider "the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief[;] . . . the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties" to determine if an affirmative action program is narrowly tailored.[35] Had the *Podberesky* court properly applied *Paradise*, it would have held that the program was narrowly tailored to remedy the present effects of past discrimination.

The Banneker program was a necessary component of the University's efforts to remedy the present effects of past discrimination at UMCP. Title VI regulations require a recipient of federal funding to

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[27] 480 U.S. 149 (1987); *see Podberesky*, 38 F.3d at 158 n.10. The Fourth Circuit previously applied the *Paradise* test in Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 216 (4th Cir. 1993).

[28] *See Podberesky*, 38 F.3d at 158 n.10.

[29] *See id.*

[30] *See Paradise*, 480 U.S. at 154–55.

[31] *See Croson*, 488 U.S. at 507.

[32] *Id.*

[33] *Id.* at 505–07.

[34] *See id.* at 505, 511.

[35] *Paradise*, 480 U.S. at 171. Like the panel's opinion, this Recent Case assumes a statistically significant disparity exists and that the disparity is related to past discrimination. *See Podberesky*, 38 F.3d at 157–58.

"take affirmative action to overcome the effects of prior discrimination."[36] The University's history of discrimination and segregation created barriers to the creation of a fully integrated system of higher education.[37] Prior to the program's institution, the state had made repeated attempts to comply with Title VI. The final plan that was approved by the Office of Civil Rights "included specific reliance on the . . . Banneker Scholarship Program."[38] Without such a program, many minorities may have been unwilling or financially unable to attend the University.[39] The Banneker program addressed these barriers at UMCP.[40]

Moreover, race-neutral remedies would neither have effectively addressed the present effects of past discrimination at UMCP nor substantially furthered the University's diversity goals. The University's attempts at both a race-blind merit-based scholarship program and a race-neutral need-based scholarship program had already failed to recruit black students in significant numbers.[41] Additionally, race-neutral efforts would not have addressed several factors that deterred black students from attending UMCP, including the perception of racial hostility and the poor reputation of the University within African American communities. Furthermore, alternative remedies would not have effectively furthered the University's diversity goals.[42] Although racial diversity is only one aspect of creating a diverse student body, "it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful."[43]

In addition, the Banneker program was flexible and of limited duration. It was reevaluated at least every three years,[44] which ensured that its minimal burden would be imposed only so long as it was necessary to mitigate persisting problems. This periodic reevaluation increased the program's flexibility, because it allowed administrators to alter or eliminate the program if it proved no longer necessary.

The University also established the proper relationship between the Banneker program's goals and the relevant student population. The program's goals must have been designed to address the under-

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[36] 34 C.F.R. § 100.3(b)(6)(i) (1994). The regulations also permit universities to undertake voluntary affirmative action programs to overcome the continuing effects of factors that contributed to the underrepresentation of minority groups. *See id.* § 100.3(b)(6)(ii).

[37] *See* Podberesky v. Kirwan, 838 F. Supp. 1075, 1084–94 (D. Md. 1993).

[38] *Id.* at 1081.

[39] Several university officials have commented that a university may have difficulty recruiting minority students without financial aid specifically designated for such students. *See* Nondiscrimination in Federally Assisted Programs, 59 Fed. Reg. 8756, 8761 (1994).

[40] *See Podberesky*, 838 F. Supp. at 1094.

[41] *See id.* at 1095.

[42] The Supreme Court recognized the importance of a diverse student body in Regents of the Univ. of California v. Bakke, 438 U.S. 265, 311–12 (1978).

[43] *Id.* at 407 (Blackmun, J., concurring in the judgment in part and dissenting in part).

[44] *See Podberesky*, 838 F. Supp. at 1082.

representation and attrition rates of black students, rather than an alternative racial disparity.[45] The program was so designed — among other things, it attempted to attract more African Americans to UMCP and to reduce the attrition rate of those African Americans who had chosen to attend the University.[46] To remedy these problems, the University provided Banneker scholarships to twenty to thirty black students in each entering class of approximately 3100 total students — less than one percent of the entering class.[47] This relationship was analogous to similar relationships that have been approved as constitutionally permissible.[48] The provision of Banneker scholarships was directly related to remedying the proper disparities.

Finally, the program imposed a minimal burden upon third parties.[49] The program was not administered "to affirmatively admit African-American students solely on the basis of race."[50] Rather, Banneker scholarships were presented after admissions decisions had been completed, and therefore, did not affect the admission of any student — African American or otherwise.[51] Furthermore, the funds for the Banneker Scholarship program represented just one percent of the University's total financial aid budget;[52] therefore, all students competed for the overwhelming majority of University financial aid.

As opposition to affirmative action continues to grow, the Fourth Circuit, among others, would overlook the pervasive effects of past discrimination. However, the effects of centuries of economic and educational deprivation continue to disadvantage many blacks who attempt to pursue economic and educational opportunities. The elimination of race-conscious means today will only exacerbate the deep chasms that presently exist between the races.[53]

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[45] *Compare* United States v. Paradise, 480 U.S. 149, 179–80 (1987) (upholding a promotional requirement, in part because the requirement's minority representation goal reflected the percentage of blacks in the applicable labor market) *with* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 294 (1986) (O'Connor, J., concurring in part and concurring in the judgment) (explaining that the school board's minority representation goal for teachers was impermissibly tied to "the percentage of minority students in the school district," rather than "the percentage of qualified minority teachers within the relevant labor pool").

[46] *See Podberesky*, 838 F. Supp. at 1087–89, 1091.

[47] *See id.* at 1096.

[48] *See, e.g.*, Hopwood v. Texas, 861 F. Supp. 551, 575 (W.D. Tex. 1994) (explaining that the proper relationship was "easily satisfied" by the University of Texas School of Law's admissions goals, which were based on the "percentages of black and Mexican American college graduates in the State of Texas").

[49] The Supreme Court has recognized that remedying this country's history of discrimination may require innocent parties to bear some of the burden. *See Wygant*, 476 U.S. at 280–81.

[50] Podberesky v. Kirwan, 38 F.3d 147, 160 (4th Cir. 1994).

[51] *See Podberesky*, 838 F. Supp. at 1096.

[52] *See id.* at 1077.

[53] *See, e.g.*, CORNEL WEST, RACE MATTERS 95 (1994) ("Given the history of this country, it is a virtual certainty that without affirmative action, racial and sexual discrimination would return with a vengeance.").