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The Race-Based Affirmative Action: Does It Constitute Violation of the United States Laws?

"Government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction. Under the Constitution there can be no either a creditor or a debtor race. We are just one race in the eyes of government... [and] law. We are Americans."
Hon. Antonin Scalia, the Justice of the United States Supreme Court

The problem of the race-based affirmative action's legality in the United States higher education system has been one of America's most complex, explosive, unresolved, and contentious issues ever since the policy's inception in the late 1960's. The issue of the policy's legality has sparked unceasing discussion on whether the policy constitutes violation of the United States Constitution and the 1964 Civil Rights Act or not. Although the courts of the country have struck down many race-based affirmative action programs as unconstitutional, the justices of the United States Supreme Court have not yet clearly articulated a unified position on the legality of the race-based affirmative action in the U.S. higher education system. Scholars have written conflicting views on the issue. Even if widely implemented in the U.S. colleges and universities, the race-based affirmative action policy has, nevertheless, undergone much criticism and suffered setbacks. Several American states, including Michigan, California, Washington, Florida, and Texas, have already banned the race-based affirmative action in their higher education systems on the basis of the policy's violation of the Constitution and the Civil Rights legislation. Many states have active plans of eliminating the race-based affirmative action, thus, creating the possibility of an anti-affirmative action wave washing over the United States. All of these developments testify to the highly contentious nature of the race-based affirmative action.

The most important and unanswered question behind all of the heated debates on the race-based affirmative action is whether this policy violates the U.S. laws or not. The present research study aims to answer this question, since it is concentrated upon the race-based affirmative action's legality in the public colleges and universities of the United States. The research proposes that the race-based affirmative action in the higher education system

constitutes violation of the 14th Amendment to the U.S. Constitution and Title VI of the 1964 Civil Rights Act. The purpose of the present work is to analyze why and how the policy contradicts the letter and spirit of these laws on the basis of the content analysis of the U.S. Supreme Court, District Court, and Court of Appeals' decisions, scholarly works on the issue of the policy's legality, the legislative history of these laws, and the review of state practice with respect to the efforts of abolishing the race-based affirmative action in the system of higher education.

First, it is important to provide a definition for the race-based affirmative action. The race-based affirmative action programs are policies that exercise the preferential treatment based on race via a number of active measures. (2) These active measures favor the historically underrepresented and oppressed racial minority groups over the representatives of racial majority (white males) in the higher education. Thus, the race-based affirmative action programs are generally designed to counteract the effects of past and present discrimination, endured by the various representatives of racial minority groups and to raise the level of their representation in the U.S. colleges and universities.

The race-based affirmative action programs in the U.S. higher education system were established on the basis of the Executive order 11246 of President L. Johnson. In accordance with this order, the responsibility for implementing the race-based affirmative action policy in the United States higher education system was put under the direction of the Department of Health, Education and Welfare (HEW, now the Department of Education) in 1967. By the 1970s HEW issued guidelines and threatened the withholding of federal funding from colleges and universities that failed to implement the program. (3) Presently, most public institutions of higher education diligently follow the policy guidance of the Department of Education, since the latter may suspend federal funding if they fail to so. Having defined the race-based affirmative action programs, it is important to analyze how and why such programs constitute violation of the 14th Amendment to the U.S. Constitution and Title VI of the 1964 Civil Rights Act.

I. The Race-Based Affirmative Action as Violation of the 14th Amendment to the United States Constitution

In accordance with Section 1 of the 14th Amendment to the United States Constitution, state governments cannot deny to any person within its jurisdiction the equal protection of the laws. The literal interpretation of the present Amendment reveals that it guarantees the equality of opportunity, i.e. it guarantees that all citizens of the United States should be protected equally, and not be discriminated, before the law. Such interpretation of the 14th Amendment is warranted by many of the United States Supreme Court cases. Specifically, the Supreme Court of the United States in *Shaw v. Reno, Strauder v. State of West Virginia,* and *Yick Wo v. Hopkins* mainly affirmed that:

- the central purpose of the Equal Protection Clause of the U.S. Constitution is to prevent the States from purposefully discriminating between individuals on the basis of race;
- the 14th Amendment declares that the United States law "shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States";
- the guarantees of equal protection "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or

of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." (4)

Key in these court decisions is the affirmation of the invalidity of racial classifications under the cherished Equal Protection Clause of the Constitution. These important Supreme Court cases serve as compelling proof of the fact that the overarching purpose of the 14th Amendment is to ensure that each American citizen is treated without regard to his/her race before the law of the country. It also becomes evident that the Amendment prohibits any intentional or unintentional differential treatment based on race of *any* racial group, *minority* or *majority* and of any person, whether or not a member of any minority group.

