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# Contested Terrains of Compensation: Equality, Affirmative Action and Diversity in the United States

*Taunya Lovell Banks\**

## Introduction

Equality is an elusive concept. Celeste Condit and John Louis Lucaites write that equality 'is at once a normative abstraction that resonates with the highest ideals of America's collective being, and a rather narrow and pedestrian, empirical characterisation of the sameness or identity of any two objects' (Condit and Lucaites, 1993: ix). In the United States the concept of equality is unstable and relatively indeterminate. 'The language of equality is rhetorical cover under which political claims are advanced and contested; but it very seldom captures the substance of those political claims' (Waldron, 1991: 1351). Therefore, some argue, the rhetoric of equality has no substantive content (Westen, 1982). Nevertheless, the rhetoric and public discourse surrounding discussions of equality influence legal interpretations of what constitutes compensatory justice.

Given the indeterminacy of law, it is unsurprising that there are competing visions of equality in the United States today. The controversy in the United States over what constitutes equality for blacks or African Americans<sup>1</sup> and other 'racial minorities'<sup>2</sup> is one site of this debate. In fact, much of the current public discourse on affirmative action, for example, centres around the meaning of equality. Affirmative action is seen by proponents as a means to achieving a racially just society. Opponents argue, however, that affirmative action undermines equality between racialised groups because race can be used as a decision-making factor. This essay adopts the more cynical view advanced by some critical scholars, namely that affirmative action programs and anti-discrimination law in general are not designed to achieve a racially just society.

Anti-discrimination law leaves intact those institutions and structures that support racial subordination because the dominant powers are

unwilling to support an interpretation of legal doctrine that will achieve a racially just society (Freeman, 1978; Crenshaw, 1989). The dominant powers construct and interpret anti-discrimination law from the perspective of the perpetrator of discrimination as opposed to the person discriminated against. As a result, plaintiffs in discrimination suits find it difficult to establish actionable discrimination in all but the most flagrant situations (Freeman, 1978; Lawrence, 1987). Successful legal strategies are short lived as courts invoke equality on behalf of white plaintiffs who advance racial discrimination claims, thereby undermining the usefulness of these strategies for non-white plaintiffs.

This pattern is apparent from a brief review of Supreme Court race and gender equal protection cases. Given this reality, the development of any theory for racial justice in the United States must be a continuous evolutionary process. Advocates for racial justice must continue to develop new theories of equality as racial conservatives undermine current legal theories.

## Equal Protection of the Laws

There was no specific guarantee of equality in the US Constitution until the ratification of the Fourteenth Amendment in 1868, almost a century after the Declaration of Independence. Section 1 of that amendment provides that 'No State shall ... deny any person within its jurisdiction the equal protection of the laws'. This amendment only applies to State action, but in 1954 the United States Supreme Court read a similar guarantee into the due process clause of the Fifth Amendment which applies to the federal government (*Bolling v Sharpe*, 1954).

This constitutional guarantee of equal protection of the laws, however, is problematic. First, the equal protection guarantee applies only to government (public) not private actors.<sup>3</sup> This public-private distinction ignores the role private individuals and entities play in thwarting one's ability to realise equality before the law. Second, even the Supreme Court admits that equal protection of the laws, like equality, 'is susceptible of varying interpretations' (*Bakke v Regents of the University of California*, 1978: 284). Thus, the measure of equality, or determination of sameness or identity, depends on who is doing the defining as well as the historical context of the equality claim.

Since anti-discrimination law views discrimination from the perspective of a perpetrator rather than that of the victim, equality is defined very narrowly. In the 19th century, for example, the United States Supreme Court upheld State laws mandating separation of the races in almost every walk of life, reasoning that *de jure* racial segregation did not connote inequality under the law (*Plessy v Ferguson*, 1896). The court also upheld laws denying equal rights to women, reasoning that '[c]ivil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of men and women' (*Bradwell v Illinois*, 1873: 141, Brady concurring).

These decisions do not reflect the perspectives of the petitioners, blacks and white women, but rather reinforce explicit political decisions about which groups should be considered full participants in US society. Over time just what constitutes equal protection under the laws, in the eyes of the perpetrators, also changed. The court outlawed government mandated racial segregation (*Brown v Board of Education*, 1954) and now applies a heightened level of judicial scrutiny to government actions that disadvantage women (*Fronterio v Richardson*, 1973).

By the late 20th century court decisions and legislation reflected public consensus that laws should apply to all 'equally', including racial minorities and white women. Problems immediately arose over the contemporary meaning of the equal protection guarantee, and how to achieve this equality in a country with a long history of racial and gender subordination. The debate centered on what constituted 'legal equality' and whether compensatory measures were necessary to this equality for white women and non-whites or communities of colour.<sup>4</sup>

For blacks the legacy of slavery and *de jure* racial segregation made simply removing legally sanctioned racial barriers, as the court did in *Brown v Board of Education*, insufficient to achieve parity with whites. Following *Brown* some whites continued to resist efforts to desegregate. Even where there was no overt resistance, structural barriers growing out of the systematic exclusion of blacks from various areas of public life resulted in *de facto* rather than *de jure* racial exclusion. Similar barriers existed for all women arising from centuries of legalised gender subordination. Compensatory or affirmative measures were needed, but the dominant powers' narrow construction of the equal protection guarantee substantially limited the use of the doctrine to secure racial justice.

## Formal Equality

There are two primary competing visions of legal equality in the United States. The dominant powers construct equal protection of the laws to mean equal treatment, or *formal* equality, and critical scholars and anti-racialist argue that equal protection means equal results or *substantive* equality. The discourse of formal equality is further controlled because the courts determine who are similarly situated parties for comparison purposes and require claimants to prove the perpetrator intended to discriminate.

