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REVITALIZING THE MEANING OF DIVERSITY FOR RACIAL JUSTICE IN EDUCATION

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Mato Grosso Book Chapter: Education and Diversity: Counter-Hegemonic Practices

Within the United States legal context, the term “diversity” was first introduced as a justification for race conscious remedies to racial inequality such as affirmative action. It emanated from Supreme Court Justice Powell’s concurring opinion in the 1978 university affirmative action case of *Regents vs. Bakke*. In that case Bakke, a white applicant to the University of California, Davis Medical School, sued the University, alleging his denial of admission on racial grounds was a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, because the school reserved 16 spots out of the 100 in any given class for “disadvantaged minorities.” Bakke, when compared to students admitted under the special admissions program, had a higher numerical indicia of performance, while his race was the only distinguishing characteristic from the 16 out of 100 disadvantaged minorities admitted. (At the same time Bakke’s numerical performance was lower than the 84 out of 100 non-program students admitted). The Court ruled that although race may be a factor in determining admission to public educational institutions, it may not be a sole determining factor. This permitted race to be legally considered as a factor amongst many but abolished the use of specific numerical quotas in the United States.

Justice Powell rejected grounding his analysis in terms of racial justice. He instead used the Federal Constitutional First Amendment free speech concept of academic freedom and held that the attainment of a diverse student body is a constitutionally acceptable goal for a university to achieve (REGENTS V. BAKKE, 1978: 312). He stated that this was because “[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection. 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” (REGENTS V. BAKKE, 1978: 312). Despite the empowering nature of his words, Justice Powell’s sole focus on the diversity of ideas benefit, undermined the true spirit of any affirmative action policy, which is to remedy society's racism and promote racial justice and equality (TREVINO, 2002: 451).

It is thus particularly troubling that diversity has become the contemporary dominant defense of affirmative action in the university setting, and in doing so has pushed more substantive racial equality justifications to the background. Moreover, “diversity” has been deeply critiqued as a paltry conceptual basis for supporting affirmative action. For instance, U.S. Critical Race Theorist Derrick Bell noted that “the concept of diversity, far from a viable means of ensuring affirmative action in the admissions policies of colleges and graduate schools, is a serious distraction in the ongoing efforts to achieve racial justice” (BELL, 2003:1622). This is

because Bell was concerned that “diversity enables courts and policymakers to avoid addressing directly the barriers of race and class that adversely affect so many applicants” (BELL, 2003:1622). Similarly, Charles Lawrence has cautioned that “diversity cannot be an end in itself--it is substanceless. It has no inherent meaning” (LAWRENCE, 1997: 765). This is because “diversity” detached from racial justice can signify any human difference unrelated to social inequality.

The weakness of the current U.S. approach to “diversity” is well exemplified by the contemporary Supreme Court affirmative action jurisprudence. Indeed, despite the stated constitutionality of the diversity rationale for affirmative action, the Supreme Court further narrowed the ability of universities to use affirmative action programs in the 2013 case of *Fisher v. University of Texas at Austin*. In *Fisher*, the Court affirmed the process of considering race as a factor amongst others in a public university’s admission efforts to achieve a more diverse student body. But the Court went on to specify that the specific admission process of a university is nevertheless subject to strict judicial scrutiny in its implementation to prove that the program is narrowly tailored to pursuing the goal of diversity. The *Fisher* decision further diminished the ability to effectively pursue integration with race-conscious policies by stating that in the judicial assessment of a program the university is not entitled to deference or a presumption of good faith in its operation of the program because all other non-racial options must be explored before turning to race conscious policies.