Many of the United States lower courts have also made it clear that the Constitution of the United States disallows any form of racial discrimination. In *Coalition for Economic Equity v. Wilson* the Court of Appeals, the Ninth Circuit, affirmed that the ultimate goal of the Equal Protection Clause is to "do away with all governmentally imposed discrimination based on race or gender," while in *Hopwood v. Texas* the United States Court of Appeals, the Fifth Circuit, held that the Constitution does not allow "elevating some races over the others, even for the wholesome purpose of correcting perceived racial imbalance in the student body." (5)The Court in the latter case has also unequivocally stated that when the government prefers individuals on account of their race or gender, it disadvantages individuals who belong to another race or gender. This is true, since for some of the racial minorities affirmative action may be a program that promotes *de facto* equality, but for some of the representatives of the racial majority this program may be an unconstitutional deprivation of their right to the equal protection of the laws, as guaranteed by the U.S. Constitution. Indeed, the 14th Amendment to the U.S. Constitution does not state that citizens of certain races, who have suffered discrimination in the past, should be more equal before the law today than the people of the other races. On the contrary, the Constitution explicitly invalidates racial classifications and requires the color-blind standard on the part of the government. This principle is reinforced by the fact that there is neither explicit nor implicit authorization for distinction in treatment of the American citizens based on race in the Equal Protection Clause of the Constitution.

The Constitutional prohibition on the preferential treatment based on race may, furthermore, be reinforced by many leading justices of the U.S. courts. In particular, the Supreme Court Justice Powell has underscored that the guarantee of equal protection cannot "mean one thing when applied to one individual and something else when applied to a person of another color," while the Supreme Court Justice Thomas on his part has argued that the Constitution "abhors classifications based on race, since they are based on illegitimate motives." (6) Apart from that, the prominent Justices of the U.S. Supreme Court Stevens, Stewart, and Rehnquist have vigorously affirmed that the Constitution requires a colorblind standard on the part of government. According to them, preferring members of any one group for no reason other than race or ethnic origin is "discrimination for its own sake and is forbidden by the Constitution". (7) Thus, all of these Justices of the Supreme Court vehemently assert that the Equal Protection Clause prohibits classifications made on the basis of race. Inherent in their statements is the affirmation of the principle of color-blindness upon which the United States Constitution is based.

In addition to the aforementioned analysis of the powerful statements of the prominent justices, the examination of the 14th Amendment drafters' intent clearly reveals that the

Act prohibits racial discrimination of any kind. The Supreme Court in *Shelley v. Kraemer* has specifically established that the 14th Amendment's framers were mainly concerned with the "establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color." (8) The same interpretation of the 14th Amendment was offered by the Supreme Court in the *Slaughter-House* cases. Key in these decisions is the Courts' affirmation of the inappropriateness of the consideration of race or color in the enjoyment of civil and political rights. Thus, a careful analysis of the intent of drafters of the 14th Amendment to the U.S. Constitution reveals that this Amendment should be interpreted as to require strict color-blindness. As the analysis of the various court decisions and scholarship reveals, the 14th Amendment to the U.S. Constitution is based on the principle of color-blindness. It does not allow any form of preferential treatment based on race. The Amendment guarantees that each American citizen has a right to the equal protection under the laws of the country.

