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Affirmative Action In Brazil: Reverse Discrimination And The Creation Of A Constitutionally Protected Color-line

Christopher DiSchino

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**AFFIRMATIVE ACTION IN BRAZIL:
REVERSE DISCRIMINATION AND THE CREATION OF A
CONSTITUTIONALLY PROTECTED COLOR-LINE**

Christopher DiSchino*

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I. INTRODUCTION

This paper presents a critical analysis of affirmative action programs at public universities in Brazil and other similar gender and ethnicity-based positive discrimination programs implemented throughout Latin America. Without ignoring other states, the focus is on the state of Rio de Janeiro in part because of the amount of litigation challenging the quota-based affirmative action policies in place at the State University of Rio de Janeiro (UERJ).

Brazil's racial history is dissimilar to its neighbors. Although many other countries in the Americas have implemented affirmative action programs, many of them have focused primarily on combating gender discrimination. Developing affirmative action programs to create access to universities for Brazil's population has presented new obstacles for the Brazilian government. Recent history has seen an influx of litigation challenging the government's new policies.

Faced with challenges over the implementation of affirmative action for students of African descent (*Afro-Descendentes*) in Brazil's state public university systems, both the Superior Court of Justice (STJ)¹ and Federal Supreme Court (STF),² have consistently upheld the constitutionality of quota-based admissions policies for Afro-Brazilians. However, the rationales set forth by those courts may merely be skirting the harder issues.

Although the Brazilian Constitution provides that "[a]ll persons are equal before the law, without any distinction whatsoever,"³

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¹ Art. 105 of the Brazilian Constitution establishes the powers of the Superior Court of Justice (*Superior Tribunal de Justiça* or *STJ*). C.F. art. 105 (1988). The STJ is the ultimate tribunal for cases with non-constitutional issues, but a significant number of cases in the STJ involve constitutional matters. *See id.* All cites to "C.F." refer to the 1988 Federal Constitution of Brazil unless otherwise noted.

² Art. 102 lists the powers of the Federal Supreme Court (*Supremo Tribunal Federal* or *STF*). *Id.* art. 102. The list includes several specific functions of the Court, especially to judge and declare the constitutionality or unconstitutionality of laws. *Id.*

³ *Id.* art. 5.

Brazil's affirmative action programs neglect the underlying economic causes of unequal access to education. Brazilian courts, for their part, fail to offer any serious rationale for the approval of such policies. The courts have merely upheld affirmative action as consistent with the constitutional principal of "university autonomy," an outdated and inappropriate justification for such policies. This paper attempts to show that such quota-based admissions policies amount to both social and racial discrimination in a nation where poverty, not race,⁴ leaves many without access to a college education.⁵

The iniquity of Brazil's affirmative action programs is not solely that affirmative action amounts to state-mandated segregation; the adoption of quotas for students with black and indigenous ancestry has also neglected the underlying cause of centuries of economic and racial discrimination.⁶ Some consider these programs merely a temporary and illusory measure to combat the country's economic problems.⁷ After analyzing the shortcomings of Brazil's approach to affirmative action, this article concludes by suggesting some ways in which the Brazilian government can improve both the quality of and access to public education.

II. THE COLOR-LINE: THE DIFFICULTY OF RACIAL SELF IDENTIFICATION FOR THE PURPOSE OF ADMISSIONS UNDER BRAZILIAN STATE UNIVERSITY QUOTA REGIMES.

Brazil, unlike its Latin American neighbors, is a racially mixed country, consisting of a population with European, African and indigenous ancestry. Although Brazil participated in the slave trade for almost sixty years, its history, unlike that of the United States and South Africa, is void of so-called Jim Crow or Apartheid-

⁴ Sylvia Romano, *Sistema de cotas gera injustiça*, GAZETA MERCANTIL (Brazil), June 19, 2006.

⁵ Tanya Katerí Hernández, *To be Brown in Brazil: Education and Segregation Latin American Style*, 29 N.Y.U. REV. L. & SOC. CHANGE 683, 698-99 (2005) (demonstrating that non-Whites have a lower rate of schooling than Whites and a higher likelihood of falling behind in school).

⁶ See *id.* at 700-01.

⁷ S.T.J. Ap. No. 2003/0151040-1, Realator: Luiz Fux, 120 R.S.T.J. 134, 25.02.2004.

like legislation.⁸ Due to this historical absence of legalized race-based discrimination after the end of slavery in 1888⁹, Brazil lacks a clear-cut “color-line.” As noted by one scholar, “[t]he lack of a clear-cut distinction between whites and blacks may be the greatest bar to effectiveness of any affirmative action regime currently in place in Brazil. In part, the lack of a clear-cut distinction between skin colors also raises doubts as to whether such students are actually ‘cheating’” when identifying their ethnicity on university applications.¹⁰ Because Brazil’s affirmative action system is based on self-classification, some critics contend that many light-skinned residents are taking spots in Brazil’s public universities originally intended for blacks.¹¹

The policy reasons behind Brazil’s choice of affirmative action programs stem from a long-standing “racial democracy” thesis, supported by the Brazilian government, which:

insists that the disproportionate impoverishment of blacks and their absence among elites is due to class discrimination and the legacy of slavery, and that the absence of state-sponsored segregation, a history of miscegenation, and social recognition of intermediate racial categories have upheld a unique racial order.¹²

In light of this mixed racial structure, the age-old question of “who is black in Brazil” confuses even the Brazilians themselves.¹³ Nevertheless, it is very much apparent that vast inequalities between

⁸ See Hernández, *supra* note 5, at 694.

⁹ *Id.* at 684-86.

¹⁰ 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, 1430 (2004).

¹¹ Michael Astor, “Blacks will soon be Brazil’s majority,” ASSOCIATED PRESS (May 27, 2008) available at http://www.finalcall.com/artman/publish/article_4761.shtml.

¹² Mala Htun, *From Racial Democracy to Affirmative Action: Changing State Policy on Race in Brazil*, 39 LATIN AM. RES. REV. 60, 64 (2004).

¹³ Sales Augusto dos Santos, *Who is Black in Brazil? A Timely or False Question in Brazilian Race Relations in the Era of Affirmative Action?*, 33 LAT. AM. PERSP. 30, 30 (Obianuju C. Anya, trans.) (2006).

whites and “blacks”¹⁴ pervade Brazilian society.¹⁵ Because the distinction between white and black is not so clear, the question that still remains to be decided is *who*, if anyone at all, should actually benefit from these quota-based affirmative action systems in Brazil’s public universities. As previously mentioned, particular difficulty arises with racial self-classification under UERJ’s admissions policy, as it does not distinguish between multitudes of shades of skin color in Brazil.¹⁶

Having had one of the longest reigns of slavery in the world, Brazil, like the United States, is a melting-pot of diversity, with a significant portion of its citizens descended from African slaves.¹⁷ A common saying in Brazil is that “*cada Brasileiro tem um ‘pé na cozinha,’*”¹⁸ or “every Brazilian has a foot [in Africa].”¹⁹ The slave trade in Brazil began to sink under increasing international pressure in the mid-nineteenth century, and was finally abolished in 1888 with the formation of the Republic.²⁰ In contrast to the subsequent race relations between blacks and whites in the United States after the slave trade, Brazilians became comfortable living with such a large population of freed slaves.²¹ Even before the abolition of slavery,

¹⁴ References to “Black” in this article refer to the *afro-descendente*, those tracing their roots to an ancestor from the African continent, as well as those of mixed-descent. See generally EDWARD E. TELLES, *RACE IN ANOTHER AMERICA: THE SIGNIFICANCE OF SKIN COLOR IN BRAZIL* (Princeton University Press 2004). Lower case “black” refers specifically to the Brazilian *negro* classification, or darkest skin color. *Id.*

¹⁵ dos Santos, *supra* note 13, at 43.

¹⁶ See Telles, *supra* note 14, at 61.

¹⁷ See Peggy A. Lovell, *Race, Gender, and Development in Brazil*, 29 LATIN AM. RES. REV. 7, 7 (1994) (aside from Nigeria, Brazil is the nation with the largest number of people of African descent in the world).