In addition, affirmative action was effectively abolished for the K-12 setting (primary and secondary schooling) in the 2007 case of *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education*. The case struck down as unconstitutional affirmative action programs in Seattle, Washington, and Louisville, Kentucky, that used race in assigning K-12 students to public schools. The 5 to 4 majority decision held that assigning students only on the basis of race violated the Equal Protection Clause of the Fourteenth Amendment. Despite the fact that the Court previously held that racial diversity can be a compelling interest for admission to a university, in the interest of achieving a *diverse* and robust exchange of ideas and developing leaders from various racial communities, the Court distinguished the intellectual diversity needs of a university from the primary and secondary school settings. Recognizing what a thin reed “diversity” has become for justifying affirmative action only in limited university settings, Justice Stephen Breyer, in his dissent, criticized the majority for jeopardizing the progress made regarding racial equality, indicating that “[t]his is a decision that the Court and the nation will come to regret.”

The Court’s most recent affirmative action decision effectively gave all states license to issue affirmative action bans themselves. In the 2014 case of *Schuette v. Coalition to Defend Affirmative Action*, the Court held that an amendment to the Michigan State constitution that bans the use of affirmative action at public universities is not a state action that inflicts injury on racial minorities in violation of the Equal Protection Clause of the

United States constitution. The Court reasoned that there was no authority in the U.S. Constitution that would authorize the Court to set aside the decision of the Michigan voters to amend its state constitution to ban the use of affirmative action at public universities.

Underlying the conservative majority's constraints on race-based (but noticeably not gender-based) affirmative action, is the premise that even "diversity" is now a weak basis for race-based affirmative action. This conservative critique of "diversity" emanates from the notion that race no longer has any meaning in our society today. The passage of civil rights laws and the growth of a small middle class of color are viewed as the equivalent of a society that has transcended race culminating in the election of our first known black president (CHO S., 2009:1589). From this perspective we are in a "post-racial" society where skin-color differences are not connected to anything socially or politically salient. The post-racial view also denies that differences in skin color add to the diversity of perspectives in a university setting or elsewhere. In short, the detachment of "diversity" from racial justice facilitates the post-racial questioning of what different racial groups have to add to the diversity of perspectives in a society.

This is strikingly evident in the text of the 2014 Supreme Court *Schuette v. Coalition to Defend Affirmative Action*, opinion on affirmative action. In the Majority decision, Justice Kennedy states "It cannot be entertained as a serious proposition that all individuals of the same race think alike." Justice Scalia similarly disdains drawing connections between differences in how one has been treated based upon race and the creation of

a diversity of perspectives about social issues. His concurring opinion equates race-conscious affirmative action as a “noxious fiction that, knowing only a person’s color or ethnicity, we can be sure that he has a predetermined set of policy ‘interests’ thus reinforcing the perception that that members of the same racial group-regardless of their age, education, economic status share the same political interests.” While it is certainly true that across the globe we have primarily moved away from eugenics-like presumptions that particular racial origins preordain our thinking and capacities, the notion that there is absolutely no connection between one’s racial status in society and how that status differentially influences one’s attitudes and opinions flies in the face of a wealth of social science data to the contrary (KINDER; WINTER, 2001: 439). For as philosopher Kwame Anthony Appiah notes “the concept of race might be a unicorn, but its horn [c]an draw blood” (APPIAH, 2014: 113). That is to say that while Scalia’s critique may echo post-modern challenges to the social construction of group differences as “essentialist,” his deconstruction is not accompanied by a concern with structural inequality that progressive critiques of essentialism contain. (VERKUYTEN, 2003: 371). “Essentialism” is the presumption that there are intrinsic links between a group difference like race and culture. Scalia’s concern with essentialism is limited to viewing the use of group classifications as the sole cause of inequality.