### *Similarly situated parties*

Given the extent of human difference, courts must determine which differences among individuals or groups justify treating them differently. The Supreme Court uses the formal equality approach, interpreting the equal protection guarantee to require that government treat all similarly situated persons 'equally' (Tussman and TenBroek, 1949). The determination of who is similarly situated usually dictates the outcome of an inequality claim. Much of the debate about gender equality, for example, centers on whether women are similarly situated to men. Women often receive unequal treatment because males are the model against which notions of equality are measured. Historically, the court drew distinctions based on alleged differences between women and men that were matters of 'natural destiny' (*Bradwell*, 1873). In theory, the formal equality approach adopted by the contemporary Supreme Court rejects any notion of 'natural destiny'. Yet debate still arises over whether biological differences between women and men should be considered in determining what constitutes equal protection of the laws. If men are the standard used for measuring equality claims then, under the Constitution, biological differences between women and men can be used by employers and others to disadvantage women.

In *Geduldig v Aiello* (1974) for example, the Supreme Court held that a State disability insurance plan which covered all short-term disabilities except pregnancy did not necessarily constitute sex discrimination under the equal protection clause. Discrimination based on pregnancy did not involve gender, according to the all-male court, because women were covered for the same risks as men and vice versa. The court reasoned that since 'only women become pregnant' and the plan only discriminated against 'some women' – those who are pregnant – and not all women, there was no unlawful gender discrimination. In *Geduldig v Aiello* (1974) women suffered because they were treated the same as men in a situation where clear

biological differences between the two dictated a different result to achieve meaningful equality.

Even though the equal protection guarantee seems to exempt biological differences between women and men, courts still must determine whether some asserted biological gender differences really are social constructs or 'natural destiny' justifications which should not be allowed to defeat gender discrimination claims. Many of the early equal protection gender cases decided by the Supreme Court focused on socially constructed differences framed as 'natural' or dictated by biology. In these cases women challenged restrictions on their entry into certain spheres based on alleged 'natural' difference, unchallenged presumptions about women's abilities to perform certain tasks (*Muller v Oregon*, 1908; *Goesaert v Cleary*, 1948; *Hoyt v Florida*, 1961).

Today, the court considers most restrictions that disadvantage women based on their alleged 'natural' differences to be pretexts for unlawful gender discrimination. Even so, there are situations where the court's construction of who is similarly situated preserves what appear to be socially constructed practices that perpetuate gender discrimination. For example, in *Michael M v Superior Court* (1981) the court upheld a State statutory rape law which punished men, but not women, who engaged in sex with minors, reasoning that the statute protected an important State interest, prevention of 'illegitimate pregnancies'. Three dissenting judges believed that the law was based on 'sexual stereotypes'. If prevention of pregnancies outside marriage was the real concern, then adult women who have sexual intercourse with minor males also should be punished. A better explanation is that the outcome in *Michael M* simply represents a paternalistic perpetrator-focused effort to suppress adolescent women's sexuality while implicitedly condoning the sexual activity of adolescent men. The same year in *Rostker v Goldberg* (1981) the court upheld a federal law exempting women from registering for the military draft reasoning that women and men were not similarly situated because only men were eligible for combat roles, an essential reason for the draft requirement. As the three dissenters pointed out, however, the government never established that there was either a need to draft only combat troops or draft men for both combat and non-combat positions while exempting women. Arguably, the statute simply perpetuated a governmental perpetrator-based preference for an all-male military, since neither the majority nor the dissenters questioned the decision to have male only combat troops.

The petitioners in both *Michael M* and *Rostker* were men who unsuccessfully challenged gender specific statutes they claimed disadvantaged men. As these cases suggest, formal equality also dictates equal treatment in reverse discrimination suits, where laws allegedly disadvantage men. The fact that law traditionally operated to disadvantage women and not men often gets lost in the court's analysis, but this result is not unexpected when the legal doctrine adopts a perpetrator as opposed to a victim perspective.

The equal treatment approach dictated by formal equality discourages affirmative gender-conscious efforts to counter the effects of women's long history of subordination by men. Women's colleges developed in the United States because historically women were denied access to higher education. Yet in *Mississippi College for Women v Hogan* (1982: 729) the court ordered a State-funded all women's nursing school to admit male applicants. Justice Sandra Day O'Connor, writing for the majority, said that 'rather than compensate for discriminatory barriers faced by women, MUW's policy of excluding males from admission to the school of nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job'.

Some feminist and critical scholars questioned the court's assumption that a man excluded from an all-women's institution created to compensate for the exclusion of women from higher educational institutions was similarly situated. Unlike women in earlier years, the male claimant in *Hogan* was not totally excluded from publicly funded nursing training. Yet the court treated Hogan's exclusion from the nursing program at Mississippi College for Women as discrimination, even though nursing training was available at other State-supported universities. The *Hogan* 'reverse discrimination' decision shows how anti-discrimination laws can be co-opted by the very perpetrators of the discrimination.

The decision in *Hogan* left unclear whether publicly funded sex segregated colleges or universities are ever permissible under the equal protection clause. The court's most recent decision in this area still does not clearly answer this question. In *United States v Virginia* (1996) the court ordered the State to admit women to the all-male publicly funded Virginia Military Institute (VMI). The State argued unsuccessfully that all-male military education especially benefited men and furthered educational diversity in the State. The Supreme Court rejected Virginia's claim, but did not squarely address whether publicly funded single sex colleges and universities are ever permissible under the equal protection clause.<sup>5</sup> Instead,

the court concluded that the State had not established its claim that men derived some special educational benefit from VMI's training program to justify a male-only policy, and had not provide women with substantially equal educational opportunities.

Some may see *United States v Virginia* as the flip side of *Hogan*, but in reality both threaten, not reinforce the quest for social justice. Both decisions preserve an overall institutional structure that favours men, thereby treating women like men. Meaningful social justice for women may dictate different paths for women and men.

