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# Affirmative Action In Brazil: Its Recent Developments And The Argument For A Narrow Federalism Doctrine

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# **Affirmative Action In Brazil: Its Recent Developments And The Argument For A Narrow Federalism Doctrine**

THOMAS W. DAVIS\*

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## I. INTRODUCTION

In late April of 2012, the Supreme Court of Brazil (formally known as the Supreme Federal Tribunal, or “STF”) unanimously approved the constitutionality of using racial quotas in selecting candidates for admission at the University of Brasília (UnB), a public university.<sup>1</sup> In the Court’s voting session, several Justices cited the government’s ability to take positive measures to correct social discriminations against minorities in order to steer Brazil towards “material” equality.<sup>2</sup> The *relator*, or reporter of the case, Justice Ricardo Lewandowski, specifically listed the benefits of establishing a diverse academic community at the university level and overcoming historical stigmas of racial discrimination to achieve a more equal and contemporary society.<sup>3</sup>

Approximately four months later, President Dilma Rousseff enacted one of the Western Hemisphere’s most comprehensive and sweeping affirmative action programs, requiring federal public universities<sup>4</sup> to reserve half of their admission seats for students who hail from the nation’s characteristically poor and nonwhite public high schools.<sup>5</sup> The President herself stressed the need to democratize higher

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1. *Notícias STF: STF julga constitucional política de cotas na UnB [STF Update: The STF rules in favor of UnB’s quota program]* SUPREMO TRIBUNAL FEDERAL (Apr. 26, 2012), available at <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=206042>.

2. *Id.* (As of the date of this article’s submission, the STF has not yet published an official decision regarding the case. Quite different from the practice of the United States, Brazil’s highest court has no legal obligation or internal administrative protocol to issue its legal opinions on the same day that the case is decided. Part of the reason for this difference stems from the way the STF conducts its business based upon a traditionally civil but increasingly hybrid model of judicial review vis-à-vis the United States model.); see generally, Keith S. Rosenn, *Judicial Review in Brazil: Developments Under the 1988 Constitution*, 7 SW. J.L. & TRADE AM. 291 (2000).

3. SUPREMA TRIBUNAL FEDERAL, *Notícias STF [STF Updates]*, available at <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=206042>.

4. CONSTITUÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 207 (Braz.) (The Law of Social Quotas does not address the degree of administrative freedom that state universities may enjoy under the Constitution. But the law does limit federal universities’ autonomy by stating that a federal school: (1) may adopt specific or supplementary affirmative action policies; (2) develop specific quotas for native indigents; (3) create a system of general classification consistent with a quota program; and that (4) any institution that adopts different selective procedures must adhere to a quota system in each type of selective procedure.); see also *infra* Section IV(C)(1).

5. Simon Romero, *Brazil Enacts Affirmative Action Law for Universities*, N.Y. TIMES, Aug. 31, 2012, at A4.

public education in part to repay its “debt” owed to the country’s “neglected populations.”<sup>6</sup> Section II of this Article presents the reader with a primer on recent important affirmative action legislation and jurisprudence in Brazil regarding as well as highlighting its socio-economic differences vis-à-vis its northern neighbor. In short, Brazil’s more unitary and aggressive form of affirmative action finds its bases in rudimentary constitutional principles of “dignity” and “equality”; but simply transplanting a carbon copy version of American affirmative action is not suitable for a country that faces a sophisticated and sometimes perplexing social racial strata.

Moreover, even though Brazil’s system of federalism is drastically limited in scope compared to the U.S. model, several of its benefits—distributing governmental power among more local units to enhance its functionality and accessibility over a large area; allowing localities to experiment with policies to determine more efficient outcomes; and placing those organs against one another to enhance competition in the “political market”—may be applicable in the convoluted and vague Brazilian constitutional provision of “university autonomy.” As Section III will explain, by giving the university its due in terms of its constitutional autonomous sphere, Brazil’s perceived enemy against affirmative action itself may turn out to be its greatest benefit.

## II. THEN NOW: *BAKKE* IN BRAZIL

Unlike the American experience, affirmative action in Brazil is for the majority. As of 2009, over half of Brazil’s population was classified as nonwhite: either as black (6.9%) or mixed, commonly known as *pardo* (44.2%).<sup>7</sup> Needless to say, while some may proudly state that Brazil is a “racial democracy,”<sup>8</sup> it is a belied myth that has persisted over time. Although there was never a legally backed system of racial discrimination, *de facto* injustice has existed under a camouflaged form.<sup>9</sup>

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6. *Id.*

7. S.T.F., ADPF 186, Relator: Min. Ricardo Lewandowski, 25.4.2012, (Braz.) (draft opinion of Min. Lewandowski, not yet published) (citing empirical data compiled by The National Research Center for Samples of Households [PNAD] at page 23).

8. Tanya K. Hernandez, *To Be Brown in Brazil: Education and Segregation Latin American Style*, 29 N.Y.U. REV. L. & SOC. CHANGE 683, 687 (2005).

9. Hector Tobar, *A Racial Quake in Brazil*, L.A. TIMES, Oct. 7, 2003, at A1 (quoting Ivanir dos Santos) (“Without a single in place to support it, we [Brazilians]

Looking at the socio-economic statistics, this disguised inequality still pervades today. In terms of educational disparity, more than seven (7) million mixed and black individuals are illiterate<sup>10</sup> while functional illiteracy is even higher.<sup>11</sup> Regarding primary education, whites who are younger than sixteen (16) years receive an average 8.4 years of study while nonwhites only receive 6.7 years.<sup>12</sup> While nearly two-thirds of white students go to college, less than one-third of blacks and mulattos gain admission.<sup>13</sup> The number declines substantially with respect to receiving a college degree: of the total college graduates in Brazil in 2009, only 4.7% are black and 5.3% are mixed.<sup>14</sup>

Brazil has a first-class system of public federal and state universities, which provides students with free tuition. Admittance is predicated upon the *vestibular*, which is a rigorous entrance exam. Although the exam is defended as fair and meritocratic, students from affluent families who have had strong secondary educations in private schools tend to score higher and thus receive the benefit of free public universities<sup>15</sup> while poor families' children have weak public school educations and consequently tend to score lower on entrance exams. Moreover, unlike American universities' admissions systems which procure far more diverse criteria for its applicants,<sup>16</sup> acceptance at a

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have a hierarchy of skin color where blacks appear to know their place.”); Cf. Alex Haley, *THE AUTOBIOGRAPHY OF MALCOLM X* (1992) (explaining that even though he hated Southerners, Malcolm X had more respect for them than Northerners because at least Southerners would “show their teeth.”).

10. S.T.F., ADPF 186, *supra* note 7, at 24.

11. *Id.* (The government of Brazil defines “functional illiteracy” as people older than or equal to fifteen years who have received less than four years of schooling or have not completed the fourth grade.); *Id.* (Among the 29.5 million people who are functionally illiterate in Brazil, 25.4% are black and 25.7% are mixed.).

12. *Id.* at 25.

13. *Id.*

14. *Id.*

15. Robert J. Cottrol, *Brown and the Contemporary Brazilian Struggle Against Racial Inequality: Some Preliminary Comparative Thoughts*, 66 U. PITT. L. REV. 113, 123 (2004).