The race-based affirmative action program constitutes violation of the U.S. Constitution, since it denies the equal protection of the laws. It makes the representatives of some racial groups more equal before the law than the representatives of the other races. It inherently favors minorities over non-minorities. This constitutes discrimination, since one cannot exercise preferential treatment based on race by favoring the representatives of certain racial minority groups without discriminating against the representatives of the other racial groups. The prominent Supreme Court Justice Thomas stated in his concurring opinion in *Gratz v. Bollinger* and *Adarand Constructors, Inc. v. Peña* that the State's use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause and that the race-based affirmative action programs are "at war with the principle of inherent equality that underlies and infuses our Constitution, by...undermining the moral basis of the equal protection principle." (9) This is true, for the race-based affirmative action programs employ race as a category in the higher education system. What this means is that the color of a person's skin determines whether he or she can be admitted to a university or whether he or she can pursue studies in the institutions of higher education. This is quite a dangerous policy to continue because it contradicts the letter and the spirit of the Constitution. Such a policy can destroy the very basis of the 14th Amendment, i.e. the principle of color-blindness.

In fact, the constitutionality of the race-based affirmative action has been challenged by numerous experts and scholars on the issue, such as Bybee K., Aleinikoff A., Rasnic D., Bracey A., Caldas S., and others.(10) According to these experts, the race-based affirmative action contradicts both the letter and spirit of the Constitution, since it amounts to inequality in treatment. Indeed, the race-based affirmative action is based on the principle of privilege, but not on the principle of equal protection of the laws and equality of opportunity (colorblindness). These authors argue that the Constitution does not contain any provisions that authorize the Federal or state governments to act in such a way as to give special consideration to individuals based on their race and, thus, afford more protection to the racial minorities than to the racial majorities, i.e. to exercise the race-based affirmative action. Indeed, the Constitution contains neither explicit nor implicit authorization for any form of use of racial criteria to determine the distribution of governmental benefits. These authors state that the Constitution cannot be interpreted to support color-blindness for some citizens and color-consciousness for others. This is true, since the Constitution does not authorize any color-coded group rights.

It rather protects individual's claims to the equal protection of the laws without subjecting him/her to racial discrimination (principle of individual equality). Finally, the experts claim that justice, as meant in the U.S. legal system, is an individual's claim to equality before the law, which is an idea at heart of the American liberal tradition, and not a particular distribution of social, economic, and political power among groups. Equality can indeed not be interpreted as distribution of power among the certain racial groups, since the Equal Protection Clause of the U.S. Constitution guarantees the color-blind and equal protection of the laws to each individual citizen of the United States, and not to certain racial groups. This means that even the praiseworthy goal of ending racial discrimination, sought after by the proponents of the affirmative action, cannot justify the adoption of means incompatible with the other ends of justice.

The supporters of the race-based affirmative action program justify it on the account that it is a tool for fighting racial discrimination. (11) Such program proponents claim that the race-based affirmative action is legal, since the program beneficiaries deserve to receive its benefits due to the past discrimination they experienced. However, these authors fail to link the historical discrimination of African-Americans with a specific clause in the U.S. Constitution that states that more protection should be afforded to the racial minorities who suffered discrimination than to the racial majorities. This is important because there can be no legal justification for a certain measure unless such justification is warranted by the law itself. The present authors are more concentrated on the moral justification of the affirmative action policy rather than on the valid legal analysis of the legality of the race-based affirmative action. This makes their arguments on the programs' validity legally groundless and unjustifiable.

Moreover, a close and honest review of the race-based affirmative action programs clearly demonstrates that such programs commit the same crime, the consequences of which they are supposed to cure. They are designed to fight discrimination, but they themselves end up being racially discriminatory. As the United States Court of Appeals, the Fifth Circuit, in *Hopwood v. Texas* has held, the race-based affirmative action "simply replicates the very harm that the Fourteenth Amendment was designed to eliminate." (12) The Court has unequivocally stated that the program is unconstitutional, since the distribution of benefits and costs by government on racial or ethnic grounds is impermissible. According to the holding of the Court, the Equal Protection Clause of the United States Constitution prevents states from purposefully discriminating between individuals based on their race. This is true, since promoting equality of opportunity does not permit the exercise of the preferential treatment based on race. The race-based affirmative action constitutes gross violation of the Equal Protection Clause, since it is based on presumption that people of certain races, such as African-Americans, should be afforded more protection, should be more equal, than people of other races, such as the Anglo-Saxon male citizens. This is not permissible under the Constitution of the United States, since any distinction in treatment based on race, be it benign or invidious distinction, cannot be legally justified under the United States Constitution. The policy unquestionably denies the equal protection of the laws, guaranteed by the United States Constitution, since it inherently gives favor to racial minorities over non-minorities by affording them more protection under the law. Therefore, the race-based affirmative action constitutes violation of the Amendment by denying the Constitutional guarantee for the equal, and non- discriminatory, protection of all citizens before the laws.