#### *Intent to discriminate*

A second problem that arises under the legal regime of 'formal equality' is the need for claimants to establish an intent to discriminate in race discrimination claims. Often this requirement poses an insurmountable barrier when the challenged provision is neutral on its face, but has a discriminatory impact. In *Washington v Davis* (1976) the plaintiffs established that a written objective test used in the selection of police officers had a disproportionate impact on black applicants. They argued that the test, although neutral on its face and applied evenhandedly, discriminated on the basis of race because its use imposed greater burdens on black applicants than white applicants. The Supreme Court found that proof of the racially disproportionate effect of the test did not signal an equal protection violation because the litigants could not prove that the test was adopted with the specific intent or purpose to exclude blacks from the police force. Thus, the continued use by the local government of a test where whites disproportionately out-performed blacks was insufficient under current equal protection jurisprudence to raise even a presumption of unlawful race discrimination in the absence of any overtly intentional racial animus.

Charles Lawrence argues that the result in *Washington v Davis* is unjust because the court ignores unconsciously motivated racial discrimination. This 'unconscious racism', he says, stems from a shared history and culture influenced by racism which often induces negative feelings and opinions about non-whites. These feelings and opinions often influence the behaviour of whites resulting in unintentional racial discrimination (Lawrence, 1987). Since there is no overt racial animus or invidious intent to discriminate, the formal equality approach to equal protection denies the existence of a legally cognisable race discrimination claim.

Lawrence writes that '[t]he intent requirement also disregards how overtly racist practices and laws of the past have become entrenched in institutions of white privilege that do not require new racist intent for their maintenance' (Lawrence and Matsuda, 1997: 78). For example, in *Davis* the court never questions whether education in substandard schools might be one reason why so many black applicants scored lower than their white counterparts. Thus, black applicants who already had been denied an equal chance to learn were further penalised by the use of a test that in effect perpetuated an educational advantage gained by whites as a result of recent racism (Lawrence and Matsuda, 1997: 78).

The intent requirement in equal protection jurisprudence allows courts to ignore connections between the country's history of slavery and de jure segregation and the current unequal position of blacks and other non-whites. The requirement of an intent to discriminate permits the unconscious racism embodied in the policies and practices of employers and educational institutions to go unexamined and unchallenged in the courts. So racial conservatives can attribute the continuing economic and educational disparity between blacks, most non-whites and whites to internal problems within these communities.<sup>6</sup> As a result, many conservatives assert that racial discrimination no longer exists today, and now the laws should be 'colourblind'.

Increasingly, some members of the court agree. Justice Scalia wrote in *Adarand Constructors Inc v Pena* (1995: 2118, Scalia concurring), that 'under our Constitution there can be no such thing as either a creditor or a debtor race ... To pursue the concept of racial entitlement – even for the most admirable and benign of purposes – is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred'. Charles Lawrence and Mari Matsuda (1997: 80) call the arguments in support of colourblindness the 'big lie'. They and other critical race scholars argue that affirmative action or compensatory measures are the minimum needed for blacks and other non-whites to have meaningful equal opportunity. Whether these compensatory measures are short term as opposed to long term depends also upon one's vision of equality. The answer also goes to the heart of the debate over affirmative action.

## Affirmative Action

Affirmative action usually consists of 'public or private actions or programs which provide or seek to provide opportunities or benefits to persons on the basis of, among other things, their membership in a specific group or groups' (Jones, 1985: 903). The traditional rationale for most forms of affirmative action is redress for past racial or gender injustice. Early affirmative efforts simply meant establishing positive policies of non-discrimination on the basis of race. In addition to prohibiting the exclusion of blacks from jobs, early affirmative action programs included recruitment efforts designed to attract blacks into certain jobs. The rationale for these affirmative efforts was not some moral imperative, but rather that a racially integrated workforce was in the nation's economic interest (Jones, 1988: 903). When these early affirmative action measures proved ineffective, President Johnson issued an executive order in 1964 that compelled certain government contractors to make race a factor in employment decisions by establishing hiring goals for minorities.<sup>7</sup>

In the mid-1960s Congress also enacted anti-discrimination laws to combat employment discrimination. After finding that periodic compliance review and employment reports were ineffective means to integrate the work forces of government contractors, the Nixon administration developed the Philadelphia Plan relying on hiring goals and timetables (Jones, 1988). Use of these measures spread from government contractors to public and private employers and institutions of higher learning.

Of course, these affirmative actions measures were not welcomed by all. In addition to some whites who were resistant to racial integration, some activists within the black community regarded these affirmative efforts as cosmetic and inadequate because they lacked mechanisms for community in-put or control of decision making. 'The affirmative action programs put in place met the needs of the institutions that created them' (Lawrence and Matsuda, 1997: 25).

Proponents of affirmative action argued that compensatory race and gender conscious policies are needed to redress past government-sanctioned discrimination and provide greater access to opportunities routinely denied non-whites and white women in the past as a result of societal discrimination. In addition, some argue that race conscious measures are necessary to achieve a diverse workforce and enrich the educational environment, a point addressed more fully in the next section. Promotion of

racial integration does not, however, necessarily result in a racially just society.

*Voluntary* affirmative action efforts are the most controversial and most susceptible to fail under traditional equal protection analysis. Voluntary compensatory measures include racial preferences, preferring members of a racially subordinated group over white applicants or preferring women over men when making hiring or admissions decisions. This racial or gender preference, however, does not operate as a total bar for white or male applicants. The preferences simply improve, slightly, the chances for women and non-white applicants, rather than fully compensate for existing structural inequalities. Preferences are token measures because they require the 'outsider' white woman or non-white applicant to adapt to existing structures rather than require the dismantling of these exclusionary structures.