16. MELISSA E. CLINEDINST ET AL., 2011 STATE OF COLLEGE ADMISSION 6 (Nat'l Ass'n for Coll. Admission Counseling, 2011), *available at* <http://www.nacacnet.org/research/research-data/Documents/2011SOCA.pdf>. [Among the most important factors considered are academics (grades, admission test scores, rigor of high school curriculum), personal evaluation (particular skills, personal initiative and demonstrated interest, submitted writing samples), geographic and ethnic diversity, legacy status, interviews, extracurricular activities, and full-time versus part-time desired enrollment status.]

public university in Brazil has historically been entirely dictated by test performance, notwithstanding some recent developments.<sup>17</sup> Thus, children from public high schools are denied the privilege of receiving a free college education and instead attend university (if at all) at private institutions with little or no financial support. Considering that the single-most important factor for future economic prosperity is education,<sup>18</sup> a number of Brazilian legal scholars began to study North American civil rights law to find some answers. Only very recently did legislators take action.

#### A. THE LAW OF SOCIAL QUOTAS AND BRAZIL'S RECENT AFFIRMATIVE ACTION JURISPRUDENCE

On August 29, 2012, President Dilma Rousseff enacted Law 12.711 (the "Law of Social Quotas"), which requires higher level public educational institutions to reserve at least half of their seats for applicants who graduated from public high schools,<sup>19</sup> with half of those seats partly saved for low-income families (regardless of their race) and for those who declare themselves as black, mixed or indigenous with respect to demographic data.<sup>20</sup> Universities only have until 2016

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17. See *infra*, Part III(B)(2) (Many Brazilian universities have started adopting affirmative action programs similar to those seen in the United States.).

18. S.T.F., ADPF 186, *supra* note 7, at 24. (Apart from the educational differences, economic disparity predominates in stark fashion. Across all types of employment, blacks and pardos receive 20%-40% less in hourly wages than their white counterparts.); *Id.* (Less than 5% of all black or mixed-race workers in Brazil are employers while over 6% are white.) *Id.* (Finally, there are contrasts with respect to family protection and child development. A male or female minority has a higher tendency to have a child before the age of fourteen, and single mothers are more likely to be black or pardo than white.).

19. Lei No. 12.711, de 29 de Agosto de 2012, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 30.8.2012 (Braz.). (noting only one of Brazil's 81 senators voted against the law.); see also, Decreto No. 7.824, de 11 de Outubro de 2012 (regulating and systematizing the regulation for the general requirements for reserving university seats); Portaria Normativa No. 18, de 11 de Outubro 2012 (establishing basic concepts for the Law's application).

20. Lei No. 12.711, de 29 de Agosto de 2012, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 30.8.2012 (Braz.) [Consider the following illustration regarding the Law of Social Quotas: let's say that the State of Rio de Janeiro's Law School has 100 total seats for its incoming class. Under the first part of the Quota Law, at least 50 of those spots must be reserved for public school students. Then, within that sector, a minimum of 25 spaces must go to applicants whose families are 1.5 times the minimum wage. Last, if we assume that 51% of the state of Rio de Janeiro is populated by black, pardo, and indigent individuals, then 13 spaces must be reserved for those demographics whose family incomes are less than or equal to the income threshold, along with 13 other

to full implement the government's quota scheme, and the Law itself does not explicitly indicate any sort of termination date and is without any sort of systematic temporary review.<sup>21</sup>

For the judiciary, the STF recently ruled unanimously in favor the University of Brasília (UnB) after it set aside 20% of its incoming class seats for blacks and other underrepresented groups.<sup>22</sup> Each Justice provided his or her own reasoning. Among them, Ricardo Lewandowski, the reporter, voted in favor of affirmative action by echoing America's justification of a diverse student body to overcome social distortions and perversions as well its proportional, reasonable, and temporary nature in light of its objectives.<sup>23</sup> Others cited a constitutional duty to correct the wrongs of past discrimination and a state responsibility to effectively implement the constitutional principle of equality or *isonomia* by demolishing institutional barriers to education, which has caused an educational deficit among blacks.<sup>24</sup>

In the first of two companion cases, the Court reaffirmed its decision in the UnB case that a university's racial quota program was constitutional. In this instance, the Federal University of Rio Grande de

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seats guaranteed for that same demographic with more financially stable families. Still following? Within this framework, a low-income black or mixed-race student applying to a state university (which in Brazil are traditionally the best and cheapest schools), has four distinct scenarios of review by an admissions counsel regarding admission: one under general admissions, the second under the public school quota, another under the low-income sub-quota, and lastly under the state demographic sub-quota. In a way, therefore, Brazil uniquely addresses "critical mass" in its own way: the requirement for certain individuals from public schools and of a certain ethnicity will presumably have some overlap—to the point where potential psychological stigmatization can be defended by a sufficient group of individuals who do not share the same views.]

21. Decreto No. 7.824, de 11 de Outubro de 2012.

22. *Notícias STF: Cotas: relator vota pela constitucionalidade das políticas afirmativas da UnB* [STF Update: *Quotas: the reporter votes in favor of the constitutionality of UnB's affirmative action policies*]; SUPRMEIO TRIBUNAL FEDERAL (Apr. 25, 2012), <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=205888> ("In the case of the University of Brasília, reserving 20% of its seats for black students and 'a little number' for indigenous Brazilians for a period of ten years constitutes, in my opinion, provides adequate proportionality.") (unofficial translation).

23. *Id.*

24. *Id.*; compare with, *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 307 (1978) (holding that the validity of affirmative action is does not include correcting the wrongs of pre-*Brown* discrimination on the grounds that it would be nearly impossible to identify that a white applicant denied admission actually perpetuated racial discrimination, and that placing such a burden on an innocent individual would go against the underpinnings of the Equal Protection Clause).

Sul (“UFGRS”) earmarked thirty percent (30%) of its seats for public high school applicants,<sup>25</sup> with half of those solely designated for self-declared afro-descendants. Specifically, the Court stated that UFRGS’s decision to establish certain socio-economic admissions criteria based on empirical data was “respectable” concerning its national reputation for academic excellence.<sup>26</sup> Most interestingly, however, Justice Lewandowski repudiated the idea that a university could only authorize a student-selection quota program if there was law permitting it to do so. Pointing to Article 207 of the Constitution and the Law of Guidelines and Bases of Education (Law 9.394/96), universities can independently decide the criteria of student admissions.<sup>27</sup>

In its sister case, the STF addressed the question of affirmative action within the private sector. The federal law under question was the University for All Program, or Prouni, which requires that in order to receive the program’s tax benefits, private universities must set aside part of their scholarships for public high school graduates or for those went to a private high school on a full scholarship.<sup>28</sup> By targeting students from low-income families, the legislation’s focus is on economic factors rather than racial composition.<sup>29</sup> Sitting as a full

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25. *Notícias STF: STF confirma validade de sistema de cotas em universidade pública* [The STF confirms the validity of quotas in public universities] (May 9, 2012), <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=207003>, (Students wishing to receive this benefit must have completed high school and at least four years of primary education in public schools.).

26. *Id.*

27. *Id.*

28. *Notícias Stf: Supremo declara constitucionalidade do ProUni*, [STF update: the Supreme Court rules in favor of the constitutionality of the ProUni program], (May 3, 2012), <http://ww.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=206553>, (In the private sector, institutions depend on students’ fees and tuition; federal or state public universities, however, are subsidized by their respective governmental entity. Public universities have been historically located in state capitals and large urban centers, maintaining an elitist character with more intensive full-time classes during the day. On the other hand, private institutions’ student bodies consist mainly of low-income students who also work and live along the small-town peripheries of large urban centers. To meet this different kind of demand for higher education, private schools operate chiefly in the evenings and offer less competitive courses.).