¹⁸ Nei Lopes, *Enciclopédia brasileira da diáspora africana [Brazilian Encyclopedia of African Diaspora]* 213 (2D ED. 2004).

¹⁹ The literal translation is “Every Brazilian has a foot in the kitchen.” The term “a foot in the kitchen” is a colloquial term for being black. Htun, *supra* note 12.

²⁰ U. N. Educ., Scientific, and Cultural Org. [UNESCO], *Slavery in Brazil*, http://portal.unesco.org/ci/en/ev.phpURL_ID=8161&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Mar. 29, 2010).

²¹ 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).

mixed marriages accounted for almost 6% of all marriages in Rio de Janeiro.²²

Despite Brazil's long-standing history of racial diversity and traditional self-classification as a "racial democracy," discrimination pervades the country's socio-economic structure.²³ Although, as mentioned above, Jim Crow or Apartheid-like legislation was never codified,

. . . public segregation in Brazil has nevertheless been virulent. For instance, in the 1940s Afro-Brazilians were not allowed to enter public parks in São Paulo. In Campinas, "Whites only" signs were used in movie theaters and other public places. Similarly, residents of Vasalia, a small town in Rio de Janeiro's northwestern interior, recall "Jim Crow-like segregation of the main street, stores, public sidewalks, social clubs, dances, and beauty contests that was a fact of life as recently as 1985."²⁴

Nevertheless, Brazilians have never felt especially different from each other on the basis of race; almost any tourist can point out that Brazil has no *true* white or black race,²⁵ but (some argue) instead, a "multi-colored national race."²⁶ Brazilians voluntarily classify themselves into categories such as "black, white, *pardo*, yellow, and indigenous."²⁷ According to the Washington Post,

The result [of such racial diversity] is a country in which census forms contain more than 100 classifi-

²² Garret Wilson, *The Effect of Legal Tradition on Affirmative Action in the U.S. and Brazil* (2005) (unpublished J.D. dissertation, University of San Francisco School of Law) available at <http://www.garretwilson.com/essays/law/brazilaffirmativeaction.html>.

²³ *Id.* (noting that "racial democracy" has been classified as a structure in which "discrimination runs along lines of social status rather than racial origin").

²⁴ Hernández, *supra* note 5, at 694.

²⁵ See Romano, *supra* note 4.

²⁶ Mala Htun, *supra* note 12, at 61.

²⁷ dos Santos, *supra* note 13, at 43.

cations focused on skin color; one category is 'coffee with cream.' Only 6 percent of the population chooses the darkest classification, 'black,' but nearly half of all Brazilians identify themselves as either black or *pardo*, the term used here for mixed race.²⁸

Author José Roberto Pinto de Góes also noted that there traditionally is no true black race in Brazil, but that it became necessary to create one for the purposes of speaking on its behalf.²⁹ Additionally, Brazil's current Constitution, "like its predecessors, does not recognize the idea of race as a valid criterion for distinguishing between people."³⁰ It refers only to punishment for the crime of racial discrimination.³¹

Brazil's best universities, which are state-sponsored, contain disproportionately few blacks.³² This is because those admitted on the basis of the competitive entrance exams come from private elementary schools.³³ Because very few blacks can afford private school facilities, private schools that feed the public universities tend to be exclusively white.³⁴ This is mainly because "race [in Brazil] is correlated with poverty, income distribution, education, and adequate housing."³⁵ Statistics show, however, that racial disparity is most pervasive in levels of education; for example, students of African descent primarily attend underfinanced public schools for both primary and secondary education.³⁶ "[O]f the 1.4 million students admitted to universities in Brazil each year, only 3 percent identify themselves as black or mixed race; only 18 percent come from the public schools, where most black Brazilians study."³⁷ Children whose

²⁸ John Jeter, *Affirmative Action Debate Forces Brazil to Take a Look in The Mirror*, WASH. POST, June 16, 2003, at A1.

²⁹ José Roberto Pinto de Góes, *Cotas, um remédio que é veneno* [Quotas, a Venomous Remedy], O ESTADO DE SÃO PAULO, Apr. 13, 2004 (Brazil).

³⁰ *Id.* (author's translation).

³¹ *Id.*

³² See Hernández, *supra* note 5, at 688.

³³ See *id.*

³⁴ See *id.*

³⁵ Htun, *supra* note 12, at 62.

³⁶ See Hernández, *supra* note 5 at 688.

³⁷ Rochetti, *supra* note 10, at 1426 (citation omitted).

parents are economically positioned to pay tuition for private primary and secondary British and American schools graduate better prepared for the *vestibular*, or public university entrance exam.³⁸ Prior to the passage of affirmative action legislation in Brazil, this pattern of school segregation resulted in disproportionately higher attendance levels of white, or otherwise wealthier, students in the public universities.³⁹

III. THE ROOTS OF AFFIRMATIVE ACTION IN BRAZIL

A. *The Afro-Brazilian Movement*

Education has been one of the main focuses of both the Brazilian government and Afro-Brazilian advocacy groups over the past few decades.⁴⁰ Afro-Brazilian cultural movements in Brazil, such as the Brazilian Black Front and Black Experimental Theater, were established to fight against racism through political campaigns and became a public force again in the mid-1990s.⁴¹ For decades, however, the Brazilian government denied even the existence of racism in Brazil and ignored calls for support from those groups.⁴²

Brazil in the mid-1990s saw both social change (such as the rise of new Afro-Brazilian movements) and legislative reform. Senator Benedita da Silva, who proposed a 10% quota program for "socially discriminated ethno-racial sectors" for entrance to state universities, wrote the first proposal for affirmative action legislation.⁴³ The bill, however, was never voted upon.⁴⁴

Only after some social organizations in Brazil began to internationalize the debate over access to higher education for students of

³⁸ See Hernández, *supra* note 5, at 688-89.

³⁹ *Id.* at 689.

⁴⁰ 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, 806 (2004).

⁴¹ See *id.* at 790-91.

⁴² See *id.* at 788.

⁴³ *Id.* at 798.

⁴⁴ *Id.*

African descent did the government begin to take significant reform action.⁴⁵ “Reinforced by international networks, the Afro-Brazilian movement placed intense pressure on the Brazilian government and its diplomatic agents, leading the country to assume advanced positions, including an explicit commitment to the principle of compensatory policies for the African descendant population.”⁴⁶ This included what would later become the Brazilian National Affirmative Action Program.⁴⁷

B. *The 2001 Durban Conference and the Brazilian National Affirmative Action Program.*

In the early 1990s, the world witnessed the fall of Apartheid. Despite this tremendous accomplishment, the United Nations believed that many countries around the world had stopped short of realizing the “dream of a world free of racial hatred and bias”⁴⁸ In 1997, the U.N. General Assembly passed Resolution 52/111, its self-proclaimed first step in realizing that dream.⁴⁹ Resolution 52/111 was passed as a commitment to host The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, which was to be held in Durban, South Africa (Durban Conference).⁵⁰ In its Resolution, The UN Commission noted, “with grave concern,” that, “despite the efforts of the international community, the principal objectives of the two previous Decades for Action to Combat Racism and Racial Discrimination have not been attained and that millions of human beings continue to this day to be the victims of varied forms of racism and racial discrimination.”⁵¹

The UN High Commissioner believed that the Conference would be incremental in the struggle to eradicate all forms of racism,

⁴⁵ See *id.* at 802.

⁴⁶ *Id.* at 802.

⁴⁷ See *id.* at 803.

⁴⁸ Press Release, World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Basic Information, <http://www.un.org/WCAR/e-kit/backgroundunder1.htm>

⁴⁹ G.A. Res. 52/111, U.N. Doc. A/RES/52/111 (Dec. 12, 1997).