II. The Race-Based Affirmative Action Policy as Violation of the 1964 Civil Rights Act

The race-based affirmative action policy constitutes violation of Title VI of the 1964 Civil Rights Act, which regulates the issue of non-discrimination in federally assisted programs. In compliance with Title VI of the Act, the citizens of the United States can fully participate in any program or activity receiving Federal financial assistance and enjoy its benefits without being subjected to discrimination based on their race, color, or national origin. The literal interpretation of this Title reveals that it guarantees the equality of opportunity, i.e. it guarantees to *all* citizens of the United States the right to fully participate in all the programs, activities that are sponsored by the Federal government without facing discrimination based on their race.

The principle of equality of opportunity is the force underlying the Civil Rights Act. Title VI of the Act does not state that citizens of certain races, who suffered discrimination in the past, should have more chances to participate in any federally sponsored program or activity than those who did not suffer from racial discrimination. The Clause does not state that citizens of certain races, who suffered discrimination in the past, should enjoy more benefits and rights than those who did not experience such discrimination. In fact, the Court in *McDonald v. Santa Fe Trail Transp. Co.* held that "Title VI prohibits racial discrimination against white petitioners upon the same standards as would be applicable were they African-Americans..." (13) This decision of the Court reinforces the idea that there is neither explicit nor implicit authorization for discrimination against certain people simply on the ground of their race. On the contrary, in unmistakable terms the Act explicitly prohibits the exclusion of individuals from the federally funded programs because of their race.

Moreover, nothing in the legislative history of the Act justifies the conclusion that the 1964 Civil Rights Act allows the practice of the race-based affirmative action. In accordance with the House Report, Title VI signifies "the general principle that *no person*... be excluded from participation... on the ground of race, color, or national origin under any program or activity receiving Federal financial assistance." (14) Thus, the Congressional intent was in establishing strict colorblindness. Therefore, a color-conscious remedy like the race-based affirmative action constitutes violation of the Act, of its overall spirit and purpose.

The race-based affirmative action program violates Title VI of the 1964 Civil Rights Act. It is contrary not only to the overall object and purpose of the Act, but also to the very explicitly stated prohibition on the racial discrimination of any kind. The race-based affirmative action is based on mitigating the effects of past segregation and discrimination, but, in fact, it commits the very kind of injustice, whose consequences it was supposed to cure. By inherently favoring minorities over non-minorities, the race-based affirmative action denies the citizens of the United States of certain races the guaranteed right to fully participate, enjoy the benefits of the federally funded programs, since the program subjects them to racial discrimination. This is prohibited by the 1964 Civil Rights Act. As the prominent Supreme Court Justices Stevens, Stewart, and Rehnquist have stated, "It is wrong to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others" and "race cannot be the basis of excluding anyone from participation in a federally funded program." (15) Such position is supported by numerous scholars and experts in the sphere of the race based affirmative action, among whom are Jeffrey C., Abram M., Bybee K., Aleinikoff A., Rasnic D., and others. (16) According to all of these

experts, the race-based affirmative action contradicts both the letter and spirit of the 1964 Civil Rights Act, since it amounts to inequality in treatment. Indeed, the race-based affirmative action is based on the principle of privilege, but not on the principle of equal protection of the laws and equality of opportunity (colorblindness). These authors argue that the Act does not contain any provisions that authorize the Federal or state governments to act in such a way as to give special consideration to individuals based on their race and, thus, afford more protection to the racial minorities than to the racial majorities, i.e. to exercise the race-based affirmative action. Indeed, the given law does not provide for any explicit or implicit clause for the citizens of certain races, who have suffered discrimination in the past to be more equal before the law today. These authors state that the Civil Rights Act cannot be interpreted to support color-blindness for some citizens and color-consciousness for others. It is true that the Act clearly prohibits the racial discrimination of any kind by boldly embracing the idea of color-blind justice. This means that even the laudable goal of "ending" racial discrimination, sought after by the proponents of the affirmative action, cannot justify the adoption of means incompatible with the other ends of justice. Indeed, crime, for instance, is a problem that the government desperately needs to curb, but not at the expense of due process.