29. *Id.* (According to the data published on the ProUni website, applicants to the grants should be Brazilian, not hold a university degree, have studied in public schools (or in private schools with full scholarship), be a member of a low-income household, and take the ENEM, which is the standardized national test that assesses the quality of Brazilian high schools. The program takes into account the population ratio of blacks and natives in the state where the institution is located, based on census figures. The applicants to ethno-racial places should also be eligible according to the criteria just



bench, the Court by majority ruled in favor of Prouni's constitutionality. Justice Joaquim Barbosa—the Court's first and only Afro-Brazilian member—dismissed the allegations and instead found that Prouni is consistent with several constitutional provisions that call for the reduction of social inequalities.<sup>30</sup> Moreover, he held that the Law was consistent with constitutional principles of “university autonomy” in Article 207 because any private institution was free to adopt or equally reject the Prouni program, and that the idea of “university autonomy” is not an exclusive idea but instead exists to achieve educational, social, and cultural objectives.<sup>31</sup> Finally, the Justice brushed off the constitutional equality allegation by citing that only Prouni candidates are pegged against other similarly qualified students.<sup>32</sup> Other Justices concurred, partly in mentioning that the issue of *isonomia* had already been decided in the UnB case, and also because the program examined economic rather than racial criteria.<sup>33</sup>

## B. THE DIFFICULTY OF DEFINING RACE IN BRAZIL

*The lack of a clear-cut distinction between whites and blacks may be the greatest bar to effectiveness of any affirmative action*

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mentioned. Disabled students are also eligible to the Program. The benefits range from full grants (for students with per capita family income up to one minimum wage and a half) to 50% or 25% grants for students with per capita family income of up to three minimum wages. Each applicant may choose two courses and two institutions. The indication of institutions and courses is based on the applicants' scores in the ENEM, thus being merit-based. Since there are withdrawals and redeployments, two rounds of calls are made based on the list of successful applicants. At the end of the second round, the available grants are offered to those in the ProUni waiting list. The applicant to a ProUni grant does not need to take the vestibular or entrance exams of the university in which he/she wishes to enroll. Depending on the courses, the pre-selected applicants may be submitted to a specific selection process, free of charge.).

30. *Notícias STF: Supremo declara constitucionalidade do ProUni [ STF update: the Supreme Court rules in favor of the constitutionality of the ProUni program]*, (May 3, 2012), <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=206553>. (The Justice referenced numerous data finding that over 1.4 million university jobs were unfilled—primarily at public schools—caused by the financial difficulty of households being able to pay for their children's studies. The beneficiaries of Prouni, conversely, were able to substantially contribute and improve their family's incomes because their level of employment increased by an eighty percent (80%) margin, and the marginal cost of each scholarship program is less than the cost per student in both public and private universities.).

31. *Id.*

32. *Id.*

33. *Id.*

*regime currently in place in Brazil.*<sup>34</sup>

Like the United States, Brazil's experience with slavery spanned several centuries until it was finally abolished in 1888. However, unlike the United States, Brazil did not have a post-slavery Jim Crow era of state-sponsored or codified racial discrimination.<sup>35</sup> In fact, subsequent race relations between newly freed slaves and whites in Brazil were less stratified than its northern counterpart,<sup>36</sup> caused in part by higher rates of miscegenation. Consequently, today only Nigeria has a larger afro-descendent population.<sup>37</sup>

Apart from the socio-economic statistics, perhaps the most critical aspect is the different ways in which the United States and Brazil view race. Whereas the United States dictates race by ancestry or the "one-drop rule,"<sup>38</sup> the fact that almost everyone in Brazil has some trace of African descent is insufficient to determine its socio-economic racial demarcation by American standards. In fact, the American definition of race practiced in Brazil is so confusing that it has led some to believe that there is no adequately objective method to define race in a country where so much miscegenation has occurred.<sup>39</sup>

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34. Christopher DiSchino, *Affirmative Action in Brazil: Reverse Discrimination and the Creation of a Constitutionally Protected Color-Line*, 17 U MIAMI INT'L & COMP. L. REV. 155, 158 (2010).

35. Hernández, *supra* note 8. (Public segregation throughout Brazil was more than apparent. For example, Afro-Brazilians in the 1940s were prohibited from entering parks in São Paulo.)

36. Robert Cottrol, *The Long Lingering Shadow: Law, Liberalism, and Cultures of Racial Hierarchy and Identity in the Americas*, 76 TUL. L. REV. 11, 58 (2001).

37. Romero, *supra* note 5; see also Ricardo Rochetti, *Not as Easy as Black and White: The Implications of the University of Rio de Janeiro's Quota-Based Admissions Policy on Affirmative Action Law in Brazil*, 37 VAND. J. TRANSNAT'L L. 1423, 1425 (2004) ("With sixty-five million mulattos, Brazil is also the most racially mixed nation in the world.").

38. Sérgio Da Silva Martins, Carlos Alberto Medeiros & Elisa Larkin Nascimento, *Paving Paradise: The Road From "Racial Democracy" to Affirmative Action in Brazil*, 34 J. BLACK STUD. 787, 810 (2004) (The "one-drop" rule is a term that Americans refer to a person who has any trace of African ancestry); *Id.* (This objective method established rigid racial lines based on ancestry caused by racial segregation.)

39. Daniela Ikawa, *The Right to Affirmative Action for Blacks in Brazilian Universities*, THE EQUAL RIGHTS REVIEW, 28, 31 (3d vol. 2009) (To compare the stark contrasts in miscegenation between Brazil and the United States, consider that in 1960, 99.9% of all American marriages were between white couples, and 99.15% of marriages took place between black couples. In 1992, the rates were 99.75% and 96.6% respectively. During this period, Brazil had significantly lower rates.); *Id.* (citing Telles, RACISMO À BRASILEIRA—UMA NOVA PERSPECTIVASOCIOLÓGICA

Indeed, only ten years ago, the United States (for census purposes) classified race into six categories<sup>40</sup> while Brazil's allegedly contained more than 100 classifications.<sup>41</sup>

Such prognostications, however, may appear to be exaggerated in its numbers and flawed in its conceptions. Reliable data on race in Brazil started in 1872 under four types: white, black, brown/*pardo*, and mestizo Indian (*caboclo*).<sup>42</sup> As of 2009, Brazil only moderately expanded its racial classification scheme since the nineteenth (19<sup>th</sup>) century. Today, races are divided into the following groups: black, white, yellow, brown/*pardo*, and indigenous.<sup>43</sup> Furthermore, racial identification in Brazil may be possible if the focus on race shifts from ancestry to phenotype, or physical appearance. As scholar Daniela Ikawa argues, the disparaging statistics<sup>44</sup> in education between whites and blacks today manifest the existence of racial discrimination on a phenotype basis, which constructed a racial hierarchy even in the absence of state-mandated segregation.<sup>45</sup>

Yet race in Brazil is far from being that easy. According to another perspective, race in Brazil is not static like in the United States; rather, it is fluid concept, subject to alterations throughout a person's lifetime.<sup>46</sup> For instance, a black person can "pass" loosely from one racial classification to another, especially if that individual's economic

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[BRAZILIAN RACISM—A NEW SOCIOLOGICAL PERSPECTIVE] 138-52, (Relume Dumarà, Fundação Ford, 2003) (citing U.S. Census Bureau, *Marriages between Whites and Blacks in the United States, 1960 and 1992*, tables 1 and 2)).

40. *Id.* at 32 (citing Zaid A. Zaid, *Continually Creating Races: The Census in the United States and Brazil*, 20 NAT'L BLACK L.J. 42, 45 (2006-2007)).

