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# ANOTHER APPROACH TO RACIAL PREFERENCES\*

STEVEN E. EHLMANN\*\*

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## I. INTRODUCTION: "AFFIRMATIVE ACTION" VS. "RACIAL PREFERENCE"

As the debate on "affirmative action" continues, its proponents have already won an important victory: the labeling of the term itself. The use of the term "affirmative action" in the context of modern political debate is flawed, for the modern discussion is not truly about affirmative action, but rather about racial preference. Labeling racial quotas, preferences, and set asides under the more general and less threatening term "affirmative action" is akin to the press labeling hard-line communists in the final days of the Soviet Union as "conservatives," or a politician labeling a decrease in the rate of growth of a federal spending program as a "cut."<sup>1</sup> These are all simply misnomers designed to mislead the public as to their proponents' true purpose.

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\* This Article was submitted for publication in April 1998, before the Missouri Legislature adjourned. Senate Bill 681 did not make it to the senate floor for debate. The author intends to resubmit the Bill in the legislative session beginning in January 1999.

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1. See Steven E. Ehlmann, *Both Sides*, MISSOURI IMPACT MAGAZINE, May 6, 1996, at 34.

Politically, whoever wins the battle over labels will ultimately win the war on the underlying issue concerning racial preference.<sup>2</sup> Polling seems to show that a majority of Americans are not opposed to affirmative action when it involves offering a helping hand to certain minorities that have historically been the victims of discrimination.<sup>3</sup> As journalist Clarence Page has suggested, "Affirmative action, 'in the best sense,' then, is outreach, not preferences."<sup>4</sup> It is what Abigail Thernstrom has called a "widening of the net,"<sup>5</sup> not quotas or separate standards for women and minorities.<sup>6</sup>

However, when the helping hand turns into a preference, and less is expected from someone simply because of his or her minority group status, the majority of Americans are opposed to affirmative action.<sup>7</sup> As General Colin Powell wrote in his book, *My American Journey*, "If affirmative action means programs that provide equal opportunity, then I am for it. If it leads to preferential treatment or helps those who no longer need help, I am opposed. I benefited from equal opportunity and affirmative action in the Army, but I was not shown preference."<sup>8</sup>

Similarly, President Clinton appreciated the difference between outreach and preferences when he spoke in opposition to California's Proposition 209 during the 1996 presidential campaign.<sup>9</sup> President

2. A recent vote on whether to end "affirmative action" in the city of Houston, Texas most likely failed because the Mayor and members of the City Council, who opposed the effort to end the program, rephrased as "affirmative action" all relevant legislative references to "preferences." See Clarence Page, *Voters Say Yes To Affirmative Action*, ST. LOUIS POST-DISPATCH, Nov. 18, 1997, at B7.

3. See *Executive Decision Results*, THE ATLANTIC MONTHLY (visited Apr. 16, 1998) <<http://www.theatlantic.com/election/connection/decision/960924.html>>; Sara Raley, *Affirmative Action Poll Results Stun* (visited Apr. 16, 1998) <<http://www.californiaaggie.com/archive/96/04/30/aff.action.html>>; *What The Public Says*, NATIONAL ISSUES FORUMS (visited Apr. 16, 1998) <<http://www.nifi.org/newsletters/pubsays.html>>.

4. Clarence Page, *Outreach Or Preferences?*, ST. LOUIS POST-DISPATCH, Dec. 17, 1997, at B7.

5. *Id.*

6. See *id.*

7. See *What The Public Says*, *supra* note 3; *Affirmative Action Poll*, *supra* note 3; *Executive Decision Results*, *supra* note 3; Sara Raley, *supra* note 3.

8. COLIN POWELL WITH JOSEPH E. PERSICO, *MY AMERICAN JOURNEY* 608 (1995).

9. The following language was adopted by the people of California as Proposition 209 in November of 1996:

Section 31 is added to Article I of the California Constitution as follows:

Clinton suggested that we “mend,” not “end” affirmative action.<sup>10</sup> It is now two years since the President’s re-election, and neither he nor the Democratic-controlled legislature of Missouri has made any effort to mend any aspect of racial preferences.<sup>11</sup>

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SEC. 31. (a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(b) This section shall apply only to action taken after the section’s effective date.

(c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

(e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program where ineligibility would result in a loss of federal funds to the state.

(f) For the purposes of this section, “state” shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.

