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Anne Wells

John L. Strope Jr.

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***By Anne Wells and John L. Strope, Jr.***

*The United States Supreme Court's decision of May 23, 1995 not to grant certiorari and to let stand a federal court of appeal's decision in* Podberesky v Kirwin *(1994) made headlines across the nation. The Supreme Court has let stand a lower court's findings that a race-exclusive scholarship, awarded only to African-Americans at the University of Maryland, violates the 14th Amendment to the U.S. Constitution and Title VI of the Civil Rights Act of 1964.[1] While the decision is legally binding only in the jurisdiction of the Court of Appeals for the Fourth Circuit (the states of Maryland, North Carolina, South Carolina, Virginia, and West Virginia), it does establish a significant legal precedent.*

*On the other hand, Department of Education guidelines, issued in February 1994, advise that race-exclusive scholarships are legal if they are designed to remedy past discrimination or to promote diversity. (Federal Register, 1994). Yet recent legal decisions have made it increasingly difficult to prove the existence of present effects of past discrimination, thereby justifying remedies, such as race-based financial aid.*

*Financial aid administrators now wonder how to administer institutional aid programs. Colleges and universities are being advised by the American Council on Education, "don't do anything different from what you are doing." (Jaschik, June 2, 1995, p. A25). But Richard Samp of the Washington Legal Foundation (and Daniel Podberesky's attorney) states, "it would be 'virtually impossible' for colleges to meet the legal standard set by the Fourth Circuit to justify minority scholarships," and "it will take only a few multi-million-dollar [damage] awards for schools to start thinking differently." (Jaschik, June 2, 1995, p. A25).*

*The purpose of this article is to review the* Podberesky *decision and to discuss the implications of that decision on race-based financial aid awards.*

## The Podberesky Case

Anne Wells is the Director of Dental Student Services at the School of Dentistry, University of Louisville, Kentucky. John L. Strope, Jr., is Professor and Chair, Department of Administration and Higher Education at the University of Louisville.

In 1991, Daniel Podberesky, a Hispanic, filed suit against William E. Kirwin, president of the University of Maryland at College Park (UMCP) and the University because he was denied a Banneker Scholarship. Although Mr. Podberesky possessed the academic qualifications, Banneker Scholarships were awarded only to African American students. Therefore, he was not considered an eligible candidate for the scholarship award.

The Banneker Scholarship Program came into existence as part of a desegregation plan submitted by the State of Maryland in an effort to comply with the Civil Rights Act of 1964. Enforcement of Title VI of the Civil Rights Act, which prohibits racial discrimination in any

organization receiving federal funds, was placed with the Office of Civil Rights (OCR) in the U.S. Department of Health, Education, and Welfare.[2] States determined to be operating segregated systems of higher education were required to submit comprehensive plans to desegregate.

The State of Maryland submitted, modified, and re-submitted a series of desegregation plans throughout the 1970's and 1980's that ultimately were approved by OCR. Included in the plans were efforts by the University of Maryland at College Park to recruit and retain more African American students. The Banneker Scholarship, funded with both state and private funds, was implemented in 1979. Although these scholarships were not mentioned by name in the desegregation plan, offering financial aid on a race-exclusive basis was approved as a method of attracting and retaining more minority students.

**District Court I and Appeals Court I**

Podberesky's lawsuit contended that the awarding of Banneker Scholarships only to African-American students violated the equal protection clause of the 14th Amendment to the U.S. Constitution, as well as Title VI of the Civil Rights Act of 1964. The courts have emphasized the need to examine with "strict scrutiny," situations where people are treated differently by race. In the 1978 *Bakke* decision, the Supreme Court stated, "All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny." (*Regents of the University of California v. Bakke* [Bakke], 1978, p. 2748). Therefore, to meet the strict scrutiny of the courts, UMCP had to show how the Banneker Scholarship Program served a "compelling state interest," and was a "narrowly tailored" solution.