41. DiSchino, *supra* note 34, at 160-61.

42. Zaid, *supra* note 40, at 62.

43. Ikawa, *supra* note 39, at 32.

44. Oscar Vilhena Vieira, *DIREITOS FUNDAMENTAIS—UMA LEITURA DE JURISPRUDÊNCIA DO STF [FUNDAMENTAL RIGHTS—A LECTURE ON THE STF'S JURISPRUDENCE]*, 376 (São Paulo: Direito GV/Malheiros, 2006) (noting the argument that the results of the *vestibular* (Brazil's university entrance exams) are discriminatory because they favor white applicants who have received a superior education from private schools at the detriment of predominantly black public schools.). *see also*, the listed socio-economic statistics at the beginning of Section II, *supra*.

45. Ikawa, *supra* note 39, at 32 (Racially constructed hierarchies habitually came from Western European notions of race during the colonial era in which Western culture was culturally superior to others who were considered inferior and subject to a European-styled pedagogy.); António Manuel Hespanha, *O CALEOSCÓPIO DO DIREITO—O DIREITO E A JUSTIÇA NOS DIAS E NO MUNDO DE HOJE [THE KALEIDOSCOPE OF LAW—LAW AND JUSTICE TODAY]* 238-39 (Coimbra: Almedina, 2007).

46. Rochetti, *supra* note 37, at 1461.

status improves.<sup>47</sup> Thus, under a system of racial self-declaration, the policy will run the risk of being abused by those who falsely state that they are “black” by virtue of a supposed African ancestor in order to benefit from the quota system.<sup>48</sup> If race is a permanent identity, ways to limit such risks of abuse may be possible;<sup>49</sup> however, under a more malleable concept, such acts cannot even be considered abuse.<sup>50</sup> For how can you call something “abuse” when individuals can amorphyously move from one racial classification to another? And even if you somehow create a system that sufficiently accommodates such a flexible concept of race, how can you really determine if someone in Brazil is a victim of racial discrimination? If someone is black and poor, is it because his “capabilities” have been marred by racial injustice, or instead simply because his plight was caused by socio-economic class prejudices? Can you even separate class from race in Brazil; that is, can the “socio” and “economic” in “socio-economic” be disbanded? What does all of this mean for affirmative action?

### III. ANOTHER KIND OF FEDERALISM

There is no denying that the question of affirmative action in Brazil is just as (if not more) complex than its northern counterpart based on complex social realities and the difficulty of defining race.<sup>51</sup>

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47. Marvin Harris, *PATTERNS OF RACE IN THE AMERICAS* 59 (Greenwood Press 1980) (1964) (“Brazilians say ‘Money whitens,’ meaning that the richer a dark man gets, the lighter will be the racial category to which he will be assigned by his friends, relatives and business associates.”).

48. DiSchino, *supra* note 34, at 184 (One of the most common examples cited by anti-affirmative action advocates were two twin brothers who applied to the University of Brasilia in 2007. One of them self-identified while the other did not.); Ikawa, *supra* note 147, at 33. (Although there is a distrust concerning racial identification in Brazil, there is, however, a considerable degree of confluence between self-racial identification and identification by third parties at a rate of 79%.).

49. Ikawa, *supra* note 39, at 33 (“In order to avoid fraud in obtaining benefits or simply in order to avoid distrust, a few additional identification mechanisms could be used, such as: (1) forms with multiple questions about the candidate’s race (which could be used to assess coherence in one’s self-identification); (2) signed statements; (3) interviews; and (4) photos.”).

50. Rochetti, *supra* note 37, at 1461.

51. Rochetti, *supra* note 37, at 1461 (Apart from the socio-economic statistics, perhaps the most critical aspect is the different ways in which the United States and Brazil view race. Whereas the United States dictates race by ancestry or the “one-drop rule,” the fact that almost everyone in Brazil has some trace of African descent is insufficient to determine its socio-economic racial demarcation by American standards. Although there are convincing arguments to classify race in Brazil based on phenotype,

Moreover, the concept of affirmative action in Brazil is very nascent. National dialogue on the matter only started after the turn of the millennium when former President Luiz Inácio Lula da Silva rose to power in 2003.<sup>52</sup> Although Brazil's more aggressive stance on affirmative action could be seen as a way to "catch up" with other nations whose programs have existed for more than forty years,<sup>53</sup> it may be able to use an old tool in a new fashion.

By factoring in Brazil's huge land mass and rich diversity alone, a uniform top-down federal implementation of affirmative action is ill-suited. An alternative constitutional tool in Brazil is federalism, but not in the American sense. As this Section will demonstrate, a direct transplantation of the United States' federalist structure with regard to affirmative action is unworkable based on a different constitutional relationship between the Brazilian federal government and the states, federal district, and municipalities. Nevertheless, the ambiguous parameters of "university autonomy" under the Brazilian Constitution may pave the way to develop a similar federalist structure to the American model, with public universities tending to local social issues on a national scale, thus providing the country with various methods and programs from which to select the best and most effective affirmative action programs.

#### A. FEDERALISM IN BRAZIL

Although the Brazilian federalist structure is explicitly modeled

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or outwardly physical appearance, racial identification may not be that easy. From another perspective, race in Brazil is not static like in the United States; rather, it is fluid concept, subject to alterations throughout a person's lifetime.); Marvin Harris, *supra* note 47 (For instance, a black person can "pass" loosely from one racial classification to another, especially if that individual's economic status improves.); DiSchino, *supra* note 34, at 184 (Thus, under a system of racial self-declaration, the policy will run the risk of being abused by those who falsely state that they are "black" by virtue of a supposed African ancestor in order to benefit from the quota system. If race is a permanent identity, ways to limit such risks of abuse may be possible (i.e., signed statements, interviews, and photos); however, under a more malleable concept, such acts cannot even be considered abuse.).

52. See generally *Out of Eden—Affirmative Action in Brazil*, THE ECONOMIST, Jul. 3, 2003.

53. See generally Partha S. Ghosh, *Positive Discrimination in India: A Political Analysis*, ETHNIC STUDIES REPORT, Vol. XV, No. 2, July 1997, at 135 (Contrary to general public belief, India was the first country that approved an affirmative action program when in 1935 it promulgated the Government of India Act, which sought to deconstruct the caste system for certain tribes and to positively discriminate for more equal access to primary and university education and public sector jobs.).

after the American experience, it is not a topic of intense legal activity. Rather than opting for a “cacophony of conflicting political standards,” Brazilian federalism strives for a more simplistic and organized system of government dictated by a representative national government that manages a hugely diverse land mass that is more engaged than an out-of-touch monarch.<sup>54</sup> Part of the reason why this difference exists stems from the historical differences between Brazilian and American systems of government. Colonial Brazil was not a collection of autonomous political entities like the U.S. Rather, it was a unified and unitary system of government that represented the interests of the Portuguese Emperor. Federalism was adopted in Brazil like the United States in that it was a reaction against an authoritarian sovereign; but it was more of a reaction against a heavily centralized system of government in a country of enormous size,<sup>55</sup> arrayed with diverse regions and a myriad of unique cultures.<sup>56</sup> As the pendulum of time swung from a system of weak federal powers to an outright dictatorship under Getúlio Vargas<sup>57</sup> and back again, Brazil’s current Constitution places federalism somewhere in the middle, albeit closer to a stronger centralized government.

In addition to the specific inclusion of municipalities as integral members of the federal system,<sup>58</sup> Brazil has a series of exclusive powers enjoyed by the federal government as well as joint and concurrent powers which are allocated among federal, state, municipal, and federal district bodies of government. Because of the Constitution’s seemingly infinitesimal density, Brazil’s form of

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54. Bruce A. Antkowiak, *Contemplating Brazilian Federalism: Reflections on the Promise of Liberty*, 43 DUQ. L. REV. 599, 601 (2005).