(g) The remedies available for violations of this section shall be the same, regardless of the injured party’s race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.

(h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

CAL. CONST. art. I, § 31 (adopted 1996). On November 3, 1997, the U.S. Supreme Court refused to hear the case challenging Proposition 209, thus affirming the United States Court of Appeals for the Ninth Circuit’s decision of April, 1997, to uphold the constitutionality of the new law. *See* Coalition for Economic Equity v. Wilson, 110 F.3d 1431 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997).

10. Harriet Woods, *Bill Clinton—Find Common Ground And Move Forward*, ST. LOUIS POST-DISPATCH, Oct. 20, 1996, at B3.

11. In 1997, a Missouri state senator, Peter Kinder (R-Cape Girardeau), filed Missouri Senate Joint Resolution No. 3 which proposed a constitutional amendment concerning this issue. Had it been passed by the Missouri state legislature, this Resolution would have prohibited discrimination or preferential treatment of persons on the basis of race, sex, color, ethnicity or national origin in public employment, education and contracting. The Resolution did not have the necessary support and remained in the Senate Judiciary Committee throughout the session.

In October of 1997, Ward Connerly, a sponsor of California’s Proposition 209, visited St. Louis and spoke at St. Louis University. He expressed his belief that no Democrat-controlled legislature in this country would put language similar to Proposition 209 on the ballot. Ward Connerly, Speech at St. Louis University (Oct. 16, 1997). Therefore, if a change is to occur, it must be by initiative petition of the people.

## II. MISSOURI SENATE BILL 681 AS A MEANS OF ENDING PURE RACIAL PREFERENCE WHILE SUSTAINING TRUE AFFIRMATIVE ACTION

Missouri Senate Bill 681,<sup>12</sup> filed in January of 1998, would remove racial preferences from the Missouri state statutes while leaving affirmative action programs in place. If the Bill accomplishes nothing else, it may at least make people aware of the distinction between affirmative action and racial preferences. The Bill seeks to affect only preferential treatment for public employment, educational opportunities, and public contracting with the state of Missouri and any of its political subdivisions, including public universities.<sup>13</sup> The Bill seeks to retain all traditional affirmative action measures now in the statutes, including aggressive programs that assist minority businesses in competing for state contracts.<sup>14</sup>

Senate Bill 681 declares null and void any law, executive order, policy or rule that uses race, sex, color, ethnicity or national origin as a criterion for either discriminating against or granting preferential treatment to any individual or group of persons.<sup>15</sup> The Bill allows for the reenactment of preferences if the state can show by clear and

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12. S. 681, 89th Mo. Leg., 2nd Sess. (1998). The Author of this Article is the sponsor of the Bill.

13. *See id.*

14. *See id.*; MO. REV. STAT. §§ 33.752, 33.756 (1994) (deleting the references to preferences and the sections requiring an implementation plan of hiring by the Minority Business Development Commission); MO. REV. STAT. § 67.653 (1994) (deleting references to a minimum level of minority business participation at the St. Louis Convention and Sports Complex Authority); MO. REV. STAT. § 70.379 (1994) (omitting the requirement of a minimum level of minority business participation in the Bi-State Transportation Authority); MO. REV. STAT. §§ 92.418, 92.421 (deleting references to a minimum level of minority business participation in the Kansas City Public Transit System); MO. REV. STAT. § 166.203 (1994) (omitting the requirement that at least one director of the Missouri Higher Education Trust must be from a minority class); MO. REV. STAT. §§ 226.900, 226.905, 226.907, 226.910 (1994) (deleting in its entirety the provisions relating to minority business participation in state transportation contracts); MO. REV. STAT. § 238.305 (1994) (deleting references to the employment of minorities and women in public corporations' business plans); MO. REV. STAT. § 313.270 (1994) (deleting the references to a minimum level of minority business participation in state lottery contracts); MO. REV. STAT. § 620.605 (1994) (revising the policy of promoting the perpetuation of existing minority businesses as one of assisting minority businesses to compete); MO. REV. STAT. § 643.310 (1994) (deleting the requirement that the Minority Business Commission assist in selecting certain contractors).

