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**Diversity and Equality:  
An Ambiguous Relationship.  
Reflections on the US Case Law on  
Affirmative Action in Higher Education**

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## Abstract

The concept of diversity has become increasingly salient in equality discourse. In the EU and in many of its member states, the term ‘diversity’ is now often used in place of ‘equality’ by advocates of voluntarist antidiscrimination policies. This trend echoes a phenomenon observable in the United States, where the notion of diversity has acquired a major place in discussions over affirmative action. Interestingly, the US Supreme Court has played an important role in this evolution: ‘promotion of diversity’ has progressively become almost the sole justification admitted for affirmative action programmes in higher education. This paper critically explores the use of diversity argument in US legal discourse on antidiscrimination. It argues that while the notion of diversity may valuably contribute to the promotion of equal opportunities, it is not without ambiguities. A first ambiguity results from the vagueness of the term “diversity.” Considered in the abstract, it may encompass all kind of differences and particularities. Absent further explanation, it is not self-evident that “achieving diversity” requires a special focus on disadvantaged racial or ethnic minorities. The second ambiguity lies with the fact that the diversity argument, as constructed in the US case law, tends to justify efforts to promote the inclusion of disadvantaged groups on the basis of its utility for the dominant majority. This line of argument may obfuscate more principled justifications and makes equality discourse more vulnerable to attacks based on claims that combating discrimination is in fact not “efficient” and thus not in the interest of the dominant majority.

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## Key words

Diversity - Equality - Affirmative Action - Discrimination - Racial And Ethnic Minorities - Higher Education - US Supreme Court - Racism.

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# Diversity and Equality: An Ambiguous Relationship. Reflections on the US Case Law on Affirmative Action in Higher Education<sup>1</sup>

Julie Ringelheim

## 1. Introduction

In recent years, the concept of diversity has undergone a remarkable rise in equality discourse. It has become a major component of the rhetorical apparatus of advocates of voluntarist antidiscrimination policies. It sometimes even tends to be used in place of the word 'equality.' Measures adopted by governments or private actors to promote access of disadvantaged minorities' members to higher education, employment or other areas of social life, are often described today as aiming at 'enhancing' or 'achieving diversity'.<sup>2</sup> Such language is now common within the European Union institutions as well as in many of its member states. Interestingly, 'diversity talk' is also on the rise in France, a country traditionally opposed to the recognition of ethnic minorities, and which remains attached to the idea that the norm of equality prohibits the taking into account of religious, ethnic or other differences in any circumstance. Phrases like 'reflecting the diversity of the French society' or the 'French population' in the public service,<sup>3</sup> in private companies<sup>4</sup> or in

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<sup>1</sup> This paper was first presented at a conference organized by the Council of Europe at the European Youth Center in Strasbourg on 11-13 May 2006, on "Diversity, Human Rights, Participation". I thank all the participants to the conference for the helpful comments. The paper will be published in Alana Lentin and Gavan Titley (eds.), *Diversity, Human Rights and Participation* (Council of Europe Publishing, Strasbourg (forthcoming)).

<sup>2</sup> For instance, plans adopted by companies to combat internal discriminatory practices and encourage recruitment of members of disadvantaged minorities are commonly called either "diversity plans" or "equality plans". See European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities (Unit D3), "The Business Case for Diversity: Good Practices in the Workplace", September 2005.

<sup>3</sup> See Gwenaële Calvès, "'Reflecting the diversity of the French Population': Birth and Development of a Fuzzy Concept", 183 *International Social Science Journal* (2005), 165-174. See also the arguments put forward to justify the special selection process established by the French *Institut d'Etudes Politiques (IEP or Science-Po)* in order to foster the admission of candidates from disadvantaged neighborhoods, inhabited mainly by persons with an immigrant background: Daniel Sabbagh, "Affirmative Action at Sciences Po", 20(3) *French Politics, Culture & Society* (2002), 52-64. The very title of the programme is "*Conventions ZEP: l'excellence dans la diversité (excellence in diversity)*" (see Sabbagh, "Affirmative Action at Sciences Po"..., at 57).

<sup>4</sup> The "Charter for diversity" (*Charte de la diversité*), launched in 2004 under the auspices of the Ministry of Interior, has been signed by 250 companies in the public and private sectors. The signatories pledge to "respect and promote the principle of non-discrimination in recruitment and promotion, in order to reflect the diversity of the French society, including cultural and ethnic diversity, in their workforce, [...] at the different levels of qualifications." ("... respecter et promouvoir l'application du principe de non-discrimination pour l'embauche, la formation, l'avancement ou la promotion professionnelle," afin de "réfléter la diversité de la société française, notamment culturelle et ethnique, dans leurs effectifs [...], aux différents niveaux de qualification." (*Le Monde*, 10 November 2005, at 3).)

the media,<sup>5</sup> are now widely used in political language, although their concrete implications remain somewhat vague.<sup>6</sup>

The inflation of diversity talk in Europe echoes - and maybe results from - a similar trend observable in the United States. In the case of the US, the notion of diversity has acquired a major place not only in political debates but also in legal discussions, more especially in relation to affirmative action, in particular in higher education. To be sure, the terms 'affirmative action' designate a special kind of antidiscrimination policies, which involves preferential treatment of persons belonging to disadvantaged groups or women in hiring, admission to universities or government contracting.<sup>7</sup> However, the development of the diversity concept in this regard carries more general lessons as to the relations between diversity, equality and antidiscrimination.