What then can be done to revitalize “diversity” to better reflect the race justice objectives of affirmative action? Charles Lawrence suggests that affirmative action supporters infuse the diversity rationale with meaning by

focusing its purpose on anti-racism and anti-subordination with politics that promote a commitment to remedying past discrimination, addressing present discriminatory practices, and reexamining traditional notions of merit in the reproduction of elites (LAWRENCE, 2001: 931-2). The benefit of doing so is borne out by the comparison to India. Specifically, in Meera Deo's comparison of the origins, evolution, and outcomes of affirmative action policies in the U.S. with those in India, she found that an overall difference in justifications has led to divergent outcomes in these countries. "India's dependence on equality principles as the foundation for affirmative action has led to increasing social equality through these programs there, while equality has not been achieved and should not be expected in the U.S. where the primary justification for affirmative action rests on diversity" [disaggregated from racial equality]. (DEO, 2013: 1).

One method for infusing an anti-racism purpose into the diversity rationale for affirmative action is to incorporate the emerging insights about the operation of implicit bias. Research in the field of cognitive psychology reveals that we all harbor biases (RESKIN, 2005: 33). Part of the reason for enduring social hierarchies is that individuals rely on stereotypes to process information, utilizing biases they do not even know they have. These implicit biases, as psychologists call them, are picked up over a lifetime, absorbed from our culture, and work automatically to color our perceptions and influence our choices (LAWRENCE III, 2008: 977).

In 1998, the scientific literature introduced an Implicit Association Test (IAT) designed to detect the extent of an individual's implicit biases (GREENWALD et al.1998: 1465-66). Thereafter, a massive study called Project Implicit has used a simple online version of the IAT to measure the

pervasiveness of implicit social bias

(<https://implicit.harvard.edu/implicit/iatdetails.html>). The project, housed jointly at the University of Virginia, Harvard University and the University of Washington, collects 20,000 responses a week—and hundreds of researchers are using its data to predict how people will behave based on their unconscious prejudices (KRONHOLZ, 2008: W6). The project is funded in part by the National Institute of Mental Health and the National Science Foundation.

Project Implicit's online IAT studies how quickly individuals “associate a group of people, shown in photographs, with either positive or negative words.” The IAT is rooted in the very simple hypothesis that people will find it easier to associate pleasant words with faces and names of socially favored groups than with socially disfavored group faces and names. Ease of association, measured by judgment speed, is taken as evidence for an implicitly-held attitude toward that social group. Thus for instance, the IAT test administrators would say that one has an implicit preference for thin people relative to fat people if they are faster to categorize words when Thin People and Good share a response key and Fat People and Bad share a response key, relative to the reverse. There are IAT tests that measure implicit bias regarding gender, sexuality, religion, Arab-Muslims, disability, age, weight, skin-tone, and race. Once the test is completed, test-takers receive ratings like “neutral,” “slight,” “moderate,” or “strong” preference for a particular group as a measure of their implicit bias on the subject tested. In short, the IAT measures the strength of associations between concepts like particular racial groups and positive or negative evaluations or

stereotypes about that concept.

Over a decade of testing in the United States with six million participants demonstrates pervasive ongoing bias against non-Whites and lingering suspicion of Blacks in particular (KRONHOLZ, 2008: W6). Some 75 percent of Whites, Latinos, and Asians show a bias for Whites over Blacks (BANAJI & GREENWALD, 2013: 221 n. 6). In addition, Blacks also show a preference for Whites. Similar results have been found in implicit bias testing outside of the United States, such as in Argentina, Brazil and Mexico (<http://www.projectimplicit.net/index.html>). Moreover, in a comparison of implicit racial attitudes measured by the Implicit Association Test of unconscious racial attitudes in Cuba, the Dominican Republic, and Puerto Rico, the study found that all three of the Caribbean nations displayed higher rates of implicit bias than in the United States (Peña et al., 2004).

In the educational context, studies indicate that teachers generally hold different expectations of students from different ethnic origins, and that implicit prejudiced attitudes were responsible for these different expectations, as well as the ethnic achievement gap in their classrooms (VAN DEN BERGH, 2010: 497). Research shows that teachers who hold negative prejudiced attitudes appear more predisposed to evaluate ethnic minority students as being less intelligent and having less promising prospects for their school careers (Staats & Patton, 2013: 1). The pervasiveness of implicit bias in society and the educational setting strongly suggests that the selection of students can be similarly affected by unexamined stereotypes and implicit biases. Bluntly stated, university

admission offices and educational institutions are not immune from the operation of implicit bias.