⁵⁰ *Id.*

⁵¹ *Id.*

"requiring a strong follow-up mechanism to examine whether Governments [had] delivered on their promises made."⁵² In fact, over 100 countries and dozens of NGOs and Human Rights Institutions from around the world were represented at the Conference.⁵³ Nearly every South American nation was present, seeking to help adopt uniform measures to combat racism in their respective countries.⁵⁴ Part of the Report signed at the Conference focused specifically on affirmative action programs to aid in providing equal access to basic services like primary education.⁵⁵ Section 100 of the Conference Report:

Urg[ed] States to establish, on the basis of statistical information, national programmes, including affirmative or positive measures, to promote the access of individuals and groups of individuals who are or may be victims of racial discrimination to basic social services, including primary education, basic health care and adequate housing.⁵⁶

Furthermore, the Report,

Urg[ed] States to commit themselves to ensuring access to education, including access to free primary education for all children, both girls and boys, and access for adults to lifelong learning and education, based on respect for human rights, diversity and tolerance, without discrimination of any kind.⁵⁷

⁵² Press Release, World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *supra* note 42.

⁵³ United Nations, World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance homepage, <http://www.un.org/WCAR/>

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Declaration*, Sept. 8, 2001, ¶ 100, U.N. Doc. A/CONF.189/12 (Jan. 25, 2002).

⁵⁷ *Id.* at ¶ 121.

Even before the Conference, however, the Brazilian government had already begun to set the legal framework to implement such policies. The Minister of Agrarian Development (*Ministro do Desenvolvimento Agrário* or MDA) announced that the Brazilian government would adopt an affirmative action program “to accelerate the process of building racial equality,” and set-up a minimum quota for blacks in decision-making positions and the public service sector.⁵⁸

On December 20, 2001, the Brazilian Ministry of Justice (*Ministério da Justiça*) promulgated Portaria No. 1.156.⁵⁹ This act was followed by Presidential Decree No. 3.952,⁶⁰ and consolidated under Presidential Decree 4.228 of May 13, 2002.⁶¹ Under the supervision of the Ministry, these measures created the National Affirmative Action Program, which required public universities to create quotas for Afro-Brazilians, women and handicapped students.⁶² The ultimate goal was to end discrimination against these groups.⁶³

During the consolidation of these decrees under the National Affirmative Action Program, the Rio de Janeiro state legislature approved a bill establishing a 40% quota for Blacks in its two state universities,⁶⁴ leaving it up to the students themselves to self-identify on the entrance exam as either black, white or *indígena*.⁶⁵ Beginning with *vestibular* exams in the fall of 2002, Rio’s universities began applying the quota system.⁶⁶ A conflicting 50% quota had been established one year prior and was not repealed by the 2001 bill.⁶⁷ To fulfill that 50% quota, UERJ needed to construct two different

⁵⁸ Martins et al., *supra* note 40, at 803.

⁵⁹ Portaria No. 1.156, de 20 de dezembro de 2001 (Brazil). A “Portaria” is a Ministerial Official Injunction. Marilda Rosado de Sá Ribeiro, *THE NEW OIL AND GAS INDUSTRY IN BRAZIL: COPING WITH PRIVATIZATION*, 2001C RMMMLF-INST 4B (2001).

⁶⁰ Decreto No. 3.952, de 4 de outubro de 2001 (Brazil).

⁶¹ Decreto No. 4.228, de 13 de maio de 2002 (Brazil).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See Htun, *supra* note 12, at 71. (noting that “[t]he bill followed approval of an earlier initiative . . . which created a quota of 50 percent quota for students coming from public schools”).

⁶⁵ See discussion *infra* Section 5.

⁶⁶ See *id.* at 71 n.21.

⁶⁷ See *id.* at 71.

methods of entrance: one for public school graduates, and one for private school graduates.⁶⁸ When the initial rounds of entrants had been determined based on exam performance, the university would reclassify the pool of qualified applicants until the 40% quota was reached.⁶⁹ UERJ's admissions policy requirements have since been reduced; the UERJ currently maintains a 20% quota for students coming from public schools, a 20% quota for "blacks," and a 5% quota for Indians, disabled students, and children of deceased parents who served as policemen, firefighters, and other public servants.⁷⁰

But are these percentages too high? If only 6% of Brazilians regard themselves as "black" on the census, a 40% to 50% quota seems so. Moreover, there appears little justification for using as a quota figure the percentage of the population that meet the criteria. Perhaps the percentages drawn by state legislatures are merely convenient figures. On the other hand, a quota that reaches 40% to 50% of the incoming student population may also trouble the education system as a whole. If the affect of affirmative action is lower substantive qualification for 40% of an incoming class, the end result may be an effectively diminished quality of education for all students.

In November 2001, the President of the STF held a major seminar at the Superior Labor Tribunal regarding the constitutionality of these decrees.⁷¹ Following the election of President Luiz Inácio da Silva ("Lula") in 2002, the Brazilian government created the Federal Secretariat for Policies Promoting Racial Equality (SEPPIR).⁷² Together with the Ministry of Education (*Ministério de Educação*), the Lula administration published the National Policy of Racial Equality, which emphasized the need for continued development of a *comprehensive* affirmative action program.⁷³

⁶⁸ See *id.* at 71 n.21.

⁶⁹ *Id.* at 71 n.21.

⁷⁰ Universidade do Estado do Rio de Janeiro, vestibular, <http://www.uerj.br/modulos/kernel/index.php?pagina=135> (last visited Mar. 31, 2010).

⁷¹ Martins et al., *supra* note 40, at 804.

⁷² *Id.* at 806.

⁷³ See *id.*

In one instance, several black quota students were compelled to drop out because they could no longer afford the price of education.⁷⁴ Soon after, to prevent more drop-outs, the Ministry of Education began supplementing the original affirmative action legislation. The newly created UNIAFRO⁷⁵ and ProUni⁷⁶ programs were an attempt to facilitate the continued attendance of quota-students into the universities by providing financial support.⁷⁷ Today, both programs remain at the center of the affirmative action debate.

The creation of these programs reflects governmental awareness that the underlying causes of the disparity in education are more economic than racial. Their efforts, however, have fallen short of a permanent solution. The University for All Program, ProUni, provides grants for students entering public and private universities and gives preference to certain classes of persons.⁷⁸ Together with REUNI, the Federal Program for Support for Restructuration and Expansion of Federal Universities,⁷⁹ some universities have actually *increased* the quota reserves for Black students in the university system country-wide.⁸⁰ UNIAFRO, The Affirmative Action Program for the Black Population in Public Higher Learning Institutions, created in 2004 by the Ministry of Education, is dedicated to the integration of the black student population as well as promotion of Afro-Brazilian culture in the public universities.⁸¹ These programs all function together under the National Affirmative Action Program and focus on the

⁷⁴ See Rochetti, *supra* note 10, at 1429.

⁷⁵ *Programa de Ações Afirmativas para a População Negra nas Instituições Federais e Estaduais de Educação Superior*. [Affirmative Action Program for the Black Population in Federal and State Higher Learning Institutions]. Resolução/CD/FNDE No. de 14 de 28 Abril de 2008.

⁷⁶ *Programa de Universidade Para Todos* [University for All Program, Lei No. 11.096, de 13 de janeiro de 2005 (Brazil).

⁷⁷ Ministério da Educação, http://siteprouni.mec.gov.br/perguntas_frequentes.html (follow link "O que é o Prouni").

⁷⁸ *Id.*

⁷⁹ Ministério da Educação, Programa de Apoio a Planos de Reestruturação e Expansão das Universidades Federais, http://portal.mec.gov.br/index.php?option=com_content&view=article&id=12261&Itemid=502 (last visited Apr. 1, 2010).

⁸⁰ See Htun, *supra* note 12, at 71.

⁸¹ Ministério de Educação, http://portal.mec.gov.br/index.php?option=com_content&view=article&id=12260&Itemid=86.

elimination of discrimination and promotion of equality.⁸² Despite their successes, however, these programs have failed to eliminate the need for distinguishing between blacks and whites in the educational system.