This article thus proposes to explore how the diversity argument emerged in the US legal discourse on antidiscrimination policies, how it was constructed, and how it operates. It will focus on the promotion of minorities' access to higher education, since it is primarily in relation to higher education that the diversity argument has been developed in the US case law. The discussion will be limited to the issue of racial or ethnic minorities. Although the term 'diversity' is used today, depending on the context, to refer to the struggle against all kinds of discrimination, whether the basis of the discrimination is ethnic or racial origin, gender, religion, disability or sexual orientation, in fact, racial or ethnic minorities are the only groups concerned by affirmative action policies in US universities.

Given the high level of sophistication attained by the US debate surrounding the theme of 'diversity in higher education', these controversies can cast important light on the implications of the diversity argument for equality and the fight against discrimination. The notion of diversity may appear, at first sight, as an inherently positive one or, at least, as completely innocuous. Yet, as will be shown in this paper, a close analysis of the way this notion has been shaped and understood by the US Supreme Court highlights some of its potential ambiguities and downsides from the perspective of equality.

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<sup>5</sup> The recent law on '*égalité des chances*' (equal opportunities), adopted on 31 March 2006, provides, under the heading "actions in favor of social cohesion and the struggle against discrimination in broadcasting", that the *Conseil supérieur de l'audiovisuel* (High Broadcasting Council) shall ensure that radio and television programmes "reflect the diversity of the French society" (*Loi n. 2006-396 du 31 mars 2006 pour l'égalité des chances*, J.O., 2 April 2006, Article 47).

<sup>6</sup> Calvès, "Reflecting the Diversity ...".

<sup>7</sup> See Michel Rosenfeld, *Affirmative Action and Justice: A Philosophical and Constitutional Inquiry* (Yale University Press, New Haven and London, 1991), at 47; Samuel Leiter and William M. Leiter, *Affirmative Action in Antidiscrimination Law and Policy: An Overview and Synthesis* (State University of New York Press, New York, 2002), at 1.

The paper starts with a brief description of relevant US case law (part 2). It then considers two main ambiguities of diversity as a justification for special admission policies in universities. The first results from the vagueness of the term ‘diversity’. Considered in the abstract, it may encompass all kind of differences and particularities. In consequence, absent further explanation, it is not self-evident that ‘achieving diversity’ in higher education requires a special focus on racial or ethnic features more than on other specificities (part 3). The second ambiguity lies with the fact that the diversity argument, as constructed in the US case law, tends to justify efforts to promote the inclusion of disadvantaged groups on the basis of its utility for the dominant majority, rather than as a matter of justice or moral obligation. Convincing the overall society that it should support the promotion of equal opportunities is no doubt important. But this line of argument may obfuscate more principled justifications and makes equality discourse more vulnerable to attacks based on claims that combating discrimination is not ‘efficient’ and thus not in the interest of the dominant majority after all (part 4).

## 2. Diversity in US Case Law

The diversity argument emerged in the US Supreme Court case law in *Regents of California v. Bakke* (1978).<sup>8</sup> The case was brought by an unsuccessful white applicant to the Davis Medical School of the University of California, who challenged the school’s special admission programme, designed to increase the number of minority students. Under this programme, minority candidates were evaluated separately, and sixteen of the one hundred places in the entering class were reserved for minority students. Alan Bakke claimed that he had been discriminated against on the basis of his race because some minority applicants had been admitted to the school through the special programme with grade point averages significantly lower than his.<sup>9</sup>

The central issue for the Court to decide was whether, under the 14th Amendment of the US Constitution, which prohibits states from denying any person the equal protection of the laws, governments may use race-conscious measures to redress the continuing effects of past discrimination. The Court revealed itself to be deeply divided. Four judges took the view that the race-conscious admission programme of Davis Medical School was constitutional because it was aimed at “remedying the effects of past societal discrimination” in a situation where there was “a sound basis for concluding that minority under representation [was] substantial and chronic and caused

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<sup>8</sup> *Regents of University of California v. Bakke*, 438 U.S. 265 (1978).

<sup>9</sup> He argued that the school’s admission policy contravened Title VI of the 1964 Civil Rights Act, which prohibits discrimination in education, and the Equal Protection Clause of the 14th Amendment of the US Constitution.

by past discrimination [...].”<sup>10</sup> By contrast, four other judges concluded that the policy was discriminatory and that the plaintiff should be admitted to the Medical School.<sup>11</sup> The last judge, Justice Powell, took a middle-ground position. He agreed with the ‘conservative’ judges that the specific programme in use at Davis was illegal because of its rigidity: a fixed number of places were reserved for candidates from designated ethnic or racial groups. But he concurred with the ‘liberal’ judges in considering that, as a general matter, universities can have a legitimate interest in taking race or ethnicity into account in the admission process. Importantly, he was the only judge to discuss the Medical School’s argument that a university may consider race in the selection of applicants in order to achieve a diverse student body. He agreed with this argument: obtaining diversity within a student body is a legitimate goal for a higher education institution that could justify, under certain limitations, some form of preferential treatment. “The atmosphere of ‘speculation, experiment and creation’ - so essential to the quality of higher education - is widely believed to be promoted by a diverse student body [...]. [I]t is not too much to say that the ‘Nation’s future depends upon leaders trained through wide exposure’ to the ideas and more of students as diverse as this Nation of many peoples.”<sup>12</sup> Thus, the right of universities “to select those students who will contribute the most to the ‘robust exchange of ideas’” constitutes a countervailing constitutional interest, and is necessary to enable them to pursue a goal of paramount importance in the fulfilment of their mission.<sup>13</sup>