The equal protection argument presented in *Podberesky* involved the determination of:

1. intent to discriminate against certain people in offering the Banneker Scholarship, and
2. a "suspect class," in this case, all races other than African-Americans. The government then had to present evidence of "compelling interests" to continue the discriminatory practice—in this case, continuing to award the Banneker Scholarship—and demonstrate that doing so was a means "narrowly tailored" to remedy current effects of past discrimination.

Neither side in *Podberesky* disputed the fact that the scholarship was intentionally discriminatory. The Banneker Scholarship was awarded only to members of one race, African-Americans.

Podberesky argued that "no federal agency has ever found that Maryland operated a racially segregated system of higher education in violation of Federal law." He contended that OCR's findings were "insufficient to demonstrate a history of discrimination"; that OCR "misapprehended. . .the necessity of affirmative remedies for past constitutional violations"; that the Banneker Scholarship Program, per se, was never approved by a federal official, and even if the Banneker could

have been justified in the past, UMCP was now free from discrimination (*Podberesky v. Kirwin* [Podberesky 1], 1991, p. 373).

The University argued its compelling interest was its "goal of remedying the effects of past discrimination at UMCP" (Podberesky 1, p. 372). The defendants pointed to the State's and the University's attempts to become certified in final compliance with the OCR. University officials asserted that the Banneker Scholarship Program was narrowly tailored to recruit and retain African-American students. They claimed that race-neutral alternatives had been considered, and in fact coexisted with the Banneker Scholarship (particularly the Francis Scott Key Scholarship), but were ineffective in increasing minority enrollment.

In its analysis, the district court raised an "unsettled legal question: The Supreme Court's affirmative action cases do not directly address the question of when past discrimination ceases to justify present remedies" (Podberesky 1, p. 374). To justify race-conscious remedies, the court said that the state had to prove that past discrimination has continuing effects on the present. Podberesky argued that UMCP had exceeded its goal for recruiting black freshmen, citing President Kirwin's deposition that the University had not discriminated against blacks in many years (Podberesky 1, pp. 374-5).

However, the district court was not swayed by Podberesky's arguments, stating that it was "premature to find that there are no present effects of past discrimination at the institution" (Podberesky 1, p. 375) and while a scholarship is a "desirable benefit" it is not one that prohibits him from attending the University (Podberesky 1, p. 376). A judgment in favor of the University of Maryland was entered.

Podberesky immediately appealed to the Court of Appeals for the Fourth Circuit. In a January 31, 1992 decision, the court declared that the district court "wavered" in not specifically identifying the *present* effects of *past* discrimination (*Podberesky v. Kirwin* [Podberesky 2], 1992, p. 56). The case was remanded to the district court to determine "whether present effects of past discrimination exist and whether the remedy is a narrowly tailored response to such effects" (Podberesky 2, p. 57).

**District Court II**

After remand, the district court asked the university to engage "in an administrative fact-finding process to decide whether to continue the Banneker Program" (*Podberesky v. Kirwin* [Podberesky 3], 1993, p. 1076). The product of that investigation was *Decision and Report*, a position paper recommending the continuation of the scholarship. University officials engaged in additional fact-finding to demonstrate the present effects of past discrimination, the result of which was the compilation of an extensive history of discriminatory acts by UMCP. Prior to the 1954 landmark decision, *Brown v. Board of Education*, higher education in Maryland was similar to other southern states, with separate institutions of higher education for blacks that were "segregated, vastly underfunded and consistently neglected." (Podberesky 3, p. 1077). After *Brown*, UMCP accepted African Americans, but the "state did little to promote integration." (Podberesky 3, p. 1078).

A historical recounting of university inattentiveness to black student concerns was recited.

In the 1960's, the university had failed to permit the Congress for Racial Equality to organize a campus chapter; Martin Luther King, Jr. was discouraged from speaking at the campus, but George Wallace was permitted to speak; the Ku Klux Klan marched on campus when dormitories were desegregated; university chaplains were prohibited from taking part in civil rights activities; and black student enrollment was less than 1% of the undergraduate student population (Podberesky 3, pp. 1078-9).