### *The Supreme Court and challenges to affirmative action*

A divided Supreme Court has reviewed challenges to affirmative action efforts. In *Bakke* (1978) one of the earliest challenges to reach the court, a plurality agreed that the UC-Davis Medical School admissions program reserving seats for minority applicants was unconstitutional, but they could not agree on the level of scrutiny required when reviewing (benign) race-conscious affirmative action policies. Justice Powell, for example, said that race could be used as a factor when making admissions decisions to ensure 'diversity' among entering university students. Two years later in *Fullilove v Klutznick* (1980) the court upheld a federal program requiring that 10 per cent of all federal funds awarded to contractors for State and local building projects be spend on goods and services provided by minority business enterprises, saying that the program survived both intermediate and strict scrutiny reviews (472-8). Four years later in *Wygant v Jackson Board of Education* (1986) another plurality struck down a local school board policy that attempted to preserve the jobs of minority teachers when making layoff decisions.

By 1989 the Supreme Court, turning a blind eye to the legacy of racial discrimination against blacks, issued several rulings that subjected government-sanctioned remedial or benign race-conscious measures to as stringent a review as invidious discrimination claims. A plurality in *City of Richmond v Croson* (1989) resolved the uncertainty about the standard of review for benign race conscious measures raised in *Bakke*, applying strict

scrutiny in striking down a city-initiated affirmative action set-aside program designed to remedy past discrimination. The next year the court in *Metro Broadcasting v Federal Communications Commission* (1990) applied an intermediate level of scrutiny to a federally-sponsored race and gender conscious program. This distinction between benign federal and State programs was short lived. Five years after *Metro Broadcasting* the court in *Adarand Constructors v Pena* (1990) reversed itself holding that '[f]ederal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest' (2117).

With the exception of *Bakke*, all of these Supreme Court cases focused on affirmative action efforts in employment. To date the court has resisted efforts by racial conservatives to examine benign race conscious measures by colleges and universities. In 1996, for example, the court declined to review the Fifth Circuit's decision in *Hopwood v Texas*, applying a strict scrutiny standard of review to strike down a benign race-conscious admissions program instituted by the University of Texas Law School. A year earlier the court also declined to review an analogous Fourth Circuit decision, *Podberesky v Kirwan* (1995) striking down a race-based scholarship program designed to remedy past and continuing discrimination at the University of Maryland. The court's refusal to hear either *Hopwood* or *Podberesky* leaves unresolved whether the *Croson* strict scrutiny standard applies to higher education cases and whether the diversity rationale advanced by Justice Powell in *Bakke* remains good law.

Some see these recent affirmative action decisions as signalling the death of affirmative action in the United States. Others argue that affirmative action needs to be restructured, substituting preferences based on class for racial preference (Kahlenberg, 1996: 728). Still others argue for expansion of race and gender preferences for diversity purposes, a point discussed in more detail later in this chapter.

#### *Public reaction to affirmative action*

Over the years, public support for voluntary affirmative action, while never strong, has eroded. Critics argue that race conscious efforts increase rather than minimise racial antagonism. Affirmative action, these critics claim, undermines the nation's Puritan work ethos which supports individual achievement or merit over birthright (Morrison, 1994: 354-5). Interestingly, criticism focuses on race-based rather than gender-based affirmative action

when in fact white women have been the primary beneficiaries of affirmative action efforts.<sup>8</sup> Yet, white women have not been vocal in the current debates over the future of affirmative action in the United States.

The reasons for the relative silence of white women are not entirely clear. Some women may believe that they no longer need affirmative action, and others may resist tying gender-based affirmative action to race-based affirmative action, believing that the public is more supportive of the former than the latter. A more cynical view is that many white women see non-white women and men as competitors, and retain or adopt notions of white superiority thereby rejecting calls for an anti-racist approach to discrimination.

White women still run the risk of being measured by male standards applied from the perspective of powerful men. They still experience discrimination. Sexual harassment remains a problem in the workplace. Women also continue to be under represented in the higher echelons of the private and public workforce. They also continue to make less money than men with comparable credentials (Lawrence and Matsuda, 1997: 153-5).

Opponents of affirmative action characterise these efforts as mandating racial preferences which they argue are inherently unjust to whites and inconsistent with notions of equal protection. Affirmative action opponents either deny responsibility for past or continuing discrimination or assume, disingenuously, that racism has ended. Thus, they argue, whites, especially white men are 'victimised' by compensatory measures aimed at racially subordinated groups. This narrow vision of equality focuses on individual experiences, which may vary with a variety of factors such as a person's race, class, age, gender, and location. According to Alan Freeman (1978: 1053), this approach to discrimination is the consequence of 'anti-discrimination law [that] is hopelessly embedded in the perpetrator perspective ... [and is] ultimately indifferent to the conduction of the victim'.

An individualistic approach to equality makes it difficult to attack structural or systemic discrimination, resulting in piecemeal litigation which relies primarily on each individual victim of discrimination. This focus on individualism ignores reality. Discriminatory measures are based on group membership, not individual traits, and the protection of blacks as a group is consistent with the purpose behind the adoption of the Fourteenth Amendment's equal protection guarantee (Fried, 1990: 109-10). In addition, giving racially subordinated groups preference in

employment, government contracts and university admissions is not inconsistent with the constitutional guarantee of equality.

### *Racial preferences and the Constitution*

The equal protection clause does not clearly outlaw benign racial preferences. Alexander Bickel (1955) argues that the purpose of the equal protection clause was to guarantee blacks equality with whites for those rights deemed necessary incidents of their status as free persons. During the 19th century:

Racial differences were perceived as fundamental, enduring and, almost always, reflecting the innate superiority of the white population. ... The idea that black and white are equal, that race is not a meaningful category, did not begin to gain ascendancy until well into the present century' (Sandalow, 1975: 664).