Given the split among the judges in *Bakke*, uncertainty and disagreement arose in the following years among courts and commentators as to the legal value to be attributed to the diversity rationale. In *Hopwood v. Texas* (1996), a Court of Appeal concluded that *Bakke* was not a controlling precedent because no other judge had joined Justice Powell in his reliance on the notion of diversity. The *Hopwood* Court therefore held that diversity was not a compelling state interest justifying consideration for racial or ethnic features in university admission and declared the affirmative action programme in place at the University of Texas Law School to be unconstitutional.<sup>14</sup> The

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<sup>10</sup> Opinion of Justices Brennan, Marshall, White, and Blackmun, concurring in the judgment in part and dissenting in part, at 362.

<sup>11</sup> Opinion of Justice Stevens, concurring in the judgment in part and dissenting in part, in which Justices Burger, Stewart, and Rehnquist joined, at 408-421.

<sup>12</sup> *Bakke*, at 312-313.

<sup>13</sup> *Bakke*, at 313. Nonetheless, in the specific case at stake, he found that the programme established by the Davis Medical School was not a necessary means to that end, in particular because it included rigid quota, rather than an individualised consideration of each applicant’s background and potential to contribute to the diversity of the student’s body.

<sup>14</sup> *Hopwood v. Texas*, 78 F.3d, at 932, 944 and 962 (5<sup>th</sup> Cir. 1996). The Supreme Court refused to grant certiorari, which means that it declined reviewing the Court of Appeal’s judgment. On the *Hopwood* decision and the reactions to it, see Marcia G. Synnott, “The Evolving Diversity Rationale in University Admissions: From *Regents v. Bakke* to the University of Michigan Cases”, 90 *Cornell Law Review* (2005), 463-504, at 476-478. For a defence of the diversity rationale as a matter of US Equal



Supreme Court clarified the matter in two 2003 major decisions - *Grutter v. Bollinger*<sup>15</sup> and *Gratz v. Bollinger*.<sup>16</sup> This time, a majority of 5 judges expressly endorsed Justice Powell's proposition that universities can consider race or ethnicity in admission process if their purpose is to achieve a diverse student body. The present stance of the US Supreme Court is, therefore, that diversity does constitute a compelling state interest justifying race-conscious admission programmes in higher education institutions.<sup>17</sup>

The importance acquired by the notion of diversity within the US Supreme Court jurisprudence may be partly due to the influence of notions such as multiculturalism, identity recognition and valuing differences, which became increasingly popular in the 1980s and 1990s. However, in order to grasp the real significance of this evolution, it must be emphasised that the diversity argument became increasingly prominent in legal and political debates in a period in which most of the other justifications for affirmative action measures were progressively invalidated by the Supreme Court. Remedying the effects of past societal discrimination, ensuring distributive justice for certain disadvantaged groups in the present,<sup>18</sup> or providing role models for members of disadvantaged minorities,<sup>19</sup> were all discarded as not constituting compelling state interests justifying race-conscious measures.<sup>20</sup> In effect, 'diversity' became almost the sole permissible justification for affirmative action programmes in higher education.<sup>21</sup> J. M. Balkin observes that "[t]hese

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Protection doctrine, see Goodwin Liu, "Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test", 33 *Harvard Civil Rights-Civil Liberties Law Review* (1998), 381-442.

<sup>15</sup> *Grutter v. Bollinger et al.*, 539 U.S., at 321-322 (concerning the constitutionality of the University of Michigan Law School's admission policy).

<sup>16</sup> *Gratz v. Bollinger et al.*, 539 U.S., at 267-270 (concerning the constitutionality of the University of Michigan's College of Literature, Science & the Arts' admission policy).

<sup>17</sup> Previously, in *Metro Broadcasting, Inc. v. F.C.C.* (110 S. Ct. 2997 (1990)) a majority of the Supreme Court had already upheld the diversity rationale for race-conscious policies in the context of broadcasting. Increasing broadcast diversity was deemed to be an important governmental interest, justifying race-conscious policies. On the significance of *Metro Broadcasting*, see Patricia Williams, "*Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*", 104 *Harvard Law Review* (1990), 525-546; and Sheila Foster, "Difference and Equality: A Critical Assessment of the Concept of 'Diversity'", 1 *Wisconsin Law Review* (1993), 105-161.

<sup>18</sup> *Bakke*, 438 U.S. at 306-307 (Powell, J.'s Opinion). See also *Wygant v. Jackson Board of Education*, 476 U.S. at 276 ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy").