Nevertheless, not all legal specialists agree on the unconstitutionality of the race-based affirmative action programs. Among such specialists are Fish S., Gregory D., and others. (17) According to these specialists, the race-based affirmative action is legal, since the program beneficiaries deserve to receive its benefits due to the past discrimination that they experienced. All of these authors fail to link the historical discrimination of African-Americans with a specific clause of the 1964 Civil Rights Act that states that more protection should be afforded to the racial minorities who suffered discrimination than to the racial majorities. This is important because there can be no legal justification for a certain measure unless such justification is warranted by the law itself. These authors have fallen into the trap of the inability to differentiate between what can be rightfully justified by history and what can be warranted by the law. This makes their arguments on the programs' validity legally groundless and unjustifiable.

Thus, the race-based affirmative action constitutes violation of both the 14th Amendment to the United States Constitution and Title VI of the 1964 Civil Rights Act, since they deny the Constitutional guarantee of the equal non-discriminatory protection of the laws by amounting to differential treatment based on race; deny the U.S. citizens of certain races the guaranteed right to fully participate, enjoy the benefits of the federally funded programs, since they subject them to preferential treatment based on race; and violate the principles of color-blindness, equal opportunity, absolute non-discrimination based on race by employing race as a category in the higher education and promoting the principle of privilege based on race.

III. The Major Race-Based Affirmative Action Court Decisions and Initiatives on Its Abolition

The race-based affirmative action programs have been repeatedly challenged on the equal protection and statutory grounds. There have been four major court cases in the sphere of the race-based affirmative action in the U.S. higher education: the *University of California Regents v. Bakke, Hopwood v. State of Texas , Grutter v. Bollinger ,* and *Gratz v. Bollinger.* (18)

In the first case, Bakke A., a white male student, who applied for admission to the Medical

School of the University of California at Davis, brought an action against the Regents of the University after being denied admission, challenging the medical school's race-based affirmative action admissions program as violating the Equal Protection Clause of the Federal and California Constitutions as well as Title VI of the Civil Rights Act of 1964. The Court ruled that the race-based affirmative action program at Davis employed a quota system, and, therefore, was unconstitutional. However, the Court was divided on the issue of the possibility of the use of race in the university admissions. The decision produced six separate opinions, none of which commanded a majority of the Court. Justices Stevens, Stewart, and Rehnquist wrote a separate opinion, in which they affirmed that the race-based affirmative action constituted violation of the Constitution as well as the 1964 Civil Rights Act. According to these justices, any distinction in treatment based on race could not withstand the test of strict scrutiny under the colorblind Constitution and the Civil Rights Act. The other three Justices of the Supreme Court, on the other hand, have expressed their support for the race-based affirmative action by arguing that the Government may adopt race-conscious measures when it acts not to insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice. These justices, however, fail to substantiate how the U.S. law warrants more protection to the racial minorities, who suffered discrimination and segregation, than to racial majority representatives. This is imperative, since there can be no legal justification for a certain measure unless such justification is warranted by the law itself. In the present case, the law does not specify the use of the race-based affirmative action. Therefore, the Justices' decision to uphold the use of the preferential treatment based on race contradicts not only the letter, but also the spirit of the Constitution and the 1964 Civil Rights Act.

In *Hopwood v. State of Texas* white students brought an action against the State of Texas, Board of Regents of the Texas State University System, and several other defendants after being denied admission to the University of Texas Law School. The plaintiffs challenged the law school's race-based affirmative action admissions program as violating the Equal Protection Clause of the U.S. Constitution and Title VI of the Civil Rights Act of 1964. The Court of Appeals, the Fifth Circuit, decided that the race-based affirmative action constituted violation of the Equal Protection Clause of the U.S. Constitution as well as the 1964 Civil Rights Act. The Court applying the strict scrutiny test held that the University of Texas School of Law may NOT use race as a factor in deciding which applicants to admit [1] in order to achieve a diverse student body, [2] to combat the perceived effects of a hostile environment at the law school, [3] to alleviate the law school's poor reputation in the minority community, or [4] to eliminate any present effects of past discrimination by actors other than the law school. This decision was the first court decision to openly and unequivocally affirm that the race-based affirmative action programs constitute violation of the spirit and letter of the Constitution and the Civil Rights Act.