In the 1970's, the university cited: problems in seeking compliance with the OCR desegregation order; resistance to integrating campus housing; lack of university financial support for building black sorority and fraternity houses, as well as substandard facilities for black student programs; admissions office resistance to recruiting minorities and new admissions standards imposed without consideration to their impact on minorities; and UMCP's refusal to develop cooperative and feeder programs with historically black Maryland colleges and universities (Podberesky 3, pp. 1078-81).

*"These recent court decisions are making many colleges and universities re-examine their policies regarding the recruitment and retention of minority students."*

In the 1980's the university noted that with the submission of yet another desegregation plan to the OCR, UMCP had revised its minority admission goals downward, using the term, "other race," rather than focusing specifically on African-Americans, and concentrating recruitment efforts only on first-time, full-time freshmen (Podberesky 3, pp. 1081-2).

UMCP officials presented four arguments for the present effects of past discrimination: the poor reputation of UMCP in the African-American community; the under-representation of African-Americans in the UMCP student body; the high attrition rates of African-Americans at UMCP; and the perception that the university is a hostile climate for African-Americans (Podberesky 3, pp. 1082-94). Podberesky challenged all four arguments.

*Poor reputation.* University officials had commissioned an evaluation of the reputation of the university community by an outside consultant. He interviewed high school counselors and conducted four student focus groups, concluding that UMCP has "done a poor job of serving the black community" (Podberesky 3, p. 1084). He noted that many blacks, because of the history of segregation at UMCP, were referred to historically black institutions by counselors and by family.

Podberesky challenged the findings of the surveys conducted. He stated that the questionnaires were flawed and statements were made to elicit negative responses. Furthermore, he claimed the results did not show any link between past discrimination and the present.

*Under-representation.* The UMCP did not have rigid admission standards, and extensive debate resulted concerning the identification of an appropriate reference pool, from which to compare the percentages of African-Americans. The reference pool debate ranged from all graduating high school seniors in Maryland, to takers of the SAT, to those high school seniors successfully completing a "core curriculum" to be eligible for college, to students scoring above particular levels

on the SAT—all compared to the total number of African-Americans entering the freshman class at UMCP. UMCP officials made the case that despite all their efforts, and no matter which reference pool was used, African-American students were still under-represented at UMCP.

Podberesky argued that African-Americans were no longer under-represented at UMCP, suggesting that university officials manipulated the statistics to state their case. He stated that the percentage of African-American undergraduates at UMCP was proportionate to that at many northern institutions that did not have segregated pasts.

*High attrition.* UMCP officials contended that the proportionately higher attrition rates of African-Americans was directly attributable to the university's segregated past. They showed how African-Americans had the lowest retention and graduation rates of any other group at UMCP. In 1986, a total of 42.5% of black freshmen graduated within six years, compared to 66.5% of white freshmen. (Podberesky 3, p. 1091). Podberesky countered with statistics from and references to comparable northern institutions facing the same dilemmas.

*"The courts have emphasized the need to examine with 'strict scrutiny,' situations where people are treated differently by race."*

*Hostile climate.* Citing a 1989 study at UMCP, officials noted the "chilly climate" for African-Americans on campus (Podberesky 3, p. 1092). They cited incidents of racist comments; the lack of African-American leaders; the failure of the campus media to cover accomplishments of African-American faculty, staff and students; condescending attitudes; racial epithets; and the segregated atmosphere that continued to permeate the campus.

Podberesky concurred that a hostile climate did exist toward African-Americans at UMCP. However, he disputed whether this was due to the effects of past discrimination or was merely the effect of present societal discrimination.

To consider whether the remedies offered by UMCP were narrowly tailored to justify such actions, the court applied a framework derived from the 1987 Supreme Court decision in *U.S. v. Paradise.* UMCP was required to demonstrate:

1. the necessity for relief and the efficacy of alternative remedies;
2. the flexibility and duration of the relief;
3. the propriety of the program's numerical goals; and
4. the impact of the program on the rights of third parties. (*U.S. v. Paradise*, pp. 1094-97)

*Relief and alternative remedies.* UMCP officials argued that offering Banneker Scholarships had increased the number of African-Americans admitted and expected to graduate, and had helped establish a base of supportive African-American alumni who would potentially serve as role models and mentors. Officials argued that race-neutral and need-based scholarship programs were not nearly as effective in attracting African-American students.