55. STATEMAN’S YEARBOOK: THE POLITICS, CULTURES, AND ECONOMICS OF THE WORLD 231 (Bary Turner ed., 2014) (stating that the country’s land mass is greater than 3.2 million square miles and it has 4,655 miles of coastline); THE WORLD ALMANAC: AND BOOK OF FACTS 758 (Sarah Janseen ed., 2013) (stating that Brazil is the fifth largest country in the world).

56. Keith S. Rosen, *Federalism in Brazil*, 43 DUQ. L. REV. 577, 578 (2005).

57. *Id.* at 579-82 (dividing Brazil’s historical “oscillation” between centralized and decentralized forms of government into five distinct phases: (1) the Old Republic (1889-1930); (2) the authoritarian rule of Getúlio Vargas (1930-1945); (3) the Democratic Restoration Period (1945-1964); (4) the Military Regimes (1964-1985); and The New Republic (1985-present)).

58. *Contrast* CONSTITUÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 18. (Braz.), *with* U.S. CONST. (while Brazil treats the Federal District as any other state, including its own elected governor, legislature and federal representatives elected by its constituents, the United States has no specific characterization of its own capital district).

federalism is more fleshed out than America's. Article 21 of the Constitution enumerates the federal government's exclusive powers, including maintaining international relations, declaring war and making peace, providing for the common defense, regulating currency, and operating radio and television broadcasting.<sup>59</sup> Apart from joint powers shared,<sup>60</sup> the federal government's legislative concurrent powers<sup>61</sup> are limited to establishing general rules while the states and municipalities may adopt supplementary legislation.<sup>62</sup> When the federal government has not enacted laws that fall within the purview of shared powers, the states have discretion to legislate their own regulations.<sup>63</sup> But if the federal government subsequently adopts general rules over that same area which conflict with state regulation, the state laws will be suspended under the Brazilian equivalent of the Supremacy Clause.<sup>64</sup>

Borrowing from the U.S. model, Brazil has its own Tenth Amendment clause, which reserves any powers not prohibited under the Constitution to the states.<sup>65</sup> But the Constitution does not explicitly list any exclusive state powers, and the federal government's powers are detailed and far-reaching over almost all areas of daily life.<sup>66</sup> Consequently, the Amendment is practically gutted.<sup>67</sup>

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59. CONSTITUÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 21; Rosenn, *supra* note 13, at 582.

60. CONSTITUÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 23 (Braz.) (The federal government, states, federal district, and municipalities have joint powers over areas of public health, preserving historical national treasures, proportionate accessible ways to education and culture, and combat poverty.).

61. *Id.* at art. 24 (some of the concurrent powers shared among these divisions of government include tax and finance legislation, and laws regulating producer and consumer activity and the protection of the environment and historical patrimony).

62. *Id.* at art. 24 (XVI) § 2; *Id.* at art. 30(I) & (II); ] Rosenn, *supra* note 17-19, at 583.

63. Rosenn, *supra* note 56, at 583.

64. CONSTITUÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 24 § 41 (Braz.); *Id.*

65. *Id.* at art. 25 § 1.

66. Different from common law countries such as the United States, Brazil's legislation is codified in federal statutes, which touch upon all important legal issues in Brazil. See Brazil's civil code, penal code, labor code, procedural code, commercial code (whose areas today are mainly described in the civil code), electoral law, financial markets law, and corporation law.

67. Rosenn, *supra* note 56, at 583 (“[T]he Union has supreme authority over other political entities in all economic and financial matters. This is true to such an extent that the old principle, that powers not forbidden to States are reserved to them, becomes entirely meaningless.” (quoting Fábio Konder Comparato, a leading jurist

While the U.S. Supreme Court views itself as the ultimate arbiter between state and federal prerogatives, the STF seems comfortable to let the two factions strike a political compromise outside the courtroom.<sup>68</sup> But even so, the Court does not have a problem striking down state or municipal laws that conflict with federal laws or resolving separation of powers disputes.<sup>69</sup> What is distinct from American jurisprudence, however, is that the STF has not protected states or municipality interests from the invasive reach of the federal government<sup>70</sup> nor has it delegated to the states the job of defining state law.<sup>71</sup> The reason for this is threefold: first, the Brazilian Constitution, under the historical auspices of a centralized, absolutist Emperor and Roman Catholic Church, has delegated far greater powers to the federal government than its northern neighbors; second, excluding intergovernmental tax immunity, Brazil has no equivalent to America's Eleventh Amendment establishing State sovereign immunity; finally, the STF's more rigid system of judicial review does not allow for the formation of a group of judges who are more sensitive to State preoccupations.<sup>72</sup>

But Brazil can use more of a decentralized prototype of federalism—albeit in a more limited capacity—to its advantage in implementing affirmative action. Even though the states are left relatively powerless to strike a federalist balance with the national government in the areas of education, universities themselves may be able to effectively counter-balance federal prerogatives based on constitutional guarantee of “university autonomy.”

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figure in Brazil)).

68. Rosenn, *supra* note 56, at 584 (citing David J. Samuels & Scott Mainwaring, *Strong Federalism, Constraints on the Federal Government, and Economic Reform in Brazil*, FEDERALISM AND DEMOCRACY IN LATIN AMERICA 85-125 (Edward L. Gibson ed. 2004); José Antonio Cheibub, Argelina Figueiredo & Fernando Limongi, “Presidential Agenda Power and Decision-Making in Presidential Regimes: Governors and Political Parties in the Brazilian Congress,” Paper delivered at Am. Pol. Sci. Assoc. Annual Meeting, Boston, (Aug. 29-Sept. 1, 2002).

69. *See generally*, Keith Rosenn, *Separation of Powers in Brazil*, 47 DUQ. L. REV. 839 (2009).

70. *Compare, e.g., Printz v. United States*, 521 U.S. 898 (1997), with Rosenn, *supra* note 56, at 584-85.

71. Rosenn, *supra* note 56, at 586 (In Brazil, a state or a federal forum has the discretion to determine the meaning of state law.); *contra* *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and its subsequent jurisprudence.

72. *See* Rosenn, *supra* note 56, at 585.



B. “UNIVERSITY AUTONOMY”: THE FULCRUM FOR EFFECTIVELY INCORPORATING AFFIRMATIVE ACTION IN BRAZIL

1. The Legal Debate on University Autonomy in Brazil

In Brazil, the constitutional meaning of “university autonomy” is inexhaustible and undefined, subject to further political discourse.<sup>73</sup> The reason why is partly because the country’s academic tradition has only emerged recently.<sup>74</sup> With a history that has varying degrees of centralized governmental authority which more or less validated universities’ activities, “autonomy” has traditionally been understood to be associated with teaching and research.<sup>75</sup> The 1988 Brazilian Constitution, however, has delegated universities’<sup>76</sup> administrative criteria in determining and evaluating candidates,<sup>77</sup> which has catalyzed two schools of thought on the constitutional nature of the university.

On one side lie those who view that the continual and expanding legislation regulating higher education evidences that any major alterations regarding university autonomy always requires the supporting validation of the federal government.<sup>78</sup> Unlike other constitutional provisions, “university autonomy” does not include self-executing regulatory mechanisms that ensure its efficacy. Others note that Article 207’s absent distinction between public and private colleges is a result from the relative surge in private universities and the need to define the parameters of state intervention with respect to

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73. Nina Beatriz Stocco Ranieri, *Aspectos Jurídicos da Autonomia Universitária no Brasil [Legal Aspects on University Autonomy in Brazil]*, REVISTA CEJ, n. 31, 19-30 (Oct. 2005).