C. *Constitutional Equality Throughout the Americas*

Numerous states in Latin America, like Brazil, have incorporated language in their constitutions focusing on racial and gender-based equality. The states' approaches to combating discrimination, however, differ widely. For example, Chile's Federal Constitution mentions only that "[m]en are born free and equal, in dignity and rights."⁸³ Other countries go much further by establishing equality for all people. Article 13 of the Colombian Constitution, entitled "Fundamental Rights," states:

All individuals are born free and equal before the law and are entitled to equal protection and treatment by the authorities, and to enjoy the same rights, freedoms, and opportunities without discrimination on the basis of gender, race, national or family origin, language, religion, political opinion, or philosophy.⁸⁴

Argentina took this approach a step further. Chapter 1, Article 16 of the Argentine Constitution guarantees not only that "[a]ll its inhabitants are equal before the law,"⁸⁵ but also designates certain powers to Congress to ensure that those rights are enforced. Specifically, the Federal Constitution of Argentina delegates to Congress the power:

To enact laws referring to the organization and basis of education consolidating national unity and respecting provincial and local characteristics; [those] which ensure the state responsibility that cannot be delegat-

⁸² See Martins et al., *supra* note 40, at 804; see generally, Htun, *supra* note 12.

⁸³ CONSTITUTION OF THE REPUBLIC OF CHILE (1980) art. 1.

⁸⁴ CONSTITUTION OF COLOMBIA (1991) art. 13.

⁸⁵ CONST. ARG. § 16.

ed, family and society participation, the fostering of democratic values and equal opportunities and possibilities with no discrimination whatsoever; and which guarantee the principles of free and equitable State public education as well as the autonomy and autarky of national universities.⁸⁶

Although turmoil in Venezuela currently exists involving the socio-economic status of its citizens, the text of Venezuela's Constitution goes the furthest in echoing the principals outlined at the Durban Conference. The Preamble to Venezuela's Constitution "guarantees the right to life, work, learning, education, social justice and equality, without discrimination or subordination of any kind."⁸⁷ Article 21 states that,

All persons are equal before the law, and, consequently: (1) No discrimination based on race, sex, creed or social standing shall be permitted, nor, in general, any discrimination with the intent or effect of nullifying or encroaching upon the recognition, enjoyment or exercise, on equal terms, of the rights and liberties of every individual. (2) The law shall guarantee legal and administrative conditions such as to make equality before the law real and effective manner; shall adopt affirmative measures for the benefit of any group that is discriminated against, marginalized or vulnerable; shall protect in particular those persons who, because of any of the afore-mentioned circumstances, are in a manifestly weak position; and shall punish those who abuse or mistreat such persons. . . .⁸⁸

Despite these broad assurances of equal protection, traditionally, little constitutional action in Latin America was race-based. In

⁸⁶ *Id.* § 75, ¶ 19.

⁸⁷ CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA (1999) pmb1.

⁸⁸ *Id.* art. 21.

Argentina, for instance, a special law was passed in 1991 that mandated the use of a 30% female quota for all political parties in certain national elections.⁸⁹ A 1993 decree implemented the quota requirement.⁹⁰

Although the Colombian government, like Brazil, recognizes that civil society must be based on the elimination of discrimination and promulgation of equality,⁹¹ it has not gone as far as Brazil, especially in the area of racial discrimination, to enact affirmative action programs like racially based university quotas. Thus, Brazil's position is quite unique; no other country in Latin America can compare in its approach to Brazil, particularly because of Brazil's large population of afro-descendents.

D. *The Brazilian Constitution: "Equality Under the Law"*

Brazil's 1934 Constitution was the first revision to declare that "[a]ll are equal under the law. There shall not be any privileges, nor distinctions for reasons of birth, sex, race, personal or family occupation, social class, wealth, religious beliefs, or political ideas."⁹² The Constitutions of 1937 and 1946 eliminated this language, declaring only that, "[a]ll shall be equal in the eyes of the law."⁹³ In the 1967 Constitution, the government reintroduced the prohibition of racial discrimination by adding, "racial prejudice will be punished by law."⁹⁴

⁸⁹ Leslie A. Schwindt-Bayer, *Making Quotas Work: The Effect of Gender Quota Laws On the Election of Women*, XXXIV LEGIS. STUD. Q. 1, 6, available at web.missouri.edu/~schwindtbayer/docs/schwindtbayer2009_LSQ.pdf.

⁹⁰ *Id.* at 16.

⁹¹ Rett R. Ludwikowski, *Constitutionalization of Human Rights in Post-Soviet States and Latin America: A Comparative Analysis* 33 GA. J. INT'L & COMP. L. 1, 53 (2004).

⁹² C.F. art. 113, §1 (1934).

⁹³ C.F. art. 122, §1 (1937); C.F. art. 141, § 1 (1946).

⁹⁴ C.F. art. 150, § 1 (1967).

Article 5 of the current 1988 Constitution once again establishes that "Everyone is equal before the law."⁹⁵ The preamble to the 1988 Constitution also declares:

We, the representatives of the Brazilian People, assembled in the National Constituent Assembly, to institute a democratic state destined to ensure the exercise of social and individual rights, liberty, security, well being, development, *equality and justice as supreme values of a fraternal, pluralist, and unprejudiced society*, founded on social harmony and committed, in the domestic and international orders, to the peaceful solution of disputes, promulgate, under the protection of God, the following Constitution of the Federative Republic of Brazil.⁹⁶

Despite these guarantees of equality, affirmative action policies create a special preference for members of a group that are defined by color, race, religion, language or sex. Such preferences considered by many a form of reverse discrimination.⁹⁷

On the subject of gender discrimination, Brazil has the reputation "of being the Latin American country with the lowest level of women's representation in national politics."⁹⁸ Accordingly, by 1996, Brazil joined forces with other Latin American countries in adopting mandatory gender quotas for lists of proportional representation candidacies.⁹⁹ The first experience involved the Brazilian Chamber of the Council, the equivalent of local legislative power.¹⁰⁰ In 1998, the

⁹⁵ C.F. Art. 5. (1988). Note, however, that article 5 does not mention color, but rather Art. 7, § 30 which prohibits, "any difference in wages, in the performance of duties, and in hiring criteria by reason of sex, age, color or marital status."

⁹⁶ *Id.* at pmbl. (emphasis added).

⁹⁷ Sabrina Moehlecke, *Ação Afirmativa: História e Debates No Brasil*, 117 CADERNOS DE PESQUISA 197, 210 (2002), available at <http://www.scielo.br/pdf/cp/n117/15559.pdf>.

⁹⁸ Mala Htun, *Puzzles of Women's Rights in Brazil*, SOCIAL RESEARCH (2002), http://findarticles.com/p/articles/mi_m2267/is_3_69/ai_94227139/.

⁹⁹ *Id.* at 4

¹⁰⁰ *Id.*

Brazilian government passed Constitutional Amendment No. 20, maintaining gender quotas for female political representatives at the federal and state level.¹⁰¹ However, such quotas systems for women, like those for blacks, undermine the constitutional notion that "all are equal in the eyes of the law."

Several constitutional provisions have been the foundation of litigation both against and in defense of Brazil's public university affirmative action scheme. With regard to education, Article 206 of the Brazilian Constitution guarantees "equal conditions of access and permanence in schools."¹⁰² Along these same lines, Article 227 imposes upon the State duty of "assur[ing] children and adolescents, with absolute priority, the right to life, health, nourishment, education, leisure, professional training . . . in addition to safeguarding them from all forms of negligence, discrimination, exploitation, violence, cruelty, and oppression."¹⁰³ More importantly, Article 207 establishes the principle of "university autonomy."¹⁰⁴ However, many of these provisions have been manipulated by the Brazilian courts in order to circumvent the harder issue, *to wit*: the socio-economic reasons for unequal access to education.

The 1988 Constitution also created a number of measures that encourage a social justice approach to litigation. For example, the Constitution established a procedural device, a mandate for injunction (*mandado de injunção*),¹⁰⁵ designed to empower individuals to seek a remedy for the failure to enact legislation necessary to make a constitutional rule effective.¹⁰⁶ Moreover, it has been noted that:

Brazil's Constitution is also *dirigiste*, setting out ambitious goals and programs for reforming society with virtually nothing excluded from its global scope. Many of its provisions, however, are not self-executing. They either require complementary legislation to

¹⁰¹ C.F. amend. no. 20 (Dec. 15, 1998).

¹⁰² *Id.* art. 206.

¹⁰³ *Id.* art. 227.

¹⁰⁴ *Id.* art. 207.

¹⁰⁵ *Id.* art. 5, cl. LXXI.