In *Grutter v. Bollinger*, a white Michigan resident brought an action against the University of Michigan Law School, the Regents of the University of Michigan, and other defendants, claiming the illegality of the race-based affirmative action policy. The United States District Court for the Eastern District of Michigan held that the law school's consideration of race and ethnicity in its admissions decisions was unlawful and enjoined law school from using race as a factor in its admissions decisions. The United States Court of Appeals for the Sixth Circuit reversed the District Court's judgment, allowing the University to continue its race-based affirmative action program. The facts of the case clearly indicate the controversial nature of the issue, since various courts have ruled differently on the same dispute.

The issue presented before the Supreme Court was whether the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 permitted the law school to use the race-based affirmative action in the university admission process. In a 5-4 decision, the United States Supreme Court held that: [1] law school had a compelling interest in attaining a diverse student body; and [2] admissions program was narrowly tailored to serve its compelling interest in obtaining the educational benefits that flow from a diverse student body, and, thus, did not violate the Equal Protection Clause. Thus, the Court essentially held that the race-based affirmative action may be justified on the grounds of attaining a diverse student body. At the same time, interestingly enough the Court conceded that the race-conscious university admissions policies must be limited in time, since enshrining a permanent justification for racial preferences would offend the fundamental equal protection principle.

The decision remains highly controversial. It was a 5-4 holding with the race-based affirmative action being only one vote away from defeat. In fact, many of the leading Supreme Court Justices did not join the decision, writing their own powerful dissenting opinions on the issue. The major flaw of the majority of the Court lies in its weak justification for the use of the race-based affirmative action on the basis of promoting diversity. The only possible basis that the Court used to support such a claim was Justice Powell's position in the *Bakke* case. However, the reference to Powell is highly dubious. No other judge in *Bakke* joined Powell in support for using diversity as rationale for the use of the race-based affirmative action. The rationale behind the decisions on the advancement of diversity finds no basis in the Constitution and in the 1964 Civil Rights Act. Therefore, the majority's decision to uphold the race-based affirmative action is nothing but an outright contradiction to the spirit and letter of the highest law of the country. When describing the decision of the Court, Stephen J. Caldas, Ph.D., Professor of Educational Foundations and Leadership at the University of Louisiana, Lafayette, has affirmed that it is a "confused and paradoxical defense for racial preferences" and "clumsy attempt to circumvent both the letter and the spirit of the Fourteenth Amendment." (19) This statement captures the essence of the major flaws of the decision. Indeed, as the analysis of the Court's decision reveals that it is incoherent, unwarranted, and not well-grounded.

In *Gratz v. Bollinger* Michigan residents brought an action against the University of Michigan's College of Literature, Science, and the Arts (LSA) by challenging its race-based affirmative action admissions program as violating the Equal Protection Clause of the Constitution as well as the Civil Rights Act of 1964. The Supreme Court ruled that the LSA's admissions policy constituted violation of Title VI of the 1964 Civil Rights Act and the Equal Protection Clause because its use of race was not narrowly tailored to achieve respondents' asserted compelling state interest in diversity. As the Court held, the race-based affirmative action program at the LSA employed a quota system, and, therefore, was unconstitutional. The majority of the Justices agreed to the holding of the Court. At the same time, some Supreme Court Justices have clearly affirmed the LSA's race-based affirmative action to be unconstitutional even if it had been narrowly tailored. In fact, the prominent Justice Thomas stated that the State's use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause. Indeed, even benign racial discrimination is still discrimination, which is impermissible under the highest law of the country. This court decision adds much to the overall controversy surrounding the legality of the race-based affirmative action programs. The Court has not issued clear guidelines as to when one can consider the race-based affirmative action legal, which makes the policy legally questionable.