*Flexibility.* University officials conceded that the Banneker Scholarship was not flexible because it was offered to African-Americans only, but noted that the existence of the Banneker Program was "not a perennial feature" (Podberesky 3, p. 1096), and was to be reviewed at least every three years.

*Propriety of goals.* UMCP argued that the Banneker Program satisfied this requirement because it compared the number of scholarship recipients to the incoming freshman class. Although the notion of an accurate reference pool was cloudy, the court accepted UMCP's argument that the number of scholarships offered represented less than 1% of entering freshman class, and that "[t]he percentage is small compared to any of the possible goals that the parties have bandied about . . ." (Podberesky 3, p. 1096).

*Impact on the rights of third parties.* One of the greatest benefits of the Banneker Program, officials argued, was that it did not conflict with the rights of others. The Program comprised only 1% of the UMCP financial aid budget and did not impinge on non-African-Americans' rights to attend UMCP.

On remand, the district court upheld its previous decision, insisting that the Program satisfied the requirements of addressing the present effects of past discrimination. Judge Frederick Motz said that the appeals court had constructed too rigid a framework for considering this case, noting that most affirmative action cases relate to employment disputes, rather than educational considerations. He concluded:

> . . . the Supreme Court has consistently recognized that discrimination in schooling is the most odious form of discrimination. . .Accordingly, it seems entirely proper that in order to cure these effects, legislatures and educational administrators be given more leeway in fashioning remedies that take into account the vast extent of the damage that has been done by our shameful legacy of involuntary segregated education (Podberesky 3, p. 1097).

**Appeals Court II**

Podberesky appealed the case again. A decision of the Fourth Circuit Court of Appeals was handed down October 27, 1994, overturning the district court's findings. The court rejected all four of UMCP's compelling reasons. It stated that the lower court had failed to show how Maryland's segregated past justified the existence of the current Banneker Scholarship Program, stating that "mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy" (*Podberesky v. Kirwin* [Podberesky 4], 1994, p. 154). The court rejected arguments about the under-representation of African-Americans as well as attrition rates because of concerns about the accuracy of the statistics. It insisted that the lower court had not established an accurate reference pool, nor had it precisely established the minimum admission criteria for UMCP, both factual issues that were "not inconsequential and could have been resolved at trial." (Podberesky 4, p. 157). The court also rejected the "hostile climate" argument, suggesting that it was due more to present societal discrimination, rather than the university's segregated past.

Next, the court turned to the "narrowly tailored" aspects of the remedy, rejecting the university's arguments, and concluding that:

1. the district court failed to show how a scholarship program that attracts high-achieving African-Americans, who are probably

college bound already, will remedy the low retention rates and under-representation of African-American students at UMCP;
2. offering awards to non-residents makes it ". . .apparent that the Banneker Program considers all African-American students for merit scholarships at the expense of non-African Maryland students" (Podberesky 4, p. 158);
3. the reference pool used by UMCP was arbitrarily defined and flawed in a myriad of ways, resulting in "a series of inconclusive and possibly inflated figures . . ." (Podberesky 5, p. 159), and implying that the figures constituted a quota (Podberesky 4, p. 160); and
4. ". . . the University has not made any attempt to show that it has tried, without success, any race-neutral solutions to the retention problem" (Podberesky 4, p. 161). Furthermore, the court rejected the "role model" and "societal discrimination" theories (Podberesky 4, p. 161).

In January 1995, the University of Maryland appealed to the United States Supreme Court. The Justice Department, 19 colleges and universities, 8 law schools and numerous higher education and civil rights groups filed briefs, urging the Court to consider the case and uphold the legality of race-exclusive scholarships (Jaschik, May 12, 1995, p. A34). However, on May 23, 1995, the Supreme Court announced, without comment, its refusal to review the case.