¹⁰⁶ *Id.* art. 103, § 2.

fill in certain missing elements, or they are programmatic, mandating directives for substantive legislation and regulations.¹⁰⁷

IV. THE BRAZILIAN COURTS' REACTION TO AND INTERPRETATION OF AFFIRMATIVE ACTION

In early 2003, after the implementation of quotas in Rio de Janeiro's State University, UERJ, a number of white applicants who were denied entrance were granted injunctions to prevent rejection even though "[s]ome of them would not have been admitted independently of the quotas."¹⁰⁸ That trend, however, was short lived. As the debate over the establishment of quotas at public universities grew, successful lawsuits challenging the policy soon followed.¹⁰⁹ For example, the same year, the National Confederation of Learning Establishments (*Confederação Nacional dos Estabelecimentos de Ensino* or Confenen) instituted actions in the STF, triggering both countrywide pro- and anti-affirmative action campaigns, as well as other lawsuits in the STF, STJ, and the more conservative state and regional courts.¹¹⁰ Many of the most prominent cases, both for and against the quota system, were brought as writs of security – a summary judicial remedy for the protection of basic constitutional rights unprotected by *habeas corpus*.¹¹¹

In the Brazilian civil law system, "the Supreme Court's definitive decisions on the merits in direct actions of unconstitutionality and in declaratory actions of constitutionality shall have *erga omnes* effects and shall be binding with respect to the rest of the Judiciary and Federal, State and County public administration, both direct and indirect."¹¹² While this language was slightly reworded by Amend-

¹⁰⁷ Keith Rosenn, *Judicial Review in Brazil: Developments under the 1988 Constitution*, 7 SW. J. L. & TRADE AM. 291, 292-93 (2000).

¹⁰⁸ Martins et al., *supra* note 40, at 808.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See generally Lei No. 1.533, de 31 de dezembro de 1951 [Law No. 1.533 of December 31, 1951], D.O. de 31.12.1951. (Brazil).

¹¹² C.F. art. 102, § 2.

ment 45 in 2004,¹¹³ its essence has remained unchanged since its insertion into the Constitution as Amendment No. 3 in March of 1993.¹¹⁴ Thus, *sumula vinculante*, or *stare decisis*, is unnecessary for these direct actions, because the Constitution already makes the decisions binding upon everyone. In recent years the Supreme Court has decided that the decisions it renders upon cases coming up from the lower courts are binding precedent.¹¹⁵ Therefore, if the Supreme Court eventually decides the issue in Rio de Janeiro, that decision will likely settle, for everyone, the issue of the constitutionality of affirmative action in Brazil.

A. *The Notion of "University Autonomy"*

The STJ has decided numerous cases challenging the constitutionality of affirmative action and the implementation of a quota system in several state universities. In one instance, the court upheld the principles of affirmative action as a "legitimate human interest" in line with the constitutional principle of *isonomia*, or equality under the law, which mandates compensation for past discrimination that created current racial inequalities.¹¹⁶

Another case before the STJ was brought against the Chancellor of the teaching hospital at the State University of West Paraná (UNIOESTE) for allegedly failing to observe the legal reserve of quotas for *afro-descendentes*. In that case, the candidates for the positions argued that the state law violated the constitutional principle of equality between candidates "without distinction as to color, sex or race."¹¹⁷ Although the issue presented in the case dealt with a quota for public service work at the University as opposed to its student-

¹¹³ C.F. art. 102, § 2, *as amended* by Constitutional Amendment No. 45 of December 8, 2004.

¹¹⁴ C.F. art. 102, § 2, *as amended* by Constitutional Amendment No. 3 of March 17, 1993.

¹¹⁵ Americas Society.org, Remarks of Gilmar Mendes, President of the Federal Supreme Court of Brazil, <http://www.americas-society.org/article.php?id=1306> (last visited Mar. 10, 2009).

¹¹⁶ S.T.J. Ap. No. 2003/0151040-1, Relator: Luiz Fux, 120 R.S.T.J. 134, 25.02.2004.

¹¹⁷ S.T.J., RMS 26.089 – PR 2008/0003014-1, Relator: Min. Felix Fischer, 12.05.2008.

admissions policy, the Court defended quota-regimes as consistent with the National Affirmative Action Program, in *all* respects, including federal employment, public service, and university admissions.¹¹⁸

The court stated that two notions of equality are present in the text of the Brazilian Constitution: formal equality and material equality.¹¹⁹ Formal equality consists of the necessity to prohibit the State from engaging in discriminatory treatment, and prohibits all administrative, legislative, and judicial acts that deprive one of the right to enjoy fundamental public liberties on the basis of arbitrary criteria.¹²⁰ Material equality, on the other hand, consists not only of the abolition of arbitrary discrimination, but also the imposition on the State of an affirmative obligation to promote equal opportunity and access to public resources for underrepresented or less favored groups, such as blacks.¹²¹ The goal is to compensate for and eliminate the factors of inequality that have developed over time and are embedded in what the court referred to as “cultural sedimentation.”¹²²

Furthermore, the Court referred to the 1988 Constitution which, in its view, not only created the possibility of a State-created affirmative action program, but also imposed a constitutional duty on the State to implement one.¹²³ The court also noted that Brazil, as a signatory, committed itself to the promotion of policies “to eliminate racism, preconceptions, discrimination, and lack of opportunities for *afro-descendentes*.”¹²⁴ According to the Court, under these notions and constitutional provisions, State policies promoting equality for blacks and other underrepresented minorities, as well as the quota regime for both public service and university admissions, should be upheld in the face of any challenge.¹²⁵

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* (citing C.F. art. 5 cl. I, art. 7 cl. XX, art. 37 cl. VII, art. 170 cl. VII).

¹²⁴ *Id.* (author’s translation).

¹²⁵ *Id.*

The court also cited to a number of prior cases that upheld the constitutionality of affirmative action legislation and quota-regimes in different aspects. One was a case decided by the STF, dealing with a challenge by a physically handicapped person seeking public employment under a state public-service quota system.¹²⁶ The STF held that the reparation or compensation of the factors creating inequality has been "inscribed" in Brazil's "fraternal society" since the publication of the Preamble to the 1988 Constitution.¹²⁷ The STJ followed the reasoning of the STF, stating that "the question of equality, although difficult to comprehend, was, without a doubt observed under state law, valorizing the call for affirmative action, a mechanism that defends material and substantive equality"¹²⁸ The STJ also placed great emphasis on the philosophy of Minister Joaquim Barbosa Gomes,¹²⁹ the only Afro-Brazilian Minister in the STF and a prominent defender of black rights.¹³⁰ According to the Court, Minister Barbosa's rationale in support of affirmative action was based on the need to eliminate the factors perpetuating inequality that have been embedded in the culture and history of Brazil.¹³¹

In conclusion, the court determined that State Law 14.274/03, which reserved the quotas at the UNIOESTE teaching hospital, was constitutional.¹³² The court held that public universities, as self-sufficient state organizations, have sufficient autonomy under Article 207 of the Constitution to determine their personnel but not to

¹²⁶ S.T.F., RMS 26.071-1/DF, Relator: Min. Carlos Britto, 13.11.2007, R.S.T.F., 314 (Brazil).

¹²⁷ *Id.*

¹²⁸ See S.T.J., RMS 26.089 – PR 2008/0003014-1 (translation by author).

¹²⁹ *Id.*

¹³⁰ Luciano Dias, *Indicado de Lula ao STF, Joaquim Barbosa Gomes é um ex-faxineiro que venceu o preconceito racial* [Appointed by Lula to the STF, Joaquim Barbosa Gomes is an ex-janitor that overcame racial preconceptions], O GLOBO, May 8, 2003 (Braz.) available at <http://revistaepoca.globo.com/Revista/Epoca/0,,EDG57316-6009-259,00.html>. Joaquim B. Barbosa Gomes was appointed to the STF by President Luiz Ignacio da Silva on June 25, 2003. *Id.*

¹³¹ *Id.*; see also S.T.J., RMS 26.089 – PR 2008/0003014-1.

¹³² S.T.J., RMS 26.089 – PR 2008/0003014-1.

override the duty to incorporate affirmative action policy.¹³³ But is the court's rationale really consistent with the Constitution?