15. *See* S. 681.

convincing evidence that:

- 1) Specific, pervasive and systematic discrimination has occurred in the past and will continue to occur in the future; 2) The executive order, policy or rule is a narrowly tailored remedial action that furthers a compelling governmental interest; and 3) The remedial action shall sunset when discrimination is eliminated but no later than two years after implementation.<sup>16</sup>

The Bill takes another important step. As outright preferences become more difficult to pass in popularly elected legislatures, preferences are more likely to be created by rules, executive orders, or other means which do not require approval by legislatures.<sup>17</sup> For example, to avoid public scrutiny, universities have traditionally exercised preference policies that are not specifically stated in any rule.<sup>18</sup> Such a policy is the subject of a lawsuit pending against the

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16. *Id.*

17. *See, e.g.*, Mo. Exec. Order No. 94-03 (1994). Executive Order 94-03 mandates that the State Office of Equal Employment Opportunity monitor all departments of the executive branch of state government and assist them to ensure equal employment opportunity and affirmative action. This Order also created an affirmative action council that is composed of members of each executive department who serve as liaisons to their director's office. In the area of state contracts, the Order requires that the State work toward the goal of awarding at least 5% of the Executive branch contracts to minority-owned or controlled businesses.

18. In 1996, after the Fifth Circuit decided the case of *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), the Commissioner of the Missouri Coordinating Board for Higher Education, while testifying before the Senate Appropriations Committee, was asked what impact the *Hopwood* decision would have on affirmative action programs in the state of Missouri. She indicated that all such programs were "under review" by legal counsel. Testimony by Kala Stroup, Commissioner of the Missouri Coordinating Board for Higher Education, in Jefferson City, Mo. (Feb. 1996).

During the preparation of this Article, letters were sent to each of the public four-year colleges and universities in Missouri, asking them about their racial quotas and affirmative action programs. Their responses were as follows:

- I. Institutions that reported they have no racial-quota policy: 1) Central Missouri State University; 2) Missouri Southern State College; 3) Missouri Western State College; 4) Northwest Missouri State University; 5) Southeast Missouri State University; 6) Southwest Missouri State University; 7) Truman State University; 8) University of Missouri-Kansas City; 9) University of Missouri-Columbia; 10) University of Missouri-Rolla; and 11) University of Missouri-St. Louis.
- II. Institutions that reported they have no affirmative action policy: 1) Central Missouri State University; 2) Missouri Southern State College; 3) Missouri Western State College; 4) Northwest Missouri State University; 5) Southeast

University of Michigan that was filed by a white female student who believes that she was rejected for admission by the University to make room for minority students who allegedly possess academic qualifications lower than her own.<sup>19</sup> The suit is based on confidential University of Michigan documents obtained<sup>20</sup> through the Freedom of Information Act.<sup>21</sup> The documents show the ways in which the University uses race in deciding who is admitted to its freshman class.<sup>22</sup>

To eliminate such preference practices in Missouri, the "proposed committee substitute"<sup>23</sup> for Senate Bill 681 contains a provision that requires that all policies regarding preferences and admissions be promulgated by rule and subject to the normal rule making process of Chapter 536 of Missouri Revised Statutes.<sup>24</sup> Section 536.021(8) allows a litigant to challenge any procedure that is not properly promulgated and to receive attorneys' fees if the court finds that a policy should have been promulgated as a rule.<sup>25</sup>

Missouri State University; 6) University of Missouri-Kansas City; 7) University of Missouri-Columbia; 8) University of Missouri-Rolla; 9) University of Missouri-St. Louis.

- III. Institutions that reported they have an affirmative action policy: 1) Southwest Missouri State University (goal: 7% minority enrollment) and 2) Truman State University (goal: 10% minority enrollment) (in their publication entitled *Affirming the Promise*, Truman State lists a 10% minority enrollment goal, but in their letter addressed to this Author, they ironically reported having no affirmative action policy).

19. For example, the documents suggest that a white student with an SAT score of 1000 and a GPA of 3.2 should not be admitted and that an African-American or Hispanic applicant with the same scores should be admitted. *See* Rene Sanchez, *Final Exam for Campus Affirmative Action?*, WASH. POST, Dec. 5, 1997, at A1; *see also* Terry Carter, *On A Roll(back)*, ABA J., Feb. 1998, at 54.

20. Professor Carl Cohen, one of the contributors to this Symposium, is the individual who obtained the University's documents.

21. *See* Sanchez, *supra* note 19, at A1.