74. *Id.* at 21. (During the colonial period, administrators on behalf of the Emperor (i.e., viceroys, governors, etc.) were all required to receive an education in Portugal at the University of Coimbra. As a consequence, the first Brazilian universities did not exist until the 19<sup>th</sup> century.)

75. *Id.* (From 1911 to 1988, five Constitutions, one constitutional amendment, six reforms concerning higher education and various federal statutes defined and regulated, directly or indirectly, university autonomy.); *Id.* at 19, 21-25.

76. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 207.

77. *Id.*

78. *See* Emenda Constitucional no. 1, de 17 de Outubro de 1969 (One of the most important areas of this argument cites a strong, centralized statist regime, which regulated almost every aspect of society. For example, apart from the Vargas era which controlled everything in the Union, governmental control during the 1960s was accentuated, culminating in the First Amendment’s promulgation which made the State duty-bound to provide education to all.).

their activities.<sup>79</sup> Hence, by interpreting Article 207 this way, the main debate relates only to private universities and the government—not university administrative powers in general.

Supporters of greater university autonomy, however, believe that the new language of Article 207 provide universities with greater material substance and protection, and that the government must respect and cooperate in accordance with this new sphere of self-administration. Additionally, Article 207 should be viewed as “living” because the 1988 Constitution itself was ratified as a special document that focused its text on modernity and consistency which delegated to future decision-makers the legitimacy to determine its proper scope.<sup>80</sup> Apart from the constitutional text, an important statute is Law no. 9.394/1996, which explains in part the boundaries of university self-governing procedures and expressly provides for the possibility of creating a separate juridical regime for public universities.<sup>81</sup> Particularly, Article 53 enumerates the exclusive attributes of university autonomy, including the creation and termination of the university, the establishment of course programs, plans, and research projects, financial administration, and fixing the available number of enrollment seats.<sup>82</sup> In addition, Article 54 states that a university has autonomous authority to administer internal matters, including the approval and execution of education programs, and the adoption of a financial plan.<sup>83</sup>

However, the explicit parameters of Article 207 with respect to other constitutional provisions remain unanswered, and they may remain unanswered if the STF does not address the issue head-on,

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79. Mariana Barbosa Cirne, *O Paradoxo da Autonomia Universitaria: acesso as universidades* [University Autonomy Paradox: university access] 14 REVISTA CEJ 26 (2010) (Scholars have noted that this has produced a paradox between private and public universities whereby the constitutional significance of “university autonomy” in the 1988 Constitution has been rendered null, leaving public universities subject to the whims of the federal administration while private universities have enjoyed plenary immunity from any sort of governmental control.); Hélió Trindade, *Universidade em ruínas: na república dos professores* [The University in ruins: republic of professors], 29 (PETRÓPOLIS: VOZES; RIO GRANDE DO SUL: CIPEDDES, 1999).

80. Cristiano Paixão, *A Constituição subtraída* [A Constitution removed], TRIBUNA DO BRASIL, Feb. 5, 2006, at 4.

81. Lei No. 9.394, de 20 de Dezembro de 1996. DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 23.12.1996.

82. *Id.* at art. 53.

83. *Id.* at art. 54.

which may happen considering the Court's prior approval of allowing some matters to be decided on the Congressional floor rather than in litigation.<sup>84</sup> For some, if this question is to be decided by political measures, it may mean that it will be resigned to an endless process.<sup>85</sup> Yet, some Justices have provided opinions on the role of the university in Brazil. As was noted above, Justice Lewandowski adhered to greater university independence by stating that they may freely decide the criteria of student admissions<sup>86</sup> whereas Justice Barbosa found that the university is not outside the educational and social norms of the Constitution.<sup>87</sup> If these opinions are of any indication, perhaps the Court may break with tradition and address university autonomy.

Notwithstanding constitutional claims, there is a functional, pragmatic reason to delegate admissions preoccupations to the university in light of the decision affirming the constitutionality of quotas: by deferring administrative matters to universities, a more narrow quasi-federalist system could emerge that would benefit Brazilian affirmative action and its justifications.

## 2. Using the Advantages of Federalism within the University Setting

Assuming that affirmative action is a favorable program in Brazil for its people, its further implementation will reap innumerable benefits if universities are left with appropriate autonomy to operate more like American states. While American states and the federal government undoubtedly have convergent interests and objectives, a university's interests are limited to the educational forum. As such, the idea of federalism will be more limited than the American model. The concern here is not to create two wholly separate and political sovereigns who would rule over the same subject. Instead, this "narrow federalism" doctrine would recognize the overlapping prerogatives between the university and the federal government and then exploit each institution's comparative advantages to best address affirmative action. Thus, certain aspects of federalism can help Brazil address the question

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84. *E.g.*, Rosenn, *supra* note 56, at 584 ("[T]he Brazilian judiciary really has not served as the ultimate arbiter of the balance of power between the states and the national government."). If the Court agrees to treat public universities with more autonomy under a federalist scheme for the purposes of enhancing the efficacy of affirmative action programs, then a plausible argument could be made to leave the balance of power to political discourse.

85. Ranieri, *supra* note 73, at 29.

86. *Supra* note 25.

87. *Supra* note 30.

of enacting affirmative action in a way that is decentralized yet effective and nascent yet savvy.

a. The Laboratory Perspective

Similarly to the way in which Brazil's government is taking more aggressive measures to institute affirmative action, Felix Frankfurter (still a Harvard professor at the time) criticized an overzealous judiciary enforcing substantive due process against state economic regulation:

Opportunity must be allowed for *vindicating reasonable belief by experience*. The very notion of our federalism calls for the free play of *local diversity in dealing with local problems*.... [J]udicial nullification on grounds of constitutionality stops experimentation at its source, and bars increase to the fund of social knowledge by scientific tests of trial and error...<sup>88</sup>

For more than a fifty year span, the Supreme Court developed the "laboratory" theory in greater detail.<sup>89</sup> Today, it highlights two critical components of American federalism. The first is that federalism permits functionalist testing of novel policy proposals. Innovative states themselves can conduct controlled legislative "experiments" to compile, analyze, interpret, and compare hypotheses tested from other sound policies derived in other States.

i. The Benefits of an Empirical University

"If only because of its immense size, federalism is a sensible form of government for Brazil."<sup>90</sup> While federalism here was used to

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88. Felix Frankfurter, *THE PUBLIC AND ITS GOVERNMENT* 49-50 (Yale Univ. Press 1930) (emphasis added).

89. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); *FERC v. Mississippi*, 456 U.S. 742, 788 (O'Connor, J., dissenting) ("[T]he 50 States serve as laboratories for the development of new social, economic, and political ideas. This state innovation is no judicial myth. When Wyoming became a State in 1890, it was the only State permitting women to vote. That novel idea did not bear national fruit for another 30 years. Wisconsin pioneered unemployment insurance, while Massachusetts initiated minimum wage laws for women and minors...").

90. Rosenn, *supra* note 56, at 578.

describe the concept of “split[ting] the atom of sovereignty,”<sup>91</sup> Professor Keith Rosenn’s statement is useful here if “university autonomy” is characterized with similar deference as American states. As previously mentioned, Brazil, like the United States, covers a vast territory, with landscapes and people that vary in complexion and environment like colors a Monet painting. In terms of regional black populations in 1999, 15.67% were located in the Southern region, 35.14% in the Southeast, 52.95% in the Central region, 70.11% in the Northeast and 70.87% in the Northern region.<sup>92</sup>

In addition to its differences in geography and economy, it would be hard to argue that the region of Rio Grande de Sul has the same social and political issues as Rio Grande de Norte. And besides the State University of Rio de Janeiro (UERJ)<sup>93</sup> and UnB’s respective quota programs,<sup>94</sup> other universities already took the initiative to implement their own affirmative prior to 2012. The following lists a small sample:

Since 2007, Rio Grande do Sul’s Federal University, in its efforts to eradicate racial segregation, reserved 30% of its seats for applicants who either received half of their primary schooling or entire high school education from public schools. Half of those spots were reserved for self-declared black applicants, and ten spots were saved for indigenous individuals, regardless of their vestibular score.<sup>95</sup> In addition, the policy’s determined life span was five years, subject to

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91. *United States Term Limits v. Thornton*, 514 U.S. 779, 838 (Kennedy, J., concurring).