Formal and material equality are two different concepts that are likely inconsistent under the Brazilian quota-regime. In the United States, it seems that affirmative action programs were established to eradicate the vestiges of discrimination, predicated upon the fact that the State had violated the constitution by enacting "separate but equal" laws and establishing dual sets of schools.¹³⁴ In Brazil, although Jim Crow laws never existed, the state has obligated itself to taking affirmative steps to prevent racial discrimination.¹³⁵ On the other hand, these affirmative steps taken by the Brazilian government are merely another form of racial and economic discrimination which, according to some scholars, violates Article V of the Constitution.¹³⁶

B. *Consistency with the Opinions of the STF and the STJ*

More conservative state and regional courts have taken their own positions on the constitutionality and feasibility of affirmative action legislation and its application to public university admission quotas. The First Federal Regional Court was presented with a public civil action brought by the Federal Public Ministry, in defense of the quotas, for students graduating from public schools and seeking to enter the state universities.¹³⁷ The court upheld the constitutionality of the quota-system under Article 207, which provides that "universities enjoy autonomy with respect to didactic, scientific and administrative matters, as well as financial and patrimonial management and shall comply with the principle of inseparability of teaching, research and extension."¹³⁸ The court reasoned that this provision allows the universities to choose the manner by which students could

¹³³ See *id.*

¹³⁴ See generally *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹³⁵ See *supra* Section III.D.

¹³⁶ See Rochetti, *supra* note 10, at 1435.

¹³⁷ TRF-1, Ap. No. 1999.38.00.036330-8/MG, Relator: Des. Selene Maria de Almeida, 19.04.2007, R.T.R.F., 47 (Brazil).

¹³⁸ *Id.*; C.F. art. 207.

be admitted after taking the entrance test.¹³⁹ The court also noted that the insufficiency of quota reserves for blacks and the privatization of the university system have left many unable to pay tuition, leaving them without access to education.¹⁴⁰ The enormous deficiencies in the basic education of the lower public school system in Brazil have created an under-representation of blacks in the university system.¹⁴¹

Although the court did not specifically mention *afro-descendants* or black students as a factor for defending affirmative action legislation, it made specific reference to "marginalized" social groups, presumably including a large percentage of indigenous and black students, and the need to work for incorporation and equality of those groups in education.¹⁴² One author notes that any policy that favors the poorer classes of Brazilian society will automatically include blacks, Indians, and other similarly marginalized groups.¹⁴³ What remains to be seen, however, is whether or not Brazil, which has not legally discriminated on the basis of race since the abolition of slavery, will ultimately be forced to establish a color-line. Nevertheless, one must still question what is to be gained by using race rather than poverty as the criterion for affirmative action in Brazil.

The STJ has defined affirmative action as a "compulsory, voluntary and facilitating set of public and private policies designed to combat racial discrimination, and to correct the practices of discrimination practiced throughout history."¹⁴⁴ In the words of the court, the policy tends to concretize the ideal of effective equality of access to fundamental goods and services, like education and employment.¹⁴⁵ The court concluded that affirmative action is but one legal method to overcome the isolation and social diminution to which minority groups are often subject.¹⁴⁶ The court also noted that

¹³⁹ TRF-1, Ap. No. 1999.38.00.036330-8/MG.

¹⁴⁰ *Id.*

¹⁴¹ See Rochetti, *supra* note 10, at 1426, 1429.

¹⁴² TRF-1, Ap. No. 1999.38.00.036330-8/MG.

¹⁴³ Editorial, *Ação afirmativa que favoreca estudantes mais pobres beneficiará negros* [Affirmative action that favors the poor will benefit blacks], FOLHA DE S. PAULO, May 14, 2008 (Braz.), available at 2008 WLNR 9063887.

¹⁴⁴ See S.T.J., RMS 26.089 – PR 2008/0003014-1 (translation by author).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

affirmative action is not intended to last perpetually.¹⁴⁷ According to the judges, it was necessary to create such a system until the socio-economic factors that benefitted the dominant social groups in Brazil could be eliminated.¹⁴⁸

In another case, the Second Federal Regional Court reversed a judicial decision that reduced the quotas for black students at the Federal University of Espírito Santo (UFES) from 50% to 20%.¹⁴⁹ The Regional Court found the ruling of the lower court to be inconsistent with the principle of university autonomy under Article 207 of the Brazilian Constitution, the principle of access to higher education for all, the principle of separation of powers, and the principle of reasonability.¹⁵⁰ The establishment or correction of obligatory quotas by judicial determination, according to the court, violates the university's autonomy to determine its own quota-system, consistent with state law and the National Affirmative Action Program.¹⁵¹ In upholding the university admissions affirmative action programs however, the regional courts have crafted arguments that are inconsistent with those of the STJ, which has upheld quota regimes in all respects, including federal employment, public service, and university admissions.¹⁵² Inconsistencies between the federal and regional courts have exacerbated the problem of finding a uniform solution to the affirmative action debate.

C. *Adjudication of UERJ's Quota-Based Admission Policy*

Since 2003, most of the debate over affirmative action legislation in Brazil has been over the policy implemented at UERJ. As mentioned above, on March 20, 2003, Confenen instituted a Direct Action of Unconstitutionality in the STF, challenging the constitutionality of UERJ's quota system.¹⁵³ Confenen challenged the constitu-

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ TRF-2, No. 199950010095680, Relator: Des. Guilherme Calmon, 31.03.2005, 2 R.T.R.F., 172 (Brazil).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See discussion *supra* Section IV.B.

¹⁵³ S.T.F., ADI/3330, Relator: Min. Carlos Britto, 19.10.2004 (Brazil).

tionality of UERJ's quota system and the PROUNI legislation as a violation of the guarantee of equality under Article 5, the social welfare provisions of Article 195, and the prohibition of discrimination under Article 3.¹⁵⁴ Those in favor of the affirmative action regime reason that, in light of the intense inequalities between whites and blacks in the public universities, it would be unjust to strike down UERJ and ProUni schemes.¹⁵⁵ However, as the ultimate arbiter of constitutional issues in Brazil,¹⁵⁶ the court has struggled to find clear answers in attempting to determine whether UERJ's quota-based system complies with provisions of the Constitution granting "equality before the law" and "university autonomy."

Although the 1988 Constitution permits, in some instances, favored treatment for special interest groups, a question remains before the STF as to whether the allowance of unequal treatment under the quota-based system is extended based on race or, more generally, to all effectively deprived of an education.¹⁵⁷ The STF analyzed the apparent conflict between Article 208(V) of the Constitution, which imposes a duty on the State to provide "access to higher levels of education, research and artistic creation according to individual capacity," and Article 207, which provides that "the universities shall have didactic, scientific, administrative, financial and property management autonomy."¹⁵⁸

After Confenen's action was instituted in the STF, numerous *manifestos* (court documents comparable to *amicus* brief in U.S. courts) were filed with the STF both in support for and against the University's policy. On May 13, 2008, the STF received a manifesto in support of the system of affirmative action.¹⁵⁹ The manifesto urged the President of the court, Gilmar Mendes, to declare the constitutional-

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See *supra* text accompanying note 1.

¹⁵⁷ See S.T.F., ADI/3330.