<sup>19</sup> *Wygant v. Jackson Board of Education*, 476 U.S. at 275-276. In this decision, the Supreme Court dismissed the notion that providing role models for the increasing proportion of Black students in a school could justify a race-conscious plan aimed at increasing the number of teachers from various racial and ethnic backgrounds.

<sup>20</sup> The scope of permissible affirmative action measures has been further limited in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding that strict scrutiny - rather than the milder criteria of intermediate scrutiny - must apply to all race-based measures used by state and local governments, even when such measures aimed at remedying the effects of discrimination) and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (extending the strict scrutiny rule to federal race-based classifications).

<sup>21</sup> The other situation where the US Supreme Court admits the validity of affirmative action is where it is proved that the concerned institution or company has been specifically responsible for identifiable past discrimination against a favored group, that this discrimination continues to affect

precedents had “discourse shaping” or “discourse forcing” effects. If state governments wanted to practice race-conscious affirmative action, they had to speak in certain ways. [...] Thus, the rules in place forced university administrators to speak the language of diversity.”<sup>22</sup>

As a matter of fact, grounding affirmative action on the objective of achieving ‘a diverse student body’ presents several advantages. ‘Diversity’ generally resonates positively in the overall public. It fits with classical liberal values of pluralism, freedom of speech, and tolerance. In addition, the diversity argument eschews the two major objections raised against affirmative action: first, that it distorts the meritocratic character of the selection process by favouring certain people on the basis of factors irrelevant to school performance; second, that it unfairly discriminates against members of non-disadvantaged groups.<sup>23</sup> The diversity-based justification, as constructed by Justice Powell, recharacterises affirmative action as a means to achieve “an end internal to the enterprise of education - rather than as a technique for promoting a redistributive goal external to it”.<sup>24</sup> It rests on the premise that interaction with people with different ideas, experiences, outlooks, or ways of life, contributes to the education of students. This has two implications. First, it suggests that the applicants’ racial or ethnic background is, in truth, a relevant factor from an educational perspective. Second, it entails that the benefit of diversity-enhancing policies in university admission is not limited to minority applicants. Non-minority candidates with special talents or experiences, may also be deemed likely to foster diversity. Seen in this light, the possibility to take racial or ethnic origins into account in admission is less likely to appear as an exception to the rule or as a form of privilege. Moreover, the diversity argument implies that inclusion of minorities in higher education institutions is a good not just for minorities themselves, but for the whole student community, and in particular for members of the dominant majority. However, as we shall see in the two next sections, these advantages also have their flip sides.

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individual victims, and that the programme is carefully tailored to remedy this particular wrong. See e.g. *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 777 (1976). See *inter alia* Jack M. Balkin, “*Plessy, Brown, and Grutter: A Play in Three Acts*”, 26 *Cardozo Law Review* (2005), 1689-1730; Trina Jones, “The Diversity Rationale: A Problematic Solution”, 1 *Stanford Journal of Civil Rights & Civil Liberties* (2005), 171-215, at 175; Peter Schuck “Affirmative Action: Past, Present, and Future”, 26 *Yale Law & Policy Review* (2002), 1-92; Samuel Issacharoff, “Law and Misdirection in the Debate over Affirmative Action”, *University of Chicago Legal Forum* (2002), 11-43, at 16-17; Stanford Levinson, “Diversity”, 2 *University of Pennsylvania Journal of Constitutional Law* (2000), 573-608, at 577.

<sup>22</sup> Balkin, “*Plessy, Brown, and Grutter ...*”, at 1722. On the same note, Jones writes: “Because civil rights advocates were left with few legal grounds upon which to rest their efforts to eliminate discrimination, they strategically and quite pragmatically climbed onto the diversity bandwagon.” (Jones, “The Diversity Rationale...”, at 175). See also Schuck, “Affirmative Action ...”, at 34-35.

<sup>23</sup> See Anthony T. Kronman, “Is Diversity a Value in American Higher Education?”, 52(5) *Florida Law Review* (2000), 861-894, at 865-867.

<sup>24</sup> Kronman, “Is Diversity a Value ...”, at 865.

### 3. Diversity of what?

The notion of diversity, without further specification, can refer to all kinds of differences, traits, or attributes.<sup>25</sup> It does not, in and by itself, connote the inclusion of the members of discriminated groups; it is potentially much larger. The concept's appeal is probably partly due to its vagueness, which enables various people to infuse it with different meanings. However, when the concern is to enhance minorities' access to universities, resorting to the diversity argument begs the question: how do we explain that a policy supposedly aimed at fostering diversity in higher education should focus on racial and ethnic particularities, rather than on other characteristics? Why should these features especially matter to an educational institution more than, for instance, religious or ideological differences?<sup>26</sup>

#### 3.1. Diversity as an Internal Educational Good

The specificity of the diversity rationale, compared with other types of justification for affirmative action, lies with the fact that it justifies race-conscious measures as a means to achieve a good internal to universities, an 'internal educational good', as A. T. Kronman puts it, rather than an external goal, such as promoting social justice.<sup>27</sup> As construed by Justice Powell and his followers, the argument is based on the claim that universities can legitimately consider that enhancing diversity contributes to their educational mission. Creating a stimulating environment, propitious to teaching and learning, is part of colleges' and universities' fundamental tasks. A diverse students body, with a plurality of 'experiences, talents, and viewpoints', helps create such a stimulating atmosphere, conducive to a "robust exchange of ideas."<sup>28</sup> And, as the argument goes, minority students bring with them special perspectives, of which other students may benefit.