92. Ikawa, *supra* note 39, at 34 (citing Ricardo Henriques, *DESIGUALDADE RACIAL NO BRASIL: EVOLUÇÃO DAS CONDIÇÕES DE VIDA NA DÉCADA DE 90* [RACIAL INEQUALITY IN BRAZIL: THE EVOLUTION OF CONIDITIONS OF LIVING IN THE ‘90s] (Rio de Janeiro: IPEA-Instituto de Pesquisa Econômica Aplicada, 2001).

93. John Jeter, *Affirmative Action Debate Forces Brazil to Take Look in the Mirror*, WASH. POST, Jun. 16, 2003, at A1 (The program reserved forty percent of its admission slots for blacks and *pardos* and fifty percent for public high school graduates. But the school faced criticism when it underestimated the overlapping effects of both quotas’ criteria with respect to the incoming student body); Rochetti, *supra* note 37, at 1428 (students who attained the requisite *vestibular* score for entrance were denied because they did not fit into either quota criteria.); S.T.F., ADPF 186, Relator: Min. Ricardo Lewandowski, 25.4.2012, (Braz.) (draft opinion of Min. Marco Aurélio, not yet published) (Nonetheless, whatever tension the program created, it did not reach the level of a “racialized society” nor did it create any sort of racialized tension in Brazilian society during its ten-plus years of existence.).

94. *See supra* Part II(A).

95. UNIVERSIDADE FEDERAL DO RIO GRANDE DO SUL VESTIBULAR, <http://www.ufrgs.br/vestibular> (last visited April 10, 2013).

annual review.<sup>96</sup>

The Federal University of Pernambuco adopted a different program to ameliorate regional disparities within its student body.<sup>97</sup> Since its 2011 incoming class, students who attended any public school system for at least three years would receive a 10% bonus, and those who hail from Vitória de Santa Antão or Agreste and had received at least three years of secondary education from any school within Pernambuco would benefit from a 5% “bump” to their application.<sup>98</sup>

In dealing with the reality that 62% of its students declared themselves as black or pardo, the Federal University of Tocantins in 2004 decided to keep at least 5% of its seats open for indigenous persons.<sup>99</sup>

Finally, the State University of Campinas in São Paulo State (“Unicamp”) decided to forgo the quota system altogether based on three premises: social inclusion, academic merit, and university autonomy.<sup>100</sup> After serious deliberation and analysis, the university decided to apply its *Affirmative Action and Social Inclusion Program* (“PAAIS”) to its 2005 National Vestibular. Unicamp’s profile itself is unique on a national and state level. Besides its specific concentration in post-graduate research, it is an institution that has national reach.<sup>101</sup> Using a combination of academic tests and American-styled admissions policies, administrators agreed that attracting the nation’s best talents would be consistent with its university mission of attaining a greater “generation of knowledge” because they believed that a national student body would best utilize an undergraduate education.<sup>102</sup> Moreover, the definition of “merit” was expanded to include not only vestibular scores but also individual experiences and differences.<sup>103</sup>

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96. *Id.*

97. UNIVERSIDADE FEDERAL DE PERNAMBUCO ADMISSÃO DE ALUNOS [STUDENT ADMISSIONS], [http://www.ufpe.br/proacad/index.php?option=com\\_content&view=article&id=72&Itemid=140](http://www.ufpe.br/proacad/index.php?option=com_content&view=article&id=72&Itemid=140).2010 (last visited April 10, 2013).

98. *Supra* note 97.

99. UNIVERSIDADE FEDERAL DE TOCANTINS VESTIBULAR, <http://www.copese.uft.edu.br> (last visited April 10, 2013).

100. Leandro R. Tessler, *Ação afirmativa sem cotas: O Programa de Ação Afirmativa e Inclusão Social da Unicamp* [*Affirmative Action without quotas: The Affirmative Action Program and Social Inclusion of Unicamp*], available at <http://www.comvest.unicamp.br/paais/artigo1.pdf>.

101. *Id.* at 9.

102. *Id.* at 10.

103. *Id.* at 7-8, 10-11, 13, 15 (Administrators found the sole evaluation of academic

Unicamp determined that this kind of policy would be able to integrate social inclusion and academic merit, both of which were important components to the “generation of knowledge.”<sup>104</sup>

Under PAAIS, therefore, a point system was institutionalized, giving thirty points to complement students who completed a public school education, and ten additional points for those students who also declared themselves as black, pardo, or indigenous based on national classifications.<sup>105</sup> Positive results have already been confirmed: 95% of PAAIS beneficiaries generally improved their academic performance greater than other students, and over 60% of all courses saw PAAIS students consistently performing better than their colleagues.<sup>106</sup> Unfortunately, recent quota legislation enacted under São Paulo Governor Geraldo Alckmin<sup>107</sup> will soon make any such non-quota program, regardless of its effectiveness, obsolete within Paulista State universities.<sup>108</sup>

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merit based on the vestibular insufficient because of a low correlation between those who scored well on the exam and the school’s graduation rate, the test’s subject matter being in favor of those who came from private schools, and a general perception that public high school graduates could never go to public colleges although on average such students performed better at the university level than their vestibular scores may have indicated.).

104. *Id.* at 11.

105. *Id.* at 12.

106. *Id.* at 18.

107. The program, known as Pimesp (“Programa de Inclusão com Mérito no Ensino Superior Paulista” [Merit Inclusion Program for Higher Education in the State of São Paulo], is quota-based.

108. Felipe Oda, *Prova de Fogo*, FOLHA DE SÃO PAULO, Feb. 3, 2013, at 28, 30 (In late 2012, Alckmin announced a state-backed quota program for the state universities of the University of São Paulo (USP), the State University of Campinas (Unicamp), and Paulista State University (Unesp).); *Id.* at 31 (The structure of the quota program states that while private school applicants will be considered under the traditional *vestibular* criteria, university committees will divide public school students into three areas. First, such students not meeting the federal quota system’s requisites will be considered separately based on their *vestibular*, with a maximum 15% “bonus” for those who do not score as high as other private-schooled applicants.); *Id.* (Second, an applicant who qualifies under the federal quota program will be considered with other similarly qualified individuals.); Under the third section, or Pimesp section, a student applies with his Enem or Saresp score. (Brazil’s primary method of college admissions is through the *vestibular*, which is created by each university.) For example, if a student wanted to go to school at USP or UERJ, he would need to take those schools’ *vestibulars*. However, some schools do not have their own *vestibular*, so the federal government provides the Enem (*Exame Nacional do Ensino Médio*; [National High School Exam]), which is a national test (similar to the SATs or ACTs in the United States) that students can take to gain admission into their desired university.