**Future Considerations**

In refusing to consider *Podberesky*, the appeals court decision stands. Though it is legally binding only in the states of the Fourth Circuit, it serves as a precedent for future lawsuits throughout the country. The door has been left open for future challenges, perhaps with extensive punitive damages attached.

When placed in the context of affirmative action cases over the past decade, the *Podberesky* result is quite logical. The Supreme Court has continued to define more narrowly the scope of allowable affirmative action remedies.

The first legal challenge to affirmative action in higher education was the *Bakke* case in 1978, which struck down the principle of "set-asides" or quotas in the admissions process, but which validated the concept of striving to achieve a diverse student body as an acceptable "compelling interest" of a university (*Bakke*, 1978). (One can only speculate whether "diversity" would stand up as a compelling interest under the 1995 Court's scrutiny. "Diversity" was not an argument in *Podberesky*.)

In the 1980's, the Supreme Court continued to refine and limit further the concepts of "compelling interest" and "narrowly tailored" in subsequent employment-related decisions.[3] The two most recent affirmative action cases decided by the Supreme Court on June 12, 1995, *Adarand v. Pena* and *Missouri v. Jenkins*, reflect an increasingly tightly constructed framework for establishing a compelling state interest and a narrowly tailored remedy. It is unclear if *any* university will

be able, under these parameters, to justify legally the awarding of race-exclusive financial aid.

These recent court decisions are making many colleges and universities re-examine their policies regarding the recruitment and retention of minority students, as well as the awarding of race-based financial aid. A 1994 Government Accounting Office (GAO) report determined that while small numbers of students are served by race-based financial aid (7% of undergraduates, 4% of graduate students, and 15% of professional students), nearly two-thirds of all colleges and universities offer at least one race-based scholarship. The decision to continue to offer race-based scholarships is currently being scrutinized at many institutions, with some colleges and universities outside the 4th Circuit taking a "wait-and-see" approach before eliminating minority scholarships likely to become the object of the next "*Podberesky*-like" lawsuit.

"Neither side in *Podberesky* disputed the fact that the scholarship was intentionally discriminatory."

*Department of Education guidelines vis-a-vis Podberesky.* Current Department of Education guidelines (1994) expressly state that financial aid to remedy past discrimination is justifiable "without waiting for a finding to be made by the Office of Civil Rights, a court or legislative body, if the college has a strong basis in evidence of discrimination . . ." (Non-discrimination, p. 8756). They also permit the awarding of race-based financial aid when it is used to create diversity and is "narrowly tailored. . . to have a diverse student body that will enrich its academic environment" (Non-discrimination, p. 8756). The guidelines use a framework to define "narrowly tailored" as when:

1. race-neutral means of achieving diversity would be ineffective;
2. less extensive or intrusive use of race in awarding financial aid for diversity would be ineffective;
3. the use of race is of "limited extent" and "applied in a flexible manner;
4. the institution regularly re-examines its use of race in financial aid awards; and
5. the race-based criteria are used sparingly "so as not to create an undue burden on [non-minority students] to receive financial aid. . . . Generally, the less severe and more diffuse the impact on non-minority students, the more likely a classification based on race. . .will address this factor" (Non-discrimination, pp. 8760-2). The University of Maryland presented the facts of its case within this very framework, and it was unconvincing to the court. We do not know when or if revised guidelines will be issued by the Department of Education.

*Meeting institutional mandates to increase minority participation.* As a corollary, colleges and universities must re-evaluate their internal mandates and evaluate their efforts to increase minority enrollment.

When the *Bakke* decision was handed down in 1978, colleges and universities throughout the nation re-evaluated their admissions processes and made necessary changes to meet the letter of the law. It is clear, when examining subsequent cases following that decision, that the universities were successful in amending admissions policies to comply with new standards. All cases upheld university admissions

standards and considered special programs to better prepare "at-risk" students to be legal.[4] Will colleges and universities be able to "catch on" to the newest standards set forth by the courts?

Moreover, the University of Maryland at College Park, in making its case in *Podberesky*, has very publicly admitted an extensive record of previous discrimination. Although not directly related to the financial aid issue, did the University consider that it has offered considerable documentation about its discriminatory past? Has it laid itself open to future discrimination lawsuits? Anyone wanting to prove that the university has discriminated in the past may have ready-made evidence.