However, we are not slaves to our implicit associations. Biases can be overcome with a concerted effort (BANAJI, 2003: 3). Remaining alert to the existence of bias and recognizing that biases may intrude in an unwanted fashion into judgments and actions can help to counter their influence (MONTEITH et al., 2010: 183). Thus, if an individual acknowledges and directly challenges his or her biases, as opposed to trying to repress them, it is possible to overcome such prejudices (KANG; BANAJI, 2006: 1063).

Race-conscious affirmative action programs provide educational institutions the needed space for acknowledging and addressing implicit bias. Specifically, race-conscious admissions policies give decision makers the ability to consider the accomplishments and potential of students in a context that tries to neutralize any implicit biases. In admissions contexts primarily based on numerical testing scores, having an affirmative action policy can counter the implicit bias that can inform the design of admission tests and policies. This is because when institutionally activated, egalitarian goals undermine and inhibit stereotyping (JOLLS & SUNSTEIN, 2006: 969).

Furthermore, affirmative action policies also provide the needed sense of accountability with the expectation that educational institutions and Admission Officers may be called on to justify their aggregate decision results to others. Research finds that having a sense of accountability can decrease the influence of bias, and encourage decision makers to self-check for bias (LERNER; TETLOCK, 1999: 255). Numerous social psychology

studies demonstrate that fair-minded people are usually unable to detect unfairness in their decision making in the absence of aggregate data (CROSBY et al., 2003: 107). Affirmative Action provides the systematic aggregate data to ferret out unconscious bias in admissions decisions by showing any patterns of exclusion however unintentional. Furthermore, when affirmative action is presented as a system for monitoring bias rather than denigrated as a system of granting preferences, public support for the policies increases (CROSBY et al., 2003: 93).

Infusing the notion of “diversity” with the insights from implicit bias research would mean that “diversity” could not be so easily undermined as the over-simplistic equivalence of racial difference with innate diverse perspectives. Instead, “diversity” would be situated as a method for “de-biasing” a selection process and monitoring discrimination. The proposal is thus related to but distinct from Jerry Kang and Mahzarin Banaji’s suggestion that the law of affirmative action be expanded to conceive of the program participants themselves as “de-biasing agents” that help to diminish discrimination (KANG; BANAJI, 2006: 1063). The Kang and Banaji suggestion is supported by research that demonstrates that exposure to racial group members in non-stereotyped positions helps to decrease implicit bias routed in stereotyped perspectives. They therefore encourage envisioning affirmative action program participants as assisting in the fight against racial discrimination rather than as the recipients of a benefit in order to reinforce the continuing legality of government-based affirmative action as a compelling state interest.

The proposal of this Article for diversity as de-biasing the selection process would in a related but distinct manner shift from focusing on diversity as yielding a mix of different perspectives or representatives to decrease bias, to instead considering the goal of “diversity” as a device for making admissions procedures more equitable and justified amidst the continuing implicit bias that can be actually measured. Furthermore, connecting the diversity goal as a device for procedurally addressing implicit bias in admissions decisions and standards also repositions affirmative action as a racial justice project. Racial justice comes into focus with the implicit association research proof that implicit bias is widespread and highly predictive of behavior. With the salience of race thus refortified by the implicit association research, “diversity” affirmative action policies can be recalibrated to pursue racial equality.

In short, affirmative action can act as a pair of corrective lenses for decision-makers for whom a long history of race-based stereotyping would otherwise influence them to unconsciously view applicants of color as presumptively less desirable. The corrective lenses of affirmative action do not in of themselves grant applicants of color coveted positions - they simply permit applicants of color to be seen and thus considered fairly in the first place despite the continuing existence of racism in our society.

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