Involuntary characteristics like skin color or sex have 'frequently been used to perpetuate the dominant political, economic, or social position of certain groups' but these concerns should not arise where the dominant group grants preferences to white women or racial minorities (Sandalow, 1975: 664 n 35, 668). Yet, as previously noted, opponents of racial preferences argue that preferences are non-egalitarian.

There is a difference, for example, between laws granting racial preferences in admission to higher education and earlier laws prohibiting the admission of blacks to colleges and universities. Even a conservative federal judge like Richard Posner would agree that these situations are different. Judge Posner would argue, however, that courts should ignore these differences (Sandalow, 1975: 676-9). He and other racial conservatives claim that legal equality can be achieved only if law is truly colourblind. A rigid colourblind rule, however, produces undesirable outcomes or consequences in a society like the United States which admits its history of past discrimination and continuing 'societal' discrimination. Under these circumstances, ignoring continuing racial inequalities implicitly condones racial discrimination. Given this history, the diversity rationale for racial preferences seems a necessary step to achieve racial justice.

## Diversity

### *Legal origins of diversity*

The notion of diversity as a justification for racial preferences in the context of higher education first appeared in *DeFunis v Odegaard* (1974) the earliest reverse discrimination suit involving professional higher education to reach the United States Supreme Court. A limited version of the diversity model was suggested by Justice William Douglas. In *DeFunis* the court refused to address directly whether racial preferences are ever permissible, ruling instead that the matter was moot since the petitioner, Marco DeFunis, Jr, would complete his legal education even if he lost. Dissenting, Justice Douglas wrote:

The introduction of race as a measure of an applicant's qualification normally introduces a capricious and irrelevant factor working an invidious discrimination. Once race is a starting point educators and courts are immediately embroiled in competing claims of different racial and ethnic groups that would make difficult, manageable standards consistent with the Equal Protection Clause. 'The clear and central purpose of the Fourteenth Amendment was to eliminate all official State sources of invidious racial discrimination in the States.' The Law School's admissions policy cannot be reconciled with that purpose, *unless cultural standards of a diverse rather than a homogeneous society are taken into account*. ... The key to the problem is the consideration of each applicant in a racially neutral way. (citations omitted) (emphasis added) (333-4).

By 1974 it seemed apparent, at least to Justice Douglas, that the direction of Supreme Court jurisprudence weighed against the use of racial preferences for remedial purposes, unless, as Justice Douglas suggests, *cultural standards of a diverse rather than a homogeneous society are taken into account*.

Justice William Powell picked up on Justice Douglas' language in *Bakke v Regents of the University of California* (1978). Like *DeFunis*, the plaintiff in *Bakke*, a white male, claimed that minority applicants to medical school with bench mark scores lower than his were admitted both years he was rejected. These bench mark scores relied more heavily on quantitative measures like standardised test scores and grade point averages than subjective measures like interview evaluations and letters of recommendation. The University of California at Davis (hereinafter UC-Davis), the defendant in *Bakke*, never addressed the reliability of these measures, particularly as applied to minority applicants (Lawrence, 1976). Instead, the school created a special admissions program to increase the number of



'disadvantaged' students in each entering class.<sup>9</sup> The University's short-term goal was to increase diversity among its student body. Its long-term goal was to stimulate interest in health professions among students from disadvantaged communities.

Justice Blackmun in a separate opinion in *Bakke* argued for a society in which race is irrelevant, but acknowledged that to reach this point race must be taken into account. He saw racial preferences as temporary and racial irrelevancy as the ultimate goal. This and other language in *Bakke* led to discussions about compensatory measures which often conflate traditional affirmative action, compensation for past or continuing intentional discrimination, with the concept of diversity, the vision of how a pluralistic society ought to look. Arguably, the rationale for each is different.

#### *Positive diversity*

Recently critical race theorists and other scholars have set out another theoretical basis for racial preferences, namely that the presence of racial and ethnic diversity within the academy and workplace is a necessary component to a just society. In fact, a racially and ethnically diverse environment reflects the larger society and promotes a more representative and enriched sense of community. Advocates of positive diversity reject a formal approach to equal protection of the laws in favour of a conception of substantive equality, which focuses not on equal or same treatment but on equal power between inevitably diverse groups. The proposition is that true equal protection under the laws consists of equivalent relationships between two or more clearly separate entities, each of which possesses its own identity.

Only in the higher education cases has the court taken an approach anything like the idea of substantive equality. Justice Powell in *Bakke* (at 2749) acknowledged that the framers of the Fourteenth Amendment intended the equal protection clause to 'function as bridging the vast distance between members of the Negro [sic] race and the white majority' but relied instead on the 'universal terms' of the amendment. He rejected the Regents' claim that discrimination against the white majority is suspect even if its purpose is benign. While racial preferences could not be used by a State university to remedy societal discrimination – the legacy of racial apartheid – Justice Powell reasoned that race could be used as one of many factors when making admissions decisions. The permissible goal, he said, was the university's interest in a diverse student body. Today, as mentioned

earlier, even this rationale is under attack in federal courts as evidenced by the *Podberesky* and *Hopwood* decisions.

The diversity concept has been attacked in the States as well. In March 1995, shortly after the *Adarand* decision, University of California system president, JW Peltason justified the need for positive diversity saying that:

[A]s the public university of our nation's most racially and ethnically diverse mainland State, the University has an obligation to encompass that diversity in its student body, its faculty, and its staff. What happens in our University campuses will have much to do with our ability to forge an emerging new culture, a culture that is inclusive, varied, and respectful of difference, but which also unites us into a community that can live, work, prosper, and flourish in our Constitutional democracy. It may well threaten California's social and economic future if we make it harder for minority and disadvantaged people to learn or work in the University of California and other institutions of higher education in this State (quoted in Morris, 1996: 187).