22. *See id.*

23. In the Missouri Senate, bill substitutes can be offered in committee or on the floor of the Senate. This mechanism affords senators the opportunity to make multiple amendments to a filed bill and have them accepted in one vote rather than requiring a vote on each individual amendment.

24. *See* Proposed Senate Committee Substitute for S. 681, 89th Mo. Leg., 2nd Sess. (1998). Section 536.018 of Missouri Revised Statutes exempts institutions of higher education from the definition of "state agency." *See* MO. REV. STAT. § 536.018 (1994).

25. *See* MO. REV. STAT. § 536.021(8) (1994). Section 172.360 of Missouri Revised Statutes requires "that each applicant for admission . . . [to a University of Missouri institution]

### III. THE COURTS AND RACIAL PREFERENCE

The language of Senate Bill 681, setting out the conditions for the enactment of preferences, is taken directly from the U.S. Supreme Court case of *City of Richmond v. J.A. Croson Co.*, in which the Court found that the Fourteenth Amendment requires strict scrutiny of all race-based action taken by state and local governments.<sup>26</sup> Before any race-based classification can be used, there must be a finding that there was, in fact, discrimination and that the program to remedy that discrimination is narrowly tailored to remedy the effects of the discrimination.<sup>27</sup>

However, a year after *Croson*, the Supreme Court, in *Metro Broadcasting, Inc. v. FCC*, upheld two federal race-based policies against a Fifth Amendment challenge.<sup>28</sup> The *Metro Broadcasting* Court held that congressionally mandated "benign" racial classifications need only satisfy intermediate scrutiny.<sup>29</sup> It thus appeared that the Supreme Court might be inclined to impose a lesser duty on the federal government than on the states in the area of equal protection.<sup>30</sup> It became clear that this was not the case with the Court's decision in *Adarand Constructors, Inc. v. Peña*.<sup>31</sup> Justice O'Connor, writing for the Court's majority, held that "all racial classifications, imposed by whatever federal, state or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."<sup>32</sup>

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shall possess such scholastic attainment and mental and moral qualifications as shall be prescribed in rules adopted by the Board of Curators." MO. REV. STAT. § 172.360 (1994). It is unclear from the language and legislative history of section 172.360 whether the statute requires that the Board of Curators adopt one set of rules that applies to every University of Missouri applicant. It appears to have been intended as a ban on preferential treatment of certain students, possibly the children of wealthy alumni or the politically connected.

26. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 227, 469 (1989).

27. See *id.*

28. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

29. See *id.* at 564.

30. See *id.*

31. 515 U.S. 200 (1995).

32. *Id.* at 227. The racial classification at issue in *Adarand* was a federal set-aside for a Hispanic-owned guardrail company in Colorado that effectively prevented the only Colorado guardrail company owned by a white male from placing bids on contracts. See *id.* at 204-07. The court emphasized that judges should examine "benign" racial classifications just as skeptically as malignant classifications. See *id.* at 226-27. At the same time, the court suggested



The *Adarand* Court's silence about the fate of the *Regents of the University of California v. Bakke*<sup>33</sup> case was especially conspicuous. In the Court's landmark 1978 *Bakke* opinion, Justice Lewis Powell had held that education is different than other spheres of state action and, thus, found that public universities are more free to resort to racial preferences than other state actors.<sup>34</sup> The *Bakke* Court concluded that race could be a factor in admission decisions but not the factor in granting admission.<sup>35</sup>

However, the *Adarand* Court's silence on the modern applicability of *Bakke* has left open the question of whether race can still be used as a deciding factor in university admissions. The United States Court of Appeals for the Fifth Circuit rejected the proposition that race can be considered as a factor in admission decisions in the recent case of *Hopwood v. Texas*.<sup>36</sup> In *Hopwood*, the Fifth Circuit struck down the racial preference program adopted by the University of Texas Law School and ordered the University's officials to adopt a color-blind admissions process.<sup>37</sup> The United States Supreme Court declined to review the case,<sup>38</sup> and, thus, *Hopwood* remains the law in Texas, Louisiana, and Mississippi.

In *Hopwood*, the Fifth Circuit suggested that, in the wake of *Adarand*, the use of race to achieve a diverse student body cannot be a state interest sufficiently compelling to meet the high standard of strict scrutiny.<sup>39</sup> According to the Fifth Circuit, *Adarand*, not *Bakke*, is the law of the land when it comes to racial preferences in higher education.<sup>40</sup>

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that affirmative action programs might be narrowly tailored as a response to the "unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country . . ." *Id.* at 237.