However, both Justice Powell and Justice O'Connor insist that 'diversity' should not be limited to *ethnic or racial* diversity. "Ethnic diversity [...] is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body."<sup>29</sup> Powell criticises the Davis Medical School's programme for being concerned exclusively with ethnic or racial features. "The diversity that furthers a compelling state interest

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<sup>25</sup> Levinson, "Diversity" ..., at 578-579.

<sup>26</sup> See Eugene Volokh, "Diversity, Race as Proxy, and Religion as Proxy", 43 *UCLA Law Review* (1996), 2059-2076; Kronman, "Is Diversity a Value ...", at 877-884; Foster, "Difference and Equality ...", at 139-140.

<sup>27</sup> On the distinction between "internal" and "external" goal, see Kronman, "Is Diversity a Value ...", at 867. For a careful discussion of the argument that racial and ethnic diversity promotes an educational good: see Kronman, "Is Diversity a Value ...". For a critical analysis of this argument, see George Sher, "Diversity", 28(2) *Philosophy & Public Affairs* (1999), 85-104.

<sup>28</sup> See *Bakke*, Opinion of Justice Powell, at 313.

<sup>29</sup> *Bakke*, at 314.

encompasses a far broader array of qualifications and characteristics of which racial and ethnic origin is but a single though important element.” In his opinion, focusing solely on ethnic diversity hinders rather than furthers attainment of “genuine diversity.”<sup>30</sup> By contrast, he mentions approvingly the admission system in place at Harvard College, where race or ethnic background may be deemed a ‘plus’ in a particular applicant’s file, without this factor being decisive when compared with other qualities likely to promote educational pluralism, such as “exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important.”<sup>31</sup>

On a similar note, Justice O’Connor, in her opinion in *Grutter*, praises the fact that Michigan Law School “engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”<sup>32</sup> In other words, a policy designed to promote diversity in higher education should neither automatically nor exclusively benefit members of disadvantaged racial or ethnic minorities. It should be devised so as to include all kinds of characteristics likely to enhance a diverse educational environment.

This reasoning, despite its egalitarian appeal, is not without problems. It raises at least two difficulties: one can be termed the risk of dilution, the other, the risk of essentialisation.

The first problem with this argument is that it dilutes the attention afforded to the disadvantaged minority background of certain applicants into a broader and vaguer interest in all sorts of differences. It conflates various types of diversities - ‘ideological diversity’, ‘experiential diversity’, ‘diversity of talents’, and ‘demographic diversity’.<sup>33</sup> Ethnic or racial differences are melt among a large array of experiences and particularities that universities may take into account in the admission process. As a consequence, the particular significance of ethnic or racial origins becomes more elusive. “By treating all differences the same, [the concept of diversity as constructed in *Bakke*] ignores the ‘salience’ of certain differences in this society by extracting differences from their socio-political contexts.”<sup>34</sup> Now, the more the fact of belonging to a disadvantaged minority is assimilated to other kinds of characteristics likely to produce various viewpoints and perspectives, the

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<sup>30</sup> *Bakke*, at 315.

<sup>31</sup> *Bakke*, at 316-317. What is particularly important for Powell is that the admission programme should be flexible enough to consider all pertinent elements of diversity and not isolate any individual applicants from comparison with others. (*Bakke*, at 316-317).

<sup>32</sup> *Grutter*.

<sup>33</sup> On these distinctions, Balkin, “*Plessy, Brown, and Grutter ...*”, at 1722-1723.

<sup>34</sup> Foster, “Difference and Equality ...”, at 111. See also her observations at 130-138.

more difficult it becomes to explain why diversity-policy in universities should particularly focus on specific ethnic or racial groups, or even why it should include them at all. Indeed, *Hopwood v. Texas* illustrates that the argument for educational diversity can be endorsed, while excluding ethnic or racial differences from its scope. The majority in *Hopwood* struck down the Texas Law School affirmative action policy, holding that the use of “ethnic diversity” to achieve “racial heterogeneity” was unconstitutional.<sup>35</sup> Yet, at the same time, it stated that universities could legitimately take into account a host of other factors in the admission process, like the ability to play the cello, make a downfield tackle, understand chaos theory, or even an applicant’s home state or relationship to school alumni.<sup>36</sup> It simply observed that “‘diversity’ can take many forms. To foster such diversity, state universities and law schools and other governmental entities must scrutinize applicants individually, rather than resorting to the dangerous proxy of race.” The judge writing for the majority went on to argue that the plaintiff herself was a good example of an applicant with a unique background: as the wife of a military and the mother of a severely handicapped child, she could have brought a ‘different perspective’ to the law school.<sup>37</sup>