Unpersuaded, the University of California Board of Regents voted to prohibit the use of 'race, religion, sex, color, ethnicity, or national origin' in admissions, employment or contracting decisions at the University of California's nine public campuses (Morris, 1996: 186). The consequences of the Board's actions were swift, especially in the system's most competitive professional schools. The number of black applicants admitted to UC-Berkeley's law school, dropped almost 90 per cent from 75 in 1996 to 14 in the 1997, the first year racial preferences were not used (Rabkin, 1997: 63). In 1997 UCLA law school admitted 80 per cent fewer black applicants and 35 per cent fewer Latino applicants (Savage, 1997: A1).

The State's public medical schools also reported a decline in both applications and admissions that started in 1996, the year after the Regent's decision but before its implementation. In 1994 when the nationwide number of students from racial and ethnic minorities in medical schools peaked, four of the five University of California schools ranked among the top eight schools producing minority doctors. By 1997 two of the five California public medical schools had no Black entering students. The UC medical schools saw a 22 per cent drop in minority applicants compared to a 14 per cent decline nationwide. Some University officials speculate that fewer racial and ethnic minorities are applying to the UC schools because they perceive the Regent's policy as signalling a less supportive environment for minorities within these schools (Burdman, 1997).

Interestingly, some opponents of affirmative action seem unconcerned about the potential return to the virtual exclusion of some racial and ethnic minorities from higher education, especially at the most elitist schools. They believe 'the change reflects a *return of fairness to the university*' (emphasis added) (Burdman, 1997). Yet, these same individuals would be less accepting of a co-educational university where the 'neutral' admissions or hiring policies resulted in an overwhelmingly male university. The reason for this tolerance of racial but not gender segregation in a racially and ethnically diverse country goes unexamined in the public debates over affirmative action.

Opponents of affirmative action also argue that true social justice occurs only where race and ethnicity are irrelevant. As US Supreme Court Justice Antonin Scalia wrote in a separate opinion in *Adarand*, '[i]n the eyes of government, we are just one race here. It is American' (at 2118). These proponents of colourblindness argue that:

[W]hen we hand out society's goodies based on merit and achievement, we should examine just those yard sticks which measure merit and achievement. ... it doesn't really matter that much how many of any racial or ethnic group is in an entering class, just that your pick the ... most qualified students' (Suarez, 1997: 7).

The *diversity* concept that had been used by colleges and universities in justifying race-conscious efforts in admissions and faculty hiring grows out of the Supreme Court's ruling in *Bakke*. But now the validity of this modest goal has been questioned by a federal appellate court in *Hopwood v Texas* (1996). That court reasoned that racial diversity in higher education is not a compelling governmental interest and is inconsistent with the concept of colourblind or 'merit-based' admissions criteria. Merit, however, like equality, is always relative and contextual.

## Colourblindness or Merit Model

The reference today to colourblind laws comes from Justice John Harlan's dissenting opinion in *Plessy* and those now famous words, '[t]here is no caste here. Our Constitution is colourblind' (at 559). These words standing alone indicate the innate equality of all races, but Justice Harlan knew that the Jim Crow practices of whites were based on a belief in black inferiority. In essence, he agreed with the majority in *Plessy* that blacks were not, and probably never would be, the social equals of whites. But he also saw more harm than good in legitimising State laws mandating racial segregation.

Harlan believed that blacks should be treated the same under law – they should enjoy formal equality.

Justice Harlan's notion of colourblindness or merit is used by both white racial conservatives and working class whites, but for different reasons. Most racial conservatives fully understand the context in which Justice Harlan used the term colourblindness in *Plessy* and the inappropriateness of the term today. The formal equality Justice Harlan intended is far different from the substantive equality denied blacks and Latinos/as by cases like *Hopwood* and *Podberesky*. Today this colourblind rhetoric is invoked to resist efforts to dismantle a system of privilege based primarily on race, not to guarantee blacks equal treatment.

The plaintiffs in *DeFunis*, *Bakke*, and *Hopwood*, all working class whites, argued that 'merit' and not race should govern admission to professional education. They, along with racial conservatives, contend that colourblind, and thus 'neutral' criteria, epitomise merit-based decision-making by institutions of higher learning. The validity of non-racial admission criteria like alumni preferences to applicants from privileged backgrounds, standardised test scores and undergraduate grade point averages are not examined for racial bias. Also unexamined is whether the so-called 'merit-based' criterion identifies the students who can best serve the nation.

An increasingly conservative federal court unquestioningly accepts claims of white plaintiffs that selection criteria other than race are valid and non-discriminatory. In addition, colleges and universities, the institutional defendants in these reverse discrimination cases, are not required to justify their heavy reliance on quantitative measures like the Law School Admissions Test (LSAT) or Medical College Admissions Test (MCAT) and undergraduate grade point average (UGPA) in making admissions decisions. The consideration of race by these institutions, in an attempt to diversify faculties and student bodies, is recent,<sup>10</sup> and the extent of institutional commitment to diversifying their communities is often questionable. These previously overwhelmingly white institutions have a vested interest in preserving 'neutral' admission criteria which disadvantages non-whites.

In the key cases challenging affirmative action efforts in higher education, the real parties of interest, blacks and other students of colour, had no voice in structuring the universities' defence. Therefore, the underlying assumption of the conservatives' attack, that removing race makes the current admissions criteria neutral and thus fair, was never

challenged. Instead, the courts in *DeFunis*, *Bakke*, and *Hopwood* were swayed by plaintiffs' arguments that quantitative measures like standardised tests and UGPA are neutral and thus fair determinants of admissibility. The institutional defendants were never required to explain or justify all their admissions criteria, nor admission goals.

Justice William O Douglas, dissenting in *DeFunis*, questioned the validity of the LSAT and undergraduate grade point averages (GPA) as predictors of success in law school, noting that neither Marco DeFunis Jr nor the University of Washington challenged the validity of these admission criteria. DeFunis simply claimed that his quantitative scores were as good as or better than minority applicants admitted by the law school. The University of Washington defended their admissions process based on the assumption that the LSAT score and UGPA (bench mark scores) were valid predictors of success in law school.