33. 438 U.S. 265 (1978).

34. *See id.* at 287.

35. *See id.* at 307.

36. 78 F.3d 932 (5th Cir. 1996).

37. *See id.*

38. *See* 518 U.S. 1033 (1996).

39. *See Hopwood*, 78 F.3d at 940.

40. In *Bakke*, Justice Powell had held otherwise. According to Powell, state universities could take race into account in admissions decisions to achieve the benefits of diversity or as a remedy for past discrimination. *See Bakke*, 438 U.S. at 311-12. The *Hopwood* court believed Powell spoke only for himself and not for the majority of the Supreme Court: "Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of a majority

Critics of the Fifth Circuit's *Hopwood* decision disagree with this conclusion,<sup>41</sup> pointing out that the court overlooked Part V-C of Powell's opinion in *Bakke*.<sup>42</sup> Part V-C of Powell's opinion, joined by four other Justices,<sup>43</sup> held that, "In enjoining [the University of California at Davis] from ever considering the race of any applicant . . . , the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."<sup>44</sup>

The Supreme Court's decision to not review the *Hopwood* case has left unresolved the issue of whether educational institutions can use racial preferences in granting college admission. On the current Supreme Court, at most four justices—Antonin Scalia, Clarence Thomas and, far more tentatively, William Rehnquist and Anthony Kennedy—have committed themselves to the proposition that the Constitution is color-blind in all circumstances.<sup>45</sup> Four justices—Stephen Breyer, Ruth Bader Ginsburg, David Souter and John Paul Stevens—have strongly hinted that they would, in the case of education at least, accept forward-looking justifications for affirmative action, such as diversity, as well as backward-looking justifications, such as racial compensation.<sup>46</sup> Thus, the future of *Bakke*, and of affirmative action itself, appears to rest with the remaining justice, Sandra Day O'Connor.<sup>47</sup>

We still do not know how the Court will decide the issue of racial

of the Court in *Bakke* or any other case." *Hopwood*, 78 F.3d at 941. The *Hopwood* court also stated its belief that Powell's opinion that achieving diversity in higher education was a constitutionally compelling interest would not gain a majority of votes on the Supreme Court today. *See id.*

41. *See, e.g.*, Leslie Yalof Garfield, *Hopwood v. Texas: Strict in Theory or Fatal in Fact*, 34 SAN DIEGO L. REV. 497, 518 (1997); Erin M. Hardtke, *Elimination of Race as a Factor in Law School Admissions: An Analysis of Hopwood v. Texas*, 80 MARQ. L. REV. 1136, 1152 (1997).

42. *Bakke*, 438 U.S. at 320.

43. In addition to Justice Powell, Justices White, Brennan, Marshall, and Blackmun concurred in this part of the opinion. *See id.*

44. *Id.* at 321.

45. *See* Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CAL. L. REV. 1037, 1043 (1996).

46. *See id.*; *see also* Jeffrey Rosen, *The Day the Quotas Died*, THE NEW REPUBLIC, Apr. 22, 1996.

47. *See* Kahlenberg, *supra* note 45, at 1041.

preferences in education, and there remains a question of whether diversity is a compelling “governmental interest.”<sup>48</sup> The issue could have been clarified when the Supreme Court agreed to hear the case of *Taxman v. Board of Education*.<sup>49</sup> In *Taxman*, a white school teacher was laid off at the request of a school board.<sup>50</sup> The board fired the white teacher in favor of an African-American teacher because the board wanted there to be greater “diversity” in the high school’s business-education department.<sup>51</sup> The case settled at the eleventh hour, however, when a consortium of civil rights groups raised the money to pay off the claims of Ms. Taxman and the fees of her lawyer.<sup>52</sup> Therefore, the Supreme Court was prevented from hearing the case, as the settlement rendered the controversy non-justiciable.<sup>53</sup> Apparently, the civil rights groups did not want the Supreme Court to hear the case because they were afraid that the Supreme Court would rule against the school board and thereby establish a precedent that would damage the cause of racial preferences.<sup>54</sup>

The Supreme Court was recently given another opportunity to rule on racial preferences in *University and Community College System v. Farmer*.<sup>55</sup> In *Farmer*, the Nevada Supreme Court upheld the University of Nevada’s decision to hire a black male immigrant from Uganda instead of an equally qualified white female applicant.<sup>56</sup> The University’s defense to the female’s claim of sex discrimination was to insist that its hiring decision was motivated solely by race and, thus, was justified by the university’s desire for diversity.<sup>57</sup> However, such motives do not meet the standard of *Adarand* which requires that discrimination remedies be narrowly tailored to address specific past or ongoing discrimination.<sup>58</sup> Nevertheless, the United States

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48. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995).