To counter the *Hopwood* logic and justify the special consideration afforded to ethnic or racial background in selection process, while remaining in line with Justice Powell’s approach, the advocates of the diversity rationale must insist that minority applicants contribute to the diversification of educational environment because they bring special perspectives and viewpoints. But this claim, in turn, raises another problem. The correlation it posits between a person’s racial or ethnic background and her outlooks, ideas, or values is highly contentious. It may be criticised as suggesting that one ‘essential’ minority viewpoint exists, thus reifying the groups concerned and neglecting their internal diversity. Furthermore, the assumption of a strong link between one’s racial or ethnic origins and one’s values or way of thinking creates the risk of reinforcing racial prejudice and stereotyping.<sup>38</sup>

### 3.2. Diversity in Context: Back to Racism and Discrimination

These two problems - that of dilution and that of essentialisation - reveal a fundamental weakness in the argument elaborated by Justice Powell: The mere objective of enhancing the diversity of viewpoints and conceptions

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<sup>35</sup> *Hopwood*, 78 F.3d, at 945.

<sup>36</sup> *Hopwood*, at 946. Thus, the policy of Texas Law School to set aside 80 % of seats for residents of Texas and to favour children of alumni was safe from attack, while the affirmative action programme aimed at promoting access of minorities was deemed unconstitutional.

<sup>37</sup> *Hopwood*, at 946.

<sup>38</sup> See Schuck, “Affirmative Action ...”, at 41; Foster, “Difference and Equality ...”, at 138-139; Volokh, “Diversity, Race as Proxy ...”, at 2060-2061. See also Daniel Sabbagh, *L’égalité par le droit - Les paradoxes de la discrimination positive aux Etats-Unis* (Economica, Paris, 2003), at 246-249.

represented in universities is not, as such, a sufficient argument to justify the special weight assigned to racial or ethnic features. Explaining why ethnic or racial diversity should matter to educational institutions, without resorting to essentialist assumptions about the existence of a 'Black' or 'Hispanic' viewpoint, requires going beyond a narrow conception of educational diversity, that is limited to the rather uncontroversial claim that students should be confronted to a multiplicity of opinions and ideas. It is necessary to first acknowledge the specific social context that gives racial or ethnic features their particular salience. In other words, the notion of diversity must be interpreted in the light of the social environment in which differences are constructed and exist. And this context is one that is characterised by past and continuing racism and discrimination.<sup>39</sup> The experience that minority youths therefore have in common is that of growing up as members of a group that, in the society in which they live, is racialised and discriminated against. This specific life experience may lead them to have different perspectives on certain issues than other students, who have not been personally exposed to racist attitudes, disadvantage or exclusion. To this extent, they may provide a special viewpoint on the society, on its dominant habits and patterns of thought.<sup>40</sup> There is at least a probability that they will be deeply interested and somewhat knowledgeable in certain issues. Moreover, given their internal knowledge of the groups concerned, they are also likely to be aware of the complexities and internal divisions of the group they are associated with.<sup>41</sup> Accordingly, the inclusion of a minimum of applicants with a minority background in universities allows other students to get a better understanding of the problems of racism and exclusion. Furthermore, by providing young people with different racial or ethnic backgrounds with the opportunity to interact with each other, it helps breaking down stereotypes and fostering inter-community understanding.<sup>42</sup>

This concern, while absent from Justice Powell's analysis in *Bakke*, surfaces in Justice O'Connor's opinion in *Grutter*. She stresses that the contested Michigan Law School admission policy "promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races."<sup>43</sup> She also endorses the Michigan Law School's argument that it needs a 'critical mass' of minority students: given

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<sup>39</sup> See Foster, "Difference and Equality ...", esp. at 110-111; Elizabeth Anderson, "Integration, Affirmative Action, and Strict Scrutiny", 77 *NYU Law Review* (2002), 1195-1271; Charles R. Lawrence III, "Each Other's Harvest: Diversity's Deeper Meaning", 31 *University of San Francisco Law Review* (1997), 757-778.

<sup>40</sup> Anderson, "Integration, Affirmative Action ...", at 1222-1223; Lawrence III, "Each Other's Harvest ...", at 774; Paul Brest and Miranda Oshige, "Affirmative Action for Whom?", 47 *Stanford Law Review* (1995), 855-900, at 862; Foster, "Difference and Equality ...". For a close discussion of this argument, see Kronman, "Is Diversity a Value ...", at 879-884.

<sup>41</sup> Levinson, "Diversity" ..., at 597.

<sup>42</sup> Anderson, "Integration, Affirmative Action ...", at 1223.

<sup>43</sup> *Grutter*, at 328.

its rejection of the view that minority students would express some characteristic minority viewpoint on any issue, the law school argued that it could not accomplish the goal of weakening the force of stereotypes - a goal Justice O'Connor considers to be a crucial part of the Law School's mission - with only token numbers of minority students. It therefore needed a 'critical mass' of underrepresented minorities in order to secure the educational benefits of a diverse student body.<sup>44</sup>

However, this line of thought implies a departure from the claim that the inclusion of minority students is merely aimed at contributing to the creation of an intellectually stimulating environment. It rests upon an expanded conception of the educational goals at stake, that encompasses the objective of eliminating racist prejudice and attitudes.<sup>45</sup> But once we acknowledge that attention to racial or ethnic origins in university admission is justified by the need to combat racism, considering only the educational benefit that the presence of minority youth in universities and colleges would bring to the student community, appears strikingly narrow. What seems primarily important from the perspective of fighting racism and its consequences, namely discrimination and disadvantage, is to enhance the very access of minorities to higher education from which they continue to be disproportionately excluded.<sup>46</sup>