Allan Bakke made a similar claim, namely that minority applicants with benchmark scores lower than his were admitted both years he was rejected. These bench mark scores relied more heavily on quantitative measures like standardised test scores and grade point averages than subjective measures like interview evaluations and letters of recommendation. The University of California at Davis (hereinafter UC-Davis), the defendant in *Bakke*, never addressed the reliability of these measures, particularly as they applied to minority applicants (Lawrence, 1976).

Allan Bakke's claim that he was 'better qualified' because he had a higher numeral index than some minority applicants who were admitted went unchallenged. Charles Lawrence (1976: 4) points out that in *Bakke* the minority community lacked the legal resources to mount a defence and naively believed that UC-Davis would vigorously defend its admissions program. According to Professor Lawrence, potential minority interveners 'would have demonstrated that the Medical School has not one but many "standards" by which it measures candidates whom it has already adjudged minimally qualified'. This approach, however, would call into question the heavy reliance on quantitative measures like standardised tests and grades. If quantitative measures cannot be used as the sole or primary measure of admissibility, then colleges and universities might look to other more individualised, and subjective measures to determine who, among many qualified applicants, should be given one of the limited number of seats.

Claude Steele and Joshua Aronson's extensive and widely praised study of black undergraduate students points out the ways in which racism affects

blacks measured performance on academic tests (Steele and Aronson, 1995). They argue that persistent and widely held negative societal stereotypes about blacks' intellectual ability and competence have a social-psychological impact on black's performance on standardised tests. While it is true that blacks often have lower standardised test scores than other entering students, some studies suggest these tests are flawed when used as the primary predictors of performance (Steele and Aronson 1995; Wightman 1996). Further, Steele and Aronson argue that many black students with high quantitative predictors underperform as often as black students admitted with weaker credentials because of the social-psychological impact of the racial stereotypes attached to these students. Black students know that the stereotypes about them raise questions about their intellectual ability, and they may grow weary of fending off what Steele and Aronson call 'stereotype vulnerability'. Even when they do not believe the stereotype, 'stereotype vulnerability' can cost black students many points on standardised exams.

Steele and others challenge critics who claim that affirmative action in higher education displaces qualified white applicants. Steele found that at the undergraduate level this occurs only in elite colleges comprising 15 per cent of all four-year colleges in the United States. There was no evidence of preference in admissions among the rest. Steele concludes that '[o]verall, affirmative action causes little displacement of other students – less by far than other forms of preferences, like the one for children of alumni' (Steele, 1995: A25). As stated previously, in reality compensatory efforts like affirmative action displace few whites, whereas the absence of such programs in colleges and universities works against blacks and other non-white students.

In *DeFunis* and *Bakke* the minority community failed to act swiftly and intervene in those reverse discrimination lawsuits. In contrast, the Thurgood Marshall Legal Society and the Black Pre-law Association sought unsuccessfully to intervene in *Hopwood* alleging that the University of Texas could not adequately protect their interests.<sup>11</sup> The trial court denied their request, saying that the objective of both the law school and the interveners was the same, viz preservation of the status quo.

On appeal both organisations attempted to intervene again, arguing that the law school failed to assert one of their proposed defences, viz the legality of the Texas Index<sup>12</sup> under Title VI. The appellate court denied their request, discounting the fact that both organisations were prevented from

introducing evidence to support their claim that the Texas Index 'by itself was an unlawful basis for admissions decisions'.<sup>13</sup> Instead, the court repeated the conclusion of the earlier appellate opinion that 'the interests of the associations were adequately represented by the law school and the State, and ... as a practical matter, disposition in the principal suit would not impair or impede either of those groups' interests' (*Hopwood*, 1996: 961). Evidentially, the real possibility of a dramatic decrease in the number of black and Latino/a students admitted to subsequent law classes was not considered an *impairment* of the groups' interests. So even where the minority community acts in a timely fashion to intervene, the courts assist the plaintiffs in framing the issues in ways that deny the affected parties, the beneficiaries of the schools' programs, from having a voice in shaping the issues presented by the lawsuit. In many respects courts today ignore racial inequalities much as did the Supreme Court in *Plessy* one hundred years ago.

## Calls for Reform

Given the Supreme Court's reluctance to deviate from an approach of formal equality to race-based discrimination, few options remain for those who seek to preserve racial diversity in higher education. Increasingly, both supporters and critics contend that affirmative action is dead. Some pragmatists call for non-racial measures like college lotteries as a means of protecting educational opportunities for non-whites (Guinier, 1997). On the other hand, some optimists argue for expanding affirmative action using a substantive equality approach that focuses on equal outcomes or results (Lawrence and Matsuda, 1997). As the entering classes at Texas and California colleges and universities become whiter, the future of affirmative action is unclear. A few liberals have sounded the alarm, but much of the public seems unconcerned (Lewis, 1997).

Access to higher education was a mechanism used by civil rights lawyers like Thurgood Marshall to dismantle de jure racial discrimination (*Missouri ex rel Gaines*, 1938; *McLaurin v Oklahoma*, 1950; and *Sweatt v Painter*, 1950). Even after, the *Brown* (1954) decision many southern colleges actively resisted admitting black students and other colleges across the nation passively continued as white-only institutions. Today, more than 40 years after *Brown*, the States of Mississippi and Louisiana remain under court order to complete dismantling segregated public colleges and universities.

*Brown v Board of Education* built on a series of legal cases attacking the total exclusion of blacks from colleges and universities across the nation. Ironically, today conservatives use *Brown* to advance a colourblind argument that will deny many blacks meaningful access to higher education. While some southern States persist in resisting efforts to desegregate their institutions of higher learning, white plaintiffs attack affirmative programs designed to increase minority enrolment at other institutions.