49. 91 F.3d 1547 (3d Cir. 1996), cert. granted, 117 S. Ct. 2506 (1997), cert. dismissed, 118 S. Ct. 595 (1997).

50. See *id.* at 1551.

51. See *id.*

52. See Roger Clegg, *Nevada Offers Supreme Court Another Piscataway*, WALL ST. J., Jan. 19, 1998, at A15.

53. See U.S. CONST. art. III, § 2, cl. 1.

54. See Clegg, *supra* note 52, at A15.

55. 930 P.2d 730 (Nev. 1997).

56. See *id.* at 733.

57. See *id.*

58. See *Adarand*, 515 U.S. at 200.

Supreme Court declined to hear the case.<sup>59</sup> Critics of the Nevada Supreme Court's decision have questioned, "How plausible is it that the university is making up for the wrongs suffered by victims of American slavery and the Jim Crow era by hiring a sociologist from Uganda?"<sup>60</sup> The United States Supreme Court's decision not to hear the case leaves this question unanswered.

Missouri Senate bill 681 seeks to eliminate from Missouri law any unconstitutional provisions dealing with racial preferences. Senate Bill 681 is specifically concerned with the unconstitutional provisions of Revised Missouri Statute sections 161.415, dealing with minority teaching scholarships, and 640.240, dealing with the minority and environmental literacy program.<sup>61</sup> The Minority Teachings Scholarships are available to minority students for the purpose of encouraging minority students to enter teaching.<sup>62</sup> To be eligible for the scholarship, a minority student must be a resident of the state of Missouri, make a commitment to pursue a teacher education program approved by the Department of Elementary and Secondary Education, and commit to teaching science or mathematics.<sup>63</sup> Additionally, the student must achieve a score on a college admission test that ranks in the top quarter, and the student must also rank in the top quarter of his or her high school class.<sup>64</sup>

Similarly, the Minority and Under-Represented Environmental Literacy Program awards scholarships to minority and under-represented students to pursue environmentally related courses of study.<sup>65</sup> The program requires that those ethnic groups that are most severely under-represented, as determined by data gathered and maintained by the National Academy of Sciences, receive priority in

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59. See 118 S. Ct. 1186 (1998).

60. Clegg, *supra* note 52, at A15.

61. See S. 681, 89th Mo. Leg., 2d Sess. (1998).

62. See MO. REV. STAT. § 161.415 (1994).

63. See *id.*

64. See *id.* For Fiscal Year 1999, Missouri Governor Mel Carnahan asked that \$449,000 be appropriated to fund this scholarship program. See H. 1002, 89th Mo. Leg., 2d Sess. (1998).

65. See MO. REV. STAT. § 640.240 (1994). The Minority and Under-Represented Environmental Literacy Program was passed in Senate Bill No. 805 in 1996. The vote in the Missouri Senate was twenty-four "yeas" (18 Democrats and 6 Republicans) and nine "nays" (1 Democrat and 8 Republicans). The vote in the House was 96 "yeas" and 60 "nays" with a party breakdown similar to that in the Senate. See SENATE JOURNAL, 88th Mo. Leg., 2d Sess. (May 2, 1996); HOUSE JOURNAL, 88th Mo. Leg., 2d Session (May 17, 1996).

annual selection.<sup>66</sup>

The above review of racial preference case law makes it clear that Missouri Senate Bill 681, in effect, asks the Missouri General Assembly to put language into the Missouri Statutes that, according to the Supreme Court's decision in *Adarand*, is already the law of the land with regard to contracting and employment.<sup>67</sup> Some question may still remain as to whether *Adarand* and, thus, the language in Senate Bill 681, is also the law with regard to educational issues. Here again, however, the relevant case law suggests that when the Supreme Court rules on this issue, *Adarand* will control.<sup>68</sup>