Eradicating racial prejudice other students may hold appears as one component of a much larger enterprise, that goes beyond the limits of the university: that of deracialising the society and promoting equal opportunities for all.<sup>47</sup> As S. Foster puts it, "the value of diversity is not only in the diverse viewpoints that individuals from different backgrounds may contribute to an institution but, more importantly, the inclusion and participation of individuals from groups that are systematically excluded and disempowered on all levels of society."<sup>48</sup> Indeed, "maintaining a 'mix' of differences, merely for the sake of sheer diversity, fails to promote equality in a society where certain differences have been constructed into a basis for systematic exclusion and disadvantage [...]."<sup>49</sup>

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<sup>44</sup> *Ibid.*

<sup>45</sup> See Anderson, "Integration, Affirmative Action ...", at 1222.

<sup>46</sup> Jones, "The Diversity Rationale ...", at 179.

<sup>47</sup> See Levinson, "Diversity" ...; Foster, "Difference and Equality ...".

<sup>48</sup> Foster, "Difference and Equality ...", at 141. She adds that: "The prospective value of diversity should be in the inclusion and participation of formerly excluded groups so as to empower those individuals to decide and define for themselves what outlooks and viewpoints they will have." (*ibid.*).

<sup>49</sup> Foster, "Difference and Equality ...", at 137.

#### 4. Diversity for what Purpose?

The diversity argument for special admission policies in universities in favour of ethnic or racial minorities, presents a further ambiguity. As elaborated by Justice Powell, diversity is presented as being a good primarily for the dominant majority.<sup>50</sup> Its main aim is supposed to be the improvement of the education of the American elite. Both Powell and O'Connor emphasise that the presence of minority students, with their special viewpoints and experiences, will enhance the education of the "future leaders of the Nation"; interacting with people of a minority background should enlarge their knowledge of the world and the society, and better prepare them to their tasks as professionals.

Justice O'Connor, writing for the majority in *Grutter*, was manifestly impressed by the large number of amicus briefs filed by other elite universities and around 500 companies, as well as by high-ranking military officers, that emphasised the importance of ethnic and racial diversity in the academy, in the workplace, and in the army. She notes that, according to numerous studies, a diverse student body promotes learning outcomes and "better prepares students for an increasingly diverse workforce and society." She further stresses that "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints."<sup>51</sup> More importantly in her eyes, high-ranking retired officers and civilian leaders of the US military assert that a "highly qualified, racially diverse officer corps [...] is essential to the military's ability to fulfill its principle mission to provide national security."<sup>52</sup>

Remarkably, the argument in favour of special admission policies in universities is here completely detached from a reflection on the causes of the difficulties minority youth encounter in accessing higher education. This certainly contributes to the diversity rationale's appeal in the general public. E. Volokh aptly points out that "[d]iversity is particularly appealing because [...] it's forward-looking; it ascribes no guilt, calls for no argument about compensation. It seems to ask simply for rational, unbigoted judgment [...]."<sup>53</sup> To be sure, convincing members of the dominant groups that they can benefit from the inclusion of disadvantaged groups in education or employment, is undeniably important. However, presenting the supposed benefits for the dominant majority as the main and primary justification for such policy is not

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<sup>50</sup> See Schuck, "Affirmative Action ...", at 34.

<sup>51</sup> *Grutter*, at 330-332. See also Justice Powell: "[I]t is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and more of students as diverse as this Nation of many peoples." (*Bakke*, at 312-313).

<sup>52</sup> *Grutter*, at 332.

<sup>53</sup> Volokh, "Diversity, Race as Proxy ...", at 2060.



without cost. It is a double-edged strategy. On the one hand, it may facilitate its acceptance by the majority. But on the other hand, it renders the policies at issue more vulnerable to empirically-based argument that would tend to show that promoting diversity does not, in practice, produce the benefits it is said to bring. Indeed, it might be possible to find empirical evidence indicating that racial or ethnic diversity does not always promote educational excellence or efficiency.<sup>54</sup> Mixing people with different backgrounds is not necessarily a smooth process; it might create tensions and difficulties within the student communities.<sup>55</sup> Thus, as S. Levinson notes, “[s]elf-regarding arguments have the advantage of appearing more hard-headed and less idealistic; they may, for better and worse, however, be subject to more stringent empirical tests than are public-regarding arguments that forthrightly admit that costs may have to be paid in order to achieve desirable social goals.”<sup>56</sup>

At this point, the basic question to ask is: Whether or not promoting racial or ethnic diversity advances the interest of the majority, aren’t there more fundamental reasons to support policies aiming at this objective, regardless of their practical benefits? Aren’t there any normative principle, independent of empirical evidence, that justifies or requires efforts in this direction? This question takes us back to the conclusion in the previous section: for diversity to remain a compelling argument in favour of the inclusion of minorities in higher education, it must remain closely linked to the principle and ideal of equality.<sup>57</sup> For Ch. Lawrence, diversity cannot be an end in itself because it has no inherent meaning and cannot be a compelling interest “unless we ask

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<sup>54</sup> See the observations of Levinson, “Diversity” ..., at 588-592. A related objection that is sometimes raised is that in certain fields, like mathematics or physics, racial or ethnic diversity seems largely irrelevant to the goals of education. See Kronman, “Is Diversity a Value ...”, at 869.