Rather than appreciate this irony, today US courts tend to narrow the situations where the equal protection clause would allow race-conscious compensatory measures. The consequences, most commentators concede, is that colleges and universities will become less racially diverse, and the educational gap between whites and blacks in particular will increase, a situation tolerated under the current interpretation of the equal protection clause. There is ample evidence that the law does not dictate this result. The acceptance by courts, legislative bodies and the general public of white feminists' arguments about the different perspective the presence of women bring to educational institutions and the workplace, illustrates that the diversity rationale can work in the United States. The rejection of the diversity rationale when applied to racial and ethnic minorities suggests a continuing resistance to compensatory justice for non-white racially subordinated groups.

## Conclusion

The traditional concept of affirmative action as compensation for past or continuing racial discrimination has been rejected by a substantial portion of the general public. In fact, racial conservatives have used the same arguments advanced by racially subordinated groups to undermine these efforts to secure racial justice. Justifying racial preferences as a compensatory measure to counter past or continuing discrimination belies the depth of racial discrimination in the United States. Compensatory racial preferences suggest short-term or temporary remedies. This understanding of affirmative action has been used by racial conservatives to undermine the legal viability of this concept. Therefore, positive diversity, which is an affirmative celebration of difference as an important component of society, seems a better approach to achieving compensatory justice for racial and ethnic minorities. Thus diversity as a rationale for racial preferences needs to be separated from affirmative action. It is possible that the diversity

rationale will be accepted under the current legal regime, but limited to the educational context because education has 'such a dramatic effect on one's life' (Cosner, 1996: 1024). Granted that education provides access to the tools for economic sufficiency, this still does not necessarily translate into employment. Therefore, in its present form the diversity rationale will be another short-term approach to the problem of racial injustice in the United States.

Given the United States' long history of racial discrimination, especially against blacks, it would be a tragic mistake to require racial and ethnic diversity in educational institutions but not the workplace or economic sphere. Under this approach it is possible for a racially diverse student body to be taught by an overwhelmingly white professorate. Meaningful compensatory justice in the United States requires that both the educational and employment environments reflect values and perspectives of all groups that comprise the nation. Thus, alternative legal theories need to be developed to expand the dominant ideology.

Social justice theories developed under the current legal regime will be temporary measures easily capable of being undermined in the way reverse discrimination suits undermined efforts to obtain social justice for white women and racially subordinated groups in the United States. Thus, social justice theory must be constantly evolving to avoid co-optation by racial conservatives. Ultimately, whether the United States has achieved racial justice will be measured by the presence or absence of economic and social conditions like residential, educational, and employment segregation, race and gender discrimination, and poverty.

## Notes

- \* Taunya Lovell Banks is the Jacob A France Professor of Equality Jurisprudence, University of Maryland School of Law. The author wishes to thank April Cropper for clerical assistance and the University of Maryland for research support.
1. I will use the terms Black and African American interchangeably throughout this essay to denote persons of African ancestry.
  2. I put the term 'racial minorities' in quotations to remind the reader that race is a social rather than scientific classification.
  3. The Supreme Court in several cases, primarily between the 1940s and mid-1960s used the State action doctrine to reach some forms of private discrimination that had a public character. See, for example, *Marsh v Alabama* (1946) (company owned town); *Shelley v Kraemer* (1948) (racially restrictive covenants); and *Burton v Wilmington Parking Authority* (1961) (restaurant in city-owned parking facility). In addition, Congress used its power to regulate interstate commerce to reach some forms of non-governmental discrimination.

See, for example, *Heart of Atlanta Motel v United States* (1964); *Katzenbach v McClung* (1964) (upholding the public accommodation section of the *Civil Rights Act 1964* (US)).

4. The terms communities of colour and people of colour are used by critical race scholars in the United States to denote non-white subordinated racial and ethnic groups like blacks, Asians, Latinos/as as well as indigenous peoples like American Indians and Hawaiians.
5. 'Thus, we are not faced with the question of whether States can provide "separate but equal" undergraduate institutions for males and females': *United States v Virginia* (1996: 533 n 7).
6. Turning a blind eye to this reality, some jurists and scholars attribute the continued disparity between black and white in the United States to a 'culture of poverty' (Dinesh D'Souza, 1995). It is not racism they argue, but a dysfunctional minority culture that creates the disparities.
7. Executive Order No 11,246, 3 CFR 339 (1964-1965).
8. Professor Lawrence and Matsuda cite several convincing examples. San Francisco Fire Department which in 1978 had no women now has 70. Today women receive 36.8 per cent of all PhDs awarded in the United States compare to 14.4 per cent in 1971. Fifty per cent of the Fortune 500 companies now have at least one woman board member (Lawrence and Matsuda: 152-3).
9. Non-whites were not automatically considered 'disadvantaged' but had to come from economically or educationally disadvantaged backgrounds.
10. For example, Texas openly denied admission to any black applicant until 1950: *Sweatt v Painter* (1950) (held that a separate State law school for blacks was not 'equal' to the law school at the University of Texas).
11. *Hopwood*: 959. Initially, both organisations attempted to intervene before trial, but were denied by the District Court and that decision was affirmed by the Court of Appeals: *Hopwood v Texas* (1994) (per curia).
12. Texas Index (TI) is a composite of the LSAT and GPA. The University of Texas relies heavily on the TI, a quantitative measure, in determining who to admit. An applicant's index is used for ranking purposes (*Hopwood* at 935).
13. The appellate court said that an earlier appellate court panel had considered and rejected the potential 'divergence of interests'. According to the court, the trial judge allowed the interveners to remain involved in the case throughout, acting as *amici curiae*. The trial judge also allowed both organisations to submit information for the record.

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