¹⁵⁸ *Id.*

¹⁵⁹ ALEXANDRE DO NASCIMENTO ET AL., 120 ANOS DE LUTA PELA IGUALDADE RACIAL NO BRASIL. MANIFESTO EM DEFESA DA JUSTIÇA E CONSTITUCIONALIDADE DAS COTAS. [120 YEARS OF FIGHTING FOR RACIAL EQUALITY IN BRAZIL. MANIFESTO IN DEFENSE OF JUSTICE AND THE CONSTITUTIONALITY OF QUOTAS] May 13, 2008 available at <http://pvnc.sites.uol.com.br/manifesto13maio2008 STF.pdf>.

ity of both the ProUni scheme and UERJ's admissions policy.¹⁶⁰ Two weeks earlier, the STF received a different manifesto requesting that the STF declare the ProUni legislation *unconstitutional*.¹⁶¹ The document, entitled "One-Hundred and Thirteen Anti-Racist Citizens against Racial Laws," supported an economic-based policy as opposed to one based on race or skin color, and argued that the quota-based system has served only to divide society further into classes.¹⁶²

In light of the STF's continued consideration of the case, the federal government has continued to remain "hands-off," allowing the individual universities to control the entrance of quota students.¹⁶³ When the STF does decide the case, it may very well settle the issue of affirmative action's constitutionality. Currently, "[t]he government believes that allowing each school to determine the mechanics of its own quota program will prevent the [legislation] from running afoul of the constitutional principle of 'university autonomy.'"¹⁶⁴

D. *Skirting the Harder Issues: University Autonomy*

Although the Brazilian Courts have defended quota regimes in public universities under the notion of "university autonomy,"¹⁶⁵ such a rationale begs the question of whether it is ideally suited for the issue. In essence, "[i]ts basic idea is that university life flourishes best, when the community of scholars enjoys a substantial degree of

¹⁶⁰ *Id.*

¹⁶¹ *Grupo Pedu ao STF que Proíba Cotas em Universidades* [Group Petitions STF to Prohibit Quotas in the Universities], O GLOBO (Brazil), April 30, 2008 *available at* <http://g1.globo.com/Noticias/Brasil/0,,MUL450073-5598,00GRUPO+PEDE+AO+STF+QUE+PROIBA+COTAS+EM+UNIVERSIDADES.html>

¹⁶² ADEL DAHER ET AL., CENTO E TREZE CIDADÃOS ANTI-RACISTAS CONTRA AS LEIS RACIAIS. [ONE HUNDRED AND THIRTEEN ANTI-RACIST CITIZENS AGAINST RACIAL LAWS] April 21, 2008 *available at* www.petitiononline.com/antiraca/petition.html.

¹⁶³ Rochetti, *supra* note 10, at 1433.

¹⁶⁴ *Id.* at 1434.

¹⁶⁵ *See* discussion *supra* Section IV.B.

autonomy.”¹⁶⁶ Although it is a “communitarian” ideal, the concept of university autonomy relates very little to the idea that an “autonomous” university can simply implement discriminatory policies.¹⁶⁷

While university autonomy remains essential “to the efficient functioning of universities, today its basic rationale has altered, radically and some would say, irrevocably.”¹⁶⁸ It has been observed that:

[t]he classic relationship between university and society rested on the separation of academia and society and, in certain systems an explicit notion of distance between State and University. Against this one sees other forms: – the State acting in a guardian relationship, as the protector of the University as a public good against private interests.¹⁶⁹

In Latin America, university autonomy ordinarily “takes the form of the medieval notion of the University as a physically autonomous space where the concept of freedom often emerges as a culture of dissent, of oppositional politics and partisanship.”¹⁷⁰ Nevertheless, there appears no indication that university autonomy, in the traditional sense, is driving Brazil’s affirmative action legislation.¹⁷¹

V. BACKLASH AND POTENTIAL REPERCUSSIONS:

THE LINGERING DEBATE OVER THE FUTURE OF THE QUOTA SYSTEM

Despite the fact that the majority of cases have upheld affirmative action legislation on constitutional grounds, opposition to

¹⁶⁶ K.R. Hughes, *On Academic Freedom and University Autonomy: Some Notes on Their Meaning, History, and Possible Future Importance in South Africa in the 21st Century*, ¶ 2.2 (2005) available at www.che.org.za/documents/d000173/submissions/11_UCT_Hughes_17-Oct05.pdf.

¹⁶⁷ See *id.*

¹⁶⁸ IAU/IAUP President’s Symposium, *Institutional Autonomy Revisited: National Dimensions, Cross regional Experiences* (Dec. 8, 2006), available at www.unesco.org/iau/conferences/chiang_mai/pdf/background_doc.pdf.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See *supra* Section IV.B.

the legislation and resulting public university quota-systems has not subsided. "A prominent member of the opposition against affirmative action" in Brazil, the newspaper *Folha de São Paulo*, took a firm stance against the system of quotas.¹⁷² At the same time, it recognized the continued existence of "rampant and pervasive racial discrimination against blacks in Brazil."¹⁷³ Although difficulty arises in trying to pin-point specific instances of racism, continued social and economic division prevails between ethnic groups.¹⁷⁴

UERJ's attempt to confer benefits to certain students under the quota-based admissions policy has been ineffective for many reasons. "[G]iven the notorious lack of rigidity in racial classifications in Brazil and the nation's considerable levels of racial miscegenation, it would be impossible to distinguish who were the most deservingly black beneficiaries of such policies."¹⁷⁵ In other words: "How can one establish programs to favor blacks when we cannot determine who is black?"¹⁷⁶ One author notes:

In a tone of irony, activists have suggested a simple procedure: When in doubt as to someone's racial identity, consult the police – or the doorman of the residential building or the employee selection agents at the local shopping mall, indeed any of the myriad of agents of discrimination in Brazilian society.¹⁷⁷

Nevertheless, racial self-identification is still the preferred method adopted by not only the Afro-Brazilian social movement, but by many of Brazil's higher learning institutions, such as UERJ, as well.¹⁷⁸ Curiously, the Federal University of Bahia (UFBA) has altogether eliminated the "white" check-box on its *vestibular* application.¹⁷⁹

¹⁷² dos Santos, *supra* note 13, at 31.

¹⁷³ *Id.*

¹⁷⁴ See dos Santos, *supra* note 13, at 32.

¹⁷⁵ *Id.* at 31.

¹⁷⁶ *Id.*

¹⁷⁷ Martins et al., *supra* note 40, at 809-10.

¹⁷⁸ *Id.* at 810.

¹⁷⁹ *Universidade Federal da Bahia omite 'raça branca' em inscrição para vestibular*, O GLOBO (Brasília), September 16, 2008 available at <http://oglobo.globo>.

Opponents of affirmative action, on the other hand, have noted that two race concepts are generally prevalent when students choose their race on their *vestibular* application: the "Brazilian color/appearance model" or the U.S. "one-drop rule."¹⁸⁰ Although many consider the latter policy racist, many students have not hesitated to invoke it, deciding to trace their ancestry back to a black or *supposedly* black ancestor¹⁸¹ in order to qualify for the quotas under the affirmative action legislation. The Washington Post reported in 2003 that "14 percent of applicants who declared themselves 'white' when they took the entrance exam, declared themselves either black or *pardo* when they submitted their applications to the University."¹⁸² Such action is not surprising considering the potential consequences of not qualifying for quota positions. One girl, after scoring 82.5% on her *vestibular* (better than half the students admitted ahead of her), was rejected from UERJ's medical school because there were not enough spaces left for white students.¹⁸³ In an interview with the Washington Post, she stated:

I have friends who are whiter than me and didn't study and didn't do well on the test, but they wrote down they were [black] on their application and they got in. My grandmother is black. I could have written down that I am black, but I didn't feel right about that. In a country like Brazil, everyone's blood is mixed together.¹⁸⁴

One still unresolved issue is whether students admitted under the affirmative action policy have succeeded in their academic

com/educacao/mat/2008/09/16/universidade_federal_da_bahia_omite_raca_branca_em_inscricao_para_vestibular-548241913.asp.