<sup>55</sup> Plausibly, “just as there are practical benefits to diversity, there may be practical benefits to uniformity. In some situations, teams may work better if their members share the same experiences, outlooks, and ideas. Uniformity has its costs, but reasonable, unprejudiced people can conclude that it can sometimes also have its benefits.” (Volokh, “Diversity, Race as Proxy ...”, at 2061-2062).

<sup>56</sup> Levinson, “Diversity” ..., at 592.

<sup>57</sup> In fact, Justice O’Connor’s opinion in *Grutter* alludes to the idea of equal opportunity, but her discussion is confused by the fact that she mixes the theme of equality with other types of arguments. Recalling that the Supreme Court has previously acknowledged that education is the very foundation of good citizenship, she infers from there that access to knowledge and opportunity provided by higher education institutions must be open to all regardless of race or ethnicity. “Effective participation by members of all racial and ethnic groups in the civic life of the Nation is essential to achieve the unity and indivisibility of the Nation.” (*Grutter*, at 332). She adds a further argument, based on the notion of legitimacy: given that universities, and law schools in particular, represent the training ground for a large number of the Nation’s leaders, “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.” (*Grutter*, at 332). As Balkin points out, it is not clear whether Justice O’Connor means here that institutions should *actually be* fair and just, in order to be *morally legitimate*, or simply *appear* fair and just, in order to be *seen as legitimate* by the general public. (Balkin, “*Plessy, Brown, and Grutter ...*”, at 1720-1721).

the prior question: diversity for what purpose? The answer to this question is that we seek racial diversity in our student bodies and faculties because a central mission of the university must be the eradication of America's racism."<sup>58</sup> While there may be other reasons for promoting racial diversity in the academy, eliminating racism should be the primary one. "The diversity rationale is inseparable from the purpose of remedying our society's racism."<sup>59</sup> Indeed, the lack of racial and ethnic diversity in universities is significant precisely because it indicates that opportunities remain unequal.<sup>60</sup> Uniformity signals the persistence of exclusionary processes that disproportionately affect the members of certain ethnic or racial groups.<sup>61</sup> "While a racially diverse student body benefits everyone, what is really being sought through these admissions policies is access for racial minorities to institutions from which they have been and still are systematically and disproportionately excluded because of racism."<sup>62</sup> Promoting diversity in higher education is not merely a matter of achieving educational goals. It is part of the broader objective of redressing the effects of past and present racism, and furthering the ability of all individuals to participate fully in the society.

## 5. Conclusion

The US case law on affirmative action in higher education demonstrates the ambivalence of the 'diversity' concept as a justification for special measures to enhance access of disadvantaged minority youths to universities. Ultimately, the goal of diversity alone, detached from a concern in advancing equality and social justice, appears insufficient to provide a compelling defence for considering racial or ethnic origins in the university admission process. An additional argument is needed, other than a striving for diversity as such.<sup>63</sup> This leads several commentators to argue that the objective of 'increasing diversity' is merely a cover for a policy whose real aim is to promote equal opportunities for members of unjustly disadvantaged groups.<sup>64</sup> It would serve to mask what is really at stake in affirmative action. The downside of this strategy is that the educational diversity rationale, if taken at face value, can spark new problems. One may adhere to the idea that a 'diverse student body', with multiple viewpoints and experiences, fosters a stimulating learning environment, while contesting that ethnic or racial

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<sup>58</sup> Lawrence III, "Each Other's Harvest ...", at 765.

<sup>59</sup> *Ibid.*, at 765. See also Jones, "The Diversity Rationale ...", at 179.

<sup>60</sup> Sher, "Diversity" ..., at 94.

<sup>61</sup> Jones, "The Diversity Rationale ...", at 179.

<sup>62</sup> *Ibid.*

<sup>63</sup> See *inter alia* Levinson, "Diversity" ..., at 601; Anderson, "Integration, Affirmative Action ...", at 1222-1228; Sher, "Diversity" ..., at 90.

<sup>64</sup> Sher, "Diversity" ..., at 97; Balkin, "*Plessy, Brown, and Grutter* ..."; Schuck, "Affirmative Action ...". See also Sabbagh, *L'égalité par le droit* ..., at 363-382.

features are in any way relevant to this aim. Or one might claim that increasing racial or ethnic diversity does not actually result, in practice, in an improvement of the educational environment.

This is not to say that the notion of diversity is inherently flawed. On the contrary, by emphasising the positive aspect of difference, it adds a valuable dimension to the ideal of equality. It is important, however, to be aware of its ambiguities and limitations. 'Diversity' as such is too vague a concept to provide a self-sufficient justification for special measures designed to promote minorities' access to higher education. It must, therefore, remain closely articulated with the principles of equality and antidiscrimination. Only insofar as it is interpreted in the light of these fundamental goals, can it valuably contribute to the advancement of equal opportunities, inclusion and participation.

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