If only for its recent developments and unconfirmed studies, allowing universities to experiment with different admissions policies would greatly benefit affirmative action in Brazil. The PAAIS program shows a sound alternative choice to a quota-based system; although the reach of Unicamp is nationwide, it nonetheless addresses the problem in a local way, with local administrators who are intimately affiliated with the local academic community. More state and locally based universities would make an even stronger argument in favor of a delegated university federalist system because they are in a better position in terms of local accessibility and resources to address questions of racial composition and local discrimination, educational disparities and their post-graduation effects in the local economy; and they may be more sensitive to local customs and perceptions about race as well as the justifications for implementing a better tailored affirmative action policy.

ii. Universities as Policy Laboratories

The second tenet of laboratory federalism is that it edifies and engages the citizenry. In other words, it is the educational and participatory testing centers of policy.<sup>109</sup> American democracy is underscored by local government because the disbursement of the “power to govern” preserves the ability of citizens to learn democratic processes by participating in local government.<sup>110</sup> Moreover, by

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Concurrently, the state of São Paulo provides its own general high school test known as Saresp (*Sistema de Avaliação do Rendimento Escolar do Estado de São Paulo*; [The State of São Paulo’s Evaluation System of High School Education]), with much of the same formatting and subject matter as the Enem.) The best scores are then admitted into a “college” program in which admitted students study mathematics, humanities, and science. Out of those future main university seats, forty percent must be reserved for such “college students.” Within those numbers of graduates, fifty percent of entering university seats must be reserved for students based on their economic or racial criteria respectively: forty percent saved for students enrolled in the Pimesp program, and ten percent reserved for students who are black, *pardo*, or indigenous. *Id.* Whereas the Law of Social Quotas steadily increases quota percentages until its full implementation in 2016, the São Paulo law will take full effect beginning in 2014. *Id.* Taking into account that fifty percent of a university’s total yearly seats must be reserved based on the federal law and forty percent per the state law, there is an assumed overlap between the two demographics; how much overlap yet remains to be determined. *Id.* For a lack of a better term, compared to the UC-Davis program, this is affirmative action “on steroids.”

109. Akhil Reed Amar, *Five Views of Federalism: “Converse-1983” in Context*, 47 VAND. L. REV. 1229, 1234 (1994).

110. *FERC v. Mississippi*, 456 U.S. at 788-91 (O’Connor, J., concurring in the



“vindicating reasonable belief by experience”<sup>111</sup> or empirically testing plausible hypotheses, different places conducting different styles of programs “increase[s] ... the fund of social knowledge.”<sup>112</sup>

Admittedly, leaving the university with greater autonomy would diminish the democratic idea of local civic participation because of the simple fact that university officials and professors are unelected representatives. The scientific aspect of laboratory federalism in the Brazilian context, however, is compelling. Affirmative action in Brazil did not take relatively long to be addressed<sup>113</sup> and the first universities that implemented affirmative action were essentially testing centers of trial and error. Therefore, considering race in university admissions on a greater scale must continue the tradition of the laboratory to accelerate and enhance viable methods which broadens the depth of empirical data so that the country as a whole and the individuals affected by it may in turn receive the utmost qualified system of affirmative action possible. By delegating public universities the ability to self-determine their admissions processes, a more proximate and flexible local institution can better address local prerogatives and social issues such as race to provide the country with a greater “fund of social knowledge.”

b. The “Political Market” Perspective: Universities Playing the Role as Decentralized Competitors

Unlike America’s historical efforts to divide and maintain sovereign power between two distinct governments to quell its fear of a centralized dominion, Brazil has gravitated towards a unitary form of government. Hence, the “double security” analogy<sup>114</sup> that arises under the political market perspective is nullified; powers delegated to Brazilian states and universities are much more minimal than those

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judgment in part and dissenting in part).

111. Frankfurter, *supra* note 88.

112. *Id.*

113. *But see*, BRASIL CÓDIGO CIVIL [BRAZIL’S CIVIL CODE] (2002) (finally approved in 2002, had lingered for twenty-six (26) years in Congress).

114. *FERC v. Mississippi*, 456 U.S. at 788-91 (O’Connor, J., concurring and dissenting in part) (Invoking de Tocqueville and Madisonian federalism, Justice O’Connor analogizes federalism within the separation of powers theory. Put otherwise, by dividing national power among three separate and equal branches of government, checks and balances—like federalism—erects competing political institutions whose political jealousy serves to diffuse power and prevent the accumulation of diluted powers held in a tyrant’s hands.).

enjoyed by American states under the Tenth and Eleventh Amendments. Competition between state and federal powers in Brazil reveals itself only rarely, and the scale in those instances overwhelmingly tips in favor of the national government.<sup>115</sup>

Yet political competition does not just focus on national-versus-state jealousies but also on competition *among* states. Similar to how American state universities operate, state Brazilian universities can be incentivized to adopt pro-affirmative action measures by infrastructure developments, subsidies, or tax deductions. Further, the University of São Paulo, like the University of Texas, may receive funds from state officials and grant in-state applicants greater advantages, such as low or free tuition. By allotting its universities the freedom to pick and choose which programs to adopt while contemporaneously influencing its decision with certain potential benefits, state and school can work together to develop a program that is more attractive than their competitors. Building on parallels between Madison's political competition model and Adam Smith's model of microeconomic competition, if incentive structures are diametric, the "free play of local diversity" will let citizens choose those universities that are most conducive to their interests. Therefore, citizens who use their hand in voting will allow others to vote with their feet by "domicile shopping." Legislative diversity—like product differentiation and consumer demand—allows for inter-university bidding and citizen self-selection.

### c. The Shortcomings of the "Nationalist" Perspective

A fair but misguided view of universities in Brazil is that they are the enemies in the battle to ensure constitutional rights. Partly seen as a place to demystify social prejudices in order to construct a pluralist collective conscience, the university has been criticized because it has been a passively segregated environment that violated less-favored groups' right to a good public education by means of exclusion which thereby reinforced social disenfranchisement and inequalities.<sup>116</sup> Universities then are viewed as a serious threat to constitutional liberties, and the national government plays the role as the Constitution's special protector. If anything, therefore, federal power must be strengthened to suppress university autonomy. But the national government itself poses threats to individual liberty. Who will then

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115. See, e.g., Rosenn, *supra* note 56.

116. Vieira, *supra* note 44.

guard against *these* threats?

In Brazil, the answer—like the nationalist argument—is the judiciary.<sup>117</sup> A university's capacity to respect constitutional norms is pessimistic and, ironically, trivialized. As previously stated,<sup>118</sup> Brazil overreacts and overlooks the possibility of enlisting the universities to help promote constitutional rights in a unique capacity.

#### IV. CONCLUSION

The Brazilian Constitution's sheer size and depth allow it to explore multiple facets in addressing the problem of social inequities in university education. Greater options, however, yield greater complexity in determining which rational justification makes the most sense for Brazil. While the United States model is far from perfect, several of its aspects may provide assistance to its southern friend whose history—which is different in its societal evolution with regard to race—nonetheless contains some similarities. Further, the fact that Brazil has mimicked some provisions of the American Constitution incidentally has presented methods capable to address racial issues through affirmative action. But those similarities must be tweaked based on context to realize full fruition.

I have shown that federalist principles could be sculpted into an unorthodox social entity that could effectively maximize political efforts to find creative and effective solutions to address university admissions to greatly minimize or annul the effects of discrimination. It will, however, require greater political discourse and ingenuity among affected officials and representatives to flesh out a comprehensive policy. Yet, the opportunity is there.

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117. Joaquim Barbosa, *Reflections on Brazilian Constitutionalism*, 12 UCLA J. INT'L L. & FOREIGN AFF. 181, 183 (2007). *See also* the US Supreme Court's line of "Our Federalism" cases, including *Younger v. Harris*, 401 U.S. 37 (1971).

118. *See, e.g., supra* note 110.