¹⁸⁰ Martins et al., *supra* note 40, at 810. The one-drop rule is a historical colloquial term in the United States that regards a person with any trace of African ancestry as black. *See id.*

¹⁸¹ *Id.*

¹⁸² John Jeter, *Affirmative Action Debate Forces Brazil to Take a Look in The Mirror*, WASH. POST, Jun. 16, 2003, at A1.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

and subsequent professional careers. One newspaper article noted the evident change in students' test scores: "The average score for students admitted into the law school last year was nearly 81 percent. Under the quota system, the average score was 64 percent, according to the university admissions office."¹⁸⁵ In an interview, one student who was accepted to UERJ through the quota-system stated: "Now, no matter what I do, people are going to look at me and say: 'Oh, he's an affirmative action student,' or 'He's an affirmative action hire' . . . '[b]ecause I am black I lose all the credit for getting good grades, for doing the work. I think the quotas are really a form of racism in reverse.'"¹⁸⁶

These concerns notwithstanding, PVNC¹⁸⁷ students admitted on scholarship to *Pontifícia Universidade Católica* (PUC-RIO, a private university in Rio de Janeiro) excelled in their academics.¹⁸⁸ Although they were admitted with lower grades, those who graduated did so with grades well above average.¹⁸⁹ This information demonstrates that students who manage to overcome their economic and academic disadvantages seize the opportunity to work hard and excel.¹⁹⁰

As the first class of quota-students admitted under Brazil's affirmative action legislation emerges from the universities, it remains to be seen whether their degrees are as valid as white students, and whether they will suffer discrimination in the job market. Some who may potentially benefit from the entrance quotas have opposed it.¹⁹¹ Supporters often suggest permitting "remedial courses" for students who enter the Universities under the quota policy.¹⁹²

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ PVNC stands for Pré-Vestibular para Negros e Carentes.[Pre-Vestibular for Blacks and Deprived Students]. The system was created by the Afro-Brazilian movements in the mid-1990s as a system of affirmative action *without quotas*. Martins et al., *supra* note 40, at 807.

¹⁸⁸ *Id.* at 811.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See Jeter, *supra* note 182.

¹⁹² Ronaldo França, *Não Deu Certo; Sistema de Cotas Para Negros, Pardos e Alunos de Escolas Públicas Desmoraliza o Vestibular da Universidade do Estado do Rio de Janeiro* [It Didn't Work: Quota System for Blacks, Pardos, and Public

However, as noted by one author, the result demoralizes and “waters down” the quality of education at the university, imposing excess costs on students and on society.¹⁹³

Organizations supporting the Brazilian university quota system, such as the United Nations Development Programme (UNDP or PNUD-Brazil), believe that the affirmative action legislation is, in fact, effective in combating racism, poverty, and violence.¹⁹⁴ According to an article published by the organization, in the short-term, “affirmative action can augment the diversity and representation of minority groups in different sectors.”¹⁹⁵ That article opines that in the long-term, however, affirmative action will induce “transformations in the cultural, pedagogical, and psychological order of Brazil.”¹⁹⁶ The United Nations believes that the quota system will minimize the weight of socio-economic conditions in the university admissions process and public service employment.¹⁹⁷ The UN also suggested that Brazilian universities adopt *per se* quotas, thus effectively reducing the debate into a numerical question – rather than one of racial identity – and to leave self-identification as the preferred method of classification for the *vestibular* and application process.¹⁹⁸

As a general principal, the UN has stood behind the belief that,

[T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.

School Students Demoralizes the Vestibular at the State University of Rio de Janeiro], Feb. 24, 2003, http://www.universia.com.br/html/noticia/noticia_clipping_ebgd.html (Brazil).

¹⁹³ *Id.*

¹⁹⁴ Programa das Nações Unidas para o Desenvolvimento (PNUD), *ONU Sugere Ação Afirmativa Para Brasil Reverter Racismo* [UN Suggests Affirmative Action to Reverse Racism] (November 22, 2005), <http://portaldovoluntario.org.br/documents/0000/0151/113269237862-2.pdf> (Brazil).

¹⁹⁵ *Id.* (author’s translation).

¹⁹⁶ *Id.* (author’s translation)

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination, in fact, it is a case of legitimate differentiation under the Covenant.¹⁹⁹

The United Nations has maintained this position in its oversight of racial discrimination around the world. The UN defines affirmative action as “a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality.”²⁰⁰ Although Affirmative Action programs around the world have been subject to much debate, due to the unique circumstances in each country in which they appear, the UN has stood behind many “positive discrimination” programs, including those in Brazil, Canada, India, Malaysia, Namibia, South Africa, the United Kingdom and the United States.²⁰¹

¹⁹⁹ United Nations Human Rights Committee, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, General Comment No. 18: Non-discrimination, ¶ 10, U.N. Doc. HRI/GEN/1/Rev.6 (May 12, 2003).

²⁰⁰ U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on the Promotion and Prot. of Human Rights, *Prevention of Discrimination: The Concept and Practice of Affirmative Action*, ¶ 6, U.N. Doc. E/CN.4/Sub.2/2002/21 (June 17, 2002) (submitted by Marc Bossuyt).

²⁰¹ The Secretary-General, *Note by the Secretary-General: Contribution of the International Labour Organisation*, 3, delivered to the Preparatory Committee of the Durban Review Conference, U.N. Doc. A/CONF.211/PC.4/9 (March 19, 2009).

VI. CONCLUSION AND SUGGESTIONS FOR IMPROVING
AFFIRMATIVE ACTION POLICIES IN BRAZIL

Because of differing attitudes on racism and racial classification, copying the United States model for university admissions will not address Brazil's needs. Brazil would fare better with an economic-based, rather than a race-based, affirmative action system. Such a system could be based on a number of factors such as income, location, and rank of primary schools. Indeed, both class and race are meaningful concepts in Brazilian society; in many instances, they are inseparable. However, class-based affirmative action may have a number of advantages over race-based affirmative action.

A class-based affirmative action system would avoid the sensitive task of classifying people according to the color of their skin, as well as the overarching difficulties of monitoring the racial self-classification system. Additionally, there is no long-standing stigmatization that the economically disadvantaged, as opposed to blacks, are less qualified upon graduation. According to Rochetti, such a system would also address two issues unique to Brazilian society:

First, such a system, by benefitting the white Brazilians living below the poverty line, would not run afoul of overriding notions of fairness. Second, unlike racial classification, class membership is 'less mutable.' Therefore, universities would not have to concern themselves with the possibility of students seeking to benefit from the system by 'crossing over' from one race to another.²⁰²

Because class is such a meaningful concept in Brazil, if the proxy for affirmative action were to be shifted from race to class, it would find itself starting from square one. Ultimately, the entire scheme would have to undergo constitutional scrutiny under Article V of the Brazilian Constitution.

²⁰² Rochetti, *supra* note 10, at 1465.

Currently, affirmative action programs for access to education based on economic status, rather than race or gender, do not exist. Not surprisingly, Brazil has come closest to implementing an economic "access-to-food" program for needy families, called *Fome Zero*, or Zero Hunger.²⁰³ The program is run by the Brazilian Ministério do Desenvolvimento Social e Combate à Fome (Ministry of Social Development and Combating Hunger).²⁰⁴ The Ministry has developed a number of micro-programs, from providing direct financial aid to the poorest families, to providing access to irrigation for rural farmers, to creating low-cost restaurants and even distributing vitamins supplements to the Brazilian people.²⁰⁵ *Fome Zero*, however, still neglects getting to the root of access to education for these underprivileged families as a means of poverty elimination.

Nevertheless, as the debate over affirmative action in Brazil continues, it is evident that race has become a major factor influencing legislation and educational reform. Brazilians are being forced to rethink the racial democracy thesis. They must now confront the hard fact that racial discrimination and race-based legislation has truly affected the lives of blacks in Brazil. It has created a previously inexistent color-line; one that many have argued is utterly ineffective and arbitrary. In a country where so many shades of black and white exist, and where even Brazilians have difficulty classifying themselves, Brazilians should rethink their approach to affirmative action. It is worth noting, however, that the judicial decisions mentioned in this article will not prevent the Brazilian legislature from amending the quota legislation in the future in order to correct inefficiencies in the way in which students are required to denote their race on admissions applications.

In some instances, as noted in this article, affirmative action legislation and quota-based admissions policies have forced many Brazilians to re-think their ethnicity and re-classify themselves in order to benefit from the quotas. This has only served to perpetuate the underlying problems of race in Brazil. Although the Brazilian

²⁰³ Presidencia da Republica, *Fome Zero*: "Conceito," <http://www.fomezero.gov.br/o-que-e> (last visited Mar. 9, 2010) (Brazil).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

government is beginning to recognize the fact that race has always influenced social placement and marginalization in Brazil, quota-based admissions to create access to higher education for underrepresented groups has not tried to deal with the underlying causes of discrimination. Instead it created a temporary "quick-fix" that will need to be addressed in the coming years. The Government's current efforts, although flush with good intention, is surely misguided.