*Government-funded v. privately-funded scholarships.* The Banneker Scholarship Program was only partially funded with state funds. It is unclear how the recent court decisions will effect privately-funded scholarships. Current Department of Education regulations expressly state that privately-funded scholarships are permissible (Non-discrimination, p. 8762-3). When the institution administers the scholarship programs, does the funding source matter?

*Historically black colleges and universities.* Another possible effect of the recent legal decisions is on the historically black colleges and universities (HBCU's). Justice Clarence Thomas, the only African-American member of the Supreme Court, expressed support for HBCU's, in a June 1995 opinion: "Because of their 'distinctive histories and traditions,' black schools can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement" (*Missouri v. Jenkins*, p. 4500). Department of Education regulations further confirm that special considerations must be given by the federal government (by both the legislative and executive branches) because HBCU's have a special mission in serving as "a key link to the chain of expanding college opportunity for African-American youth. . ." (Non-discrimination, p. 8763). However, since recent court rulings call for the re-evaluation of desegregation and affirmative action efforts, is there any danger to the continued existence of HBCU's? Can either publicly or privately funded financial aid be given special consideration in the HBCU environment?

## Conclusions

Since the historic *Brown v. Board of Education* decision in 1954 and the enactment of the Civil Rights Act of 1964, government has sought far-reaching remedies to eliminate racially discriminatory treatment. Justice Thomas, in his concurring opinion in *Missouri v. Jenkins* (1995) reflects on the most recent trend to "rein-in" the power of government:

> Our impatience with the pace of desegregation and with the lack of a good-faith effort on the part of school boards led us to approve . . . extraordinary remedial measures. But such powers should have been temporary and used only to overcome the wide-spread resistance to the dictates of the constitution. The judicial overreaching we see before us today perhaps is the price we now pay for our approval of such extraordinary remedies in the past. . . . Our willingness to unleash the federal equitable power has reached areas beyond school

> desegregation. . . . The point of the Equal Protection Clause is not to enforce strict race-mixing, but to ensure that blacks and whites are treated equally by the State without regard to their skin color (*Missouri v. Jenkins*, pp. 4501-2).

We are, no doubt, in the midst of a changing political and legal climate. Colleges and universities are faced with re-examining their values, policies, and procedures. This is but a microcosm of what our entire society now faces.

**Endnotes**

[1]Equal protection as stated in the 14th Amendment applies only to public institutions. However, Title VI applies to both public and private institutions. The framework used to analyze equal protection claims is also used for Title VI. Therefore, the logic and decision of *Podberesky* should be the same, regardless of whether the institution is public or private.

[2]Enforcement of Title VI was turned over to the Department of Education after its inception in 1978.

[3]*Wygant v. Jackson Board of Education* (1986) and *City of Richmond v. J.A. Croson Company* (1989) struck down racially determined set-asides for employment lay-offs and the awarding of city contracts. *U.S. v. Paradise* (1987), while upholding the constitutionality of a plan to integrate the Alabama Highway Patrol, produced a more limiting framework for defining "narrowly tailored" remedies that has been applied in *Podberesky* and subsequent cases.

[4]Several "post-*Bakke*" lawsuits challenged the constitutionality of admissions policies that considered race as one of many factors in admissions decisions (*DeRonde v. Regents of the University of California*, 1981; *Doherty v. Rutgers School of Law-Newark*, 1980 and 1981; *Davis v. Halpern*, 1991). Several other cases challenged the constitutionality of "at-risk" programs from which less well qualified minority and disadvantaged students were considered for admission (*McDonald v. Hogness*, 1978; *DiLeo v. Board of Regents of the University of Colorado*, 1978; *McAdams v. Regents of the University of Minnesota*, 1981). All of these cases were decided in favor of the universities. The courts upheld the constitutionality of all admissions decisions cases (none used quotas), as well as the special programs designed for "at-risk" students because a student's participation did not guarantee admission.

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