Even if we assume that *Bakke*, rather than *Adarand*, controls in the area of education, the above-referenced Minority Teaching Scholarships and Minority and Under-Represented Environmental Literacy Program are unconstitutional. While *Bakke* never specified the point at which a benign "plus" factor becomes a malignant "decisive" factor, the Supreme Court's decision did stress that the search for racial diversity should not "insulate" minority candidates from "competitive consideration" at the expense of white candidates who might bring to the relevant forum diverse perspectives of their own.<sup>69</sup> Accordingly, *Bakke* stands for the proposition that race may be a factor, but not *the* factor, in granting a racial preference.<sup>70</sup>

In the case of *Podberesky v. Kirwan*,<sup>71</sup> the United States Court of Appeals for the Fourth Circuit held that the University of Maryland at College Park could not maintain a separate merit scholarship program for which only African-Americans were eligible.<sup>72</sup> The issue before the court was whether there was a present effect of past discrimination sufficient to justify the program.<sup>73</sup> The court found that there was not.<sup>74</sup> The court found that the past discrimination was

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66. See MO. REV. STAT. § 640.240. For Fiscal Year 1999, Missouri Governor Mel Carnahan asked that \$50,000 be appropriated to fund this scholarship program. See H. 1006, 89th Mo. Leg., 2d Sess. (1998).

67. See *supra* note 32 and accompanying text.

68. See *Adarand*, 515 U.S. at 227.

69. See *Bakke*, 438 U.S. at 317.

70. See *id.* at 307.

71. 38 F.3d 147 (4th Cir. 1994).

72. See *id.* at 152.

73. See *id.* at 150.

74. See *id.*

the result of general societal actions, which cannot be used as a basis for supporting a race-conscious remedy.<sup>75</sup> The court also looked at the under-representation of African-Americans in the University and decided that “High achievers, whether African American or not, are not the groups against which the University discriminated in the past.”<sup>76</sup>

Like the program that the Fourth Circuit found to be unconstitutional in *Poberesky*, the Missouri minority scholarship programs require that one be a minority to qualify, and neither of the scholarship programs are available to all minority students. Thus, it is clear that the educational scholarship programs, which would be eliminated as a result of Senate Bill 681, would probably all fail if challenged in court. Accordingly, Senate Bill 681 simply does legislatively what a court could do judicially. Senate Bill 681 remains necessary, however, because non-minority students do not usually find that it is worthwhile to go to court over these matters and have such programs declared unconstitutional. As one commentator has observed, “Great Supreme Court decisions, for all their theatricality, are notoriously weak engines of social change. The commands of *Brown v. Board of Education* weren’t implemented until decades later.”<sup>77</sup> It could take equally long for every remnant of racial preference to be purged from the law. Legislation such as Senate Bill 681, however, would greatly expedite the remedial process.

Senate Bill 681, if adopted as law, would also reverse the burden of proof on issues of constitutionality. Today, questionable programs continue until their opponents prove in court that the programs do not meet constitutional requirements.<sup>78</sup> Under Senate Bill 681, however, the agencies that want racial preferences will bear the burden of establishing that their programs meet all relevant constitutional

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75. *See id.* at 155.

76. *Id.* at 158.

77. Rosen, *supra* note 46.

78. *See, e.g.*, MO. REV. STAT. § 211.071 (1994). This statute requires judges, in deciding whether to certify juveniles as adults, to consider “racial disparities in certifications” in making their decisions. It will continue to be impossible to make a finding that discrimination exists with regard to juvenile certification, in the absence of the enactment of Senate Bill 681, because all juvenile records are closed, making documentation of actual discrimination impossible.

requirements.<sup>79</sup> Taxpayers will have standing to bring suit to challenge the findings and receive attorneys' fees if they are successful.<sup>80</sup>

In the *Adarand* case, Justice Clarence Thomas stated, "There can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination."<sup>81</sup> One must question the motives of legislators who are unwilling to take the language from Supreme Court case law and put it in the statutes. Are they simply willing to ignore the Constitution to pursue the chimera of racial diversity, or, alternatively, do they simply wish to perpetuate the "racial spoils systems"<sup>82</sup> for their political gain?

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79. See S. 681.

80. See *id.*

81. *Adarand*, 515 U.S. at 236.

82. George Will, *Social Engineers' Diversity Agenda*, ST. LOUIS POST-DISPATCH, Apr. 11, 1996, at B7.

## **ARTICLES**