Thus, throughout the U.S. history the courts have held various decisions on the legality of the race-based affirmative action programs. Some of the decisions have banned the exercise of such programs, while others have affirmed their legality. Nevertheless, the Justices of the United States Supreme Court have not yet clearly articulated a unified position on the legality of the race-based affirmative action in the U.S. higher education system and have not issued clear criteria to determine the programs' legality.

As far as non-court civil rights initiatives are concerned, individual universities and states have been active opponents of the race-based affirmative action programs, claiming their illegality. Several U.S. states have already outlawed the race-based affirmative action in higher education. Specifically, the state of California has abolished the race-based affirmative action in the higher education system on the basis of the California Civil Rights Initiative. Michigan has also banned the race-based affirmative action on the basis of the Michigan Civil Rights Initiative, or Proposal 2. Proposal 2 has amended the state constitution to "ban affirmative action programs that give preferential treatment to groups or individuals based on their race, gender, color, ethnicity or national origin for public employment, education or contracting purposes." (20) Likewise, the people of the state of Washington banned the race-based affirmative action in the public higher education system of Washington on the basis of the Washington State Civil Rights Initiative). Similar developments have taken place in a number of other states. The state of Florida has outlawed the race-based affirmative action in the higher education system on the basis of the "One Florida" plan. The "One Florida" plan was an Executive Order 99-281, signed by the Governor of Florida with the objective of abolishing the race-based affirmative action in government employment, state contracting, and in higher education. The State of Texas has also declared the race-based affirmative action illegal in the higher education system on the basis of the 1997 order of the Texas Attorney General. Analogous developments with respect to the race-based affirmative action program abolishment have been observed in a number of other states. Thus, several big American states representing the various regions from the Northwest to the South have already banned the race-based affirmative action in their higher education system. One may confidently state that such state initiatives signify the victory of the principle of the equality of opportunity and the equal protection of the laws for each and every American citizen without any regard to his/her race.

Summarizing the article, it is important to note that the study sought to unravel the controversy behind the issue of the race-based affirmative action's legality. Having been originally designed to counteract the effects of past discrimination endured by the various representatives of racial minority groups and raise the level of their representation in the U.S. higher education system, the race-based affirmative action has, nevertheless, committed the very kind of injustice, whose consequences it was supposed to cure. By inherently favoring minorities over non-minorities, the race-based affirmative action has denied the United States citizens of certain races the guaranteed right to the equal protection before the laws and the right to fully participate, enjoy the benefits of the federally funded programs without facing discrimination based on race. As a result, the race-based affirmative action in the higher education system constitutes violation of the 14th Amendment to the U.S. Constitution and Title VI of the 1964 Civil Rights Act.

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Рынок и право: некоторые аспекты взаимодействия в экономическом механизме

Представление об универсальности рыночных возможностей к саморегулированию экономики берет свое начало в исследованиях А. Смита, К. Поппера, Ф. Хайека, М. Фридмена и многих других теоретиков. Согласно их представлениям рынок и свободное предпринимательство являются самодостаточными механизмами регулирования экономики.

«Эта позиция, – пишет П. Игнатовский, – не отличается особой новизной, но приобретает существенное значение в условиях, когда все колебания в производстве и экономических связях приписываются «невидимой руке» рынка, а экономика сводится к движению цен, прибыли, денежным показателям с сопровождающей их инфляцией. При конъюнктурном подходе для труда, объективного и субъективного в отношениях людей, их жизнедеятельности места не остается, и тогда об экономических законах говорить нечего» (4, с. 3). Следовательно, и сам экономический механизм не может существовать вне трудовой деятельности людей в рамках общественного воспроизводства.

С развитием общественного разделения труда, специализацией производителей и концентрацией капитала саморегулирование рынка трансформируется во внутренние свойства совокупного общественного капитала. Рынок переместился, образно говоря, в «чрево» совокупного капитала и стал подсистемой его функционирования и «жизнеобеспечения» (2, с. 41). Таким образом, можно констатировать изменения в самом понимании рынка, в особенностях его функционирования, т. е. саморегулирование рынка заменяется законами воспроизводства и обращениями капитала, материализованного в структуре совокупного работника.

Отсюда особую актуальность приобретает такое «понимание общественных отношений, и в первую очередь экономических, как саморегулируемого феномена, лишний