AFFIRMATIVE ACTION AND EDUCATION EQUITY IN HIGHER EDUCATION IN THE UNITED STATES AND CANADA

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August 2016

A thesis submitted to McGill University in partial fulfillment of the requirements of the degree of Master of Laws.

ABSTRACT

In recent years, many of the most contentious debates regarding affirmative action in the United States have taken place on the terrain of universities. Numerous court decisions have examined the extent to which university admissions policies may accord preferences to students from underrepresented and racialized groups. There has been much less litigation in the Canadian context; however, the underlying issue of how to insure equality and inclusion in the face of systemic discrimination is a critical concern. Therefore, the purpose of this thesis is to explore the key legal developments regarding affirmative action initiatives in higher education in Canada and the United States, by highlighting the important differences in the justifications. This thesis will advance and explore two divergent rationales that emerge as salient in affirmative action programs in the United States and Canada. In the American context, diversity is adopted as the main justification for affirmative action programs in universities, as opposed to the Canadian context where it is 'ameliorating the conditions of disadvantaged groups,' that is employed as the key justification for what are called education equity programs. In looking at the experience of each country, this thesis will also examine some of the reasons and ways in which we can understand the different approaches and justifications that have emerged in Canada and the United States in the affirmative action debate.

RÉSUMÉ

Au cours des dernières années, les universités américaines ont été impliquées dans les débats les plus litigieux concernant la discrimination positive. En effet, de nombreux jugements américains ont analysé les programmes d'admission des universités favorisant l'accès à l'éducation des groupes d'étudiants qui peuvent être fréquemment sous-représentés. Au Canada, les cas de discrimination positive ont fait l'objet de moins de litiges. Néanmoins, il est pertinent de se demander comment les universités canadiennes peuvent garantir l'égalité des chances et d'inclusion dans le but de mieux appliquer le concept de la discrimination positive. C'est pourquoi l'objectif de cette thèse est d'analyser le cadre juridique des développements instaurés en matière de discrimination positive en études supérieures au Canada et aux États-Unis, tout en ayant une perspective comparative. Cette thèse étudiera principalement les programmes de discrimination positive aux États-Unis et au Canada. Aux États-Unis, la diversité est la raison première d'instaurer une politique de discrimination positive dans les universités alors qu'au Canada, les programmes d'accès à l'égalité en matière d'éducation se traduisent par l'amélioration des conditions des groupes systématiquement discriminés. En examinant la situation des deux pays, cette thèse fera ressortir leurs points de vue quant à la place qu'occupe la discrimination positive dans les universités.

ACKNOWLEDGEMENTS

I owe gratitude to a number of people who have been instrumental and helpful in the preparation and completion of my thesis.

First and foremost, I am indebted to my supervisor, Professor Colleen Sheppard for all the generous help she extended to me throughout my Masters degree. With great appreciation, I received from her an incredible amount of support and guidance in almost every stage of my thesis. Her patience, enthusiasm as well as her scholarly expertise made my journey a stimulating and unforgettable one. To say the least, this thesis would not have been possible without her close friendly supervision.

I would also like to thank my friends, classmates, the staff and professors at the McGill faculty of law, as well as all my colleagues at the United Nations, for their unwavering encouragement and assistance during the research and writing of this thesis.

No words of gratitude would be complete without mentioning each and every member of my family. I am very thankful to my father, who has always inspired me to study law and motivated me to keep learning and searching for knowledge; to my mother, who has not only taught me the value of education but also stood next to me whenever I faced a difficulty in my life; and to my brother-in-law, who has offered me constant encouragement to advance my studies. Finally, I would like to express my heartfelt gratitude to my sister for her friendship and unfailing moral support during the challenging times of my research and writing. Despite the distance, she was always there to listen and offer her comforting advice and guidance.

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INTRODUCTION

Canada and the United States have created various programs to increase enrolment of under-represented groups in education. The main method used in the context of higher education has been the implementation and use of affirmative action or education equity in university admissions policies.[1] There has been however a critical divergence in the justifications advanced and endorsed for affirmative action or education equity in the United States and in Canada. In the American context, the key justification for special programs in higher education has been diversity. In contrast, historical and social disadvantage (also known as "ameliorating the conditions of disadvantaged groups in society") has been advanced as the main justification for education equity in Canada. Two potential explanations that attempt to address and help to understand these divergent rationales include: (1) different conceptions of equality, particularly the emergence of substantive equality in the Canadian context and (2) differences in political culture, specifically the more individualistic focus of American law and policy.

Despite the different justifications for affirmative action or education equity in Canada and the United States, affirmative action in higher education in both countries is related to the idea of widening access and enrolment of under-represented groups in colleges and universities. Access to higher education, in particular to professional programs such as law schools and medical schools have become increasingly competitive and challenging over the years. Admissions criteria in professional schools[2] in universities across Canada and the United States, without a doubt, vary from one school to another. Admissions in both the United States and Canada are generally based on a candidate's undergraduate GPA (grade score) and the score

[1] Louise Morley, "Gender equity in Commonwealth higher education" (2005) 28:2-3 Womens Stud Int Forum 209.
[2] A professional school is a postgraduate school or college which trains students for a particular profession.

he/she obtains on the LSAT exam (Law School Admission Test) for law school or the MCAT exam (Medical College Admission Test) for medical school.[3] Other criteria such as extracurricular activities, reference letters and personal performance in an individual or group interview are also carefully considered. Despite these exigent admissions policies, many universities have adopted and established special admissions programs for minority applicants, where race or ethnicity is often a factor taken into account in an individual's application. These programs are known as affirmative action in the American context or education equity in Canada.

Affirmative action or education equity is a fairly broad term that implies giving special consideration to people of minority backgrounds or groups that have been historically excluded. Affirmative action in the university context normally means that a university faculty or school has adopted an admissions policy, where a certain number of spots in admissions (whether it be in the form of a quota or percentage system) are allocated for applicants of minority background. Affirmative action is usually regarded as a public policy, which helps a country achieve social justice by giving preference to minorities, or individuals who have been historically excluded.[4] Generally, synonyms of affirmative action are "preferential treatment" or "preferential policy".[5] The term "preference" in the context of affirmative action programs is often viewed as a term that favors individuals who are disadvantaged. Preferential treatment in higher education is based on an individual's membership in an ethnic or racial group.[6] Other terms used to describe

[3] In Canada, in the province of Quebec, students from CEGEP can be admitted to an accredited law school in Quebec without taking the LSAT exam. For more information see: Federation of Law Societies in Canada, Canadian Law School Programs, online: http://flsc.ca/national-initiatives/canadian-law-school-programs/

[4] Maria Clara Dias, "SYMPOSIUM - AFFIRMATIVE ACTION AND SOCIAL JUSTICE" (2004) 36:3 Conn Law Rev 871.

[5] *Ibid.*

[6] Clyde W. Summers, "Preferential Admissions: An Unreal Solution to a Real Problem" (1970). Faculty Scholarship Series. Paper 3913. Online: http://digitalcommons.law.yale.edu/fss_papers/3913.

affirmative action in higher education are "education equity", "special program" or "positive discrimination".[7] For reasons, which will be discussed later in this thesis, Canada has chosen to adopt the term education equity, rather than affirmative action. Education equity programs are defined as programs which are "proactive, planned programs designed to remedy group-based problems of systemic discrimination".[8]

1. An Overview of Affirmative Action in Universities in Canada and the United States

Affirmative action has been one of the most challenging policy issues in American and Canadian higher education.[9] In both the United States and Canada, affirmative action initially began in the employment context and gradually expanded to higher education. In the United States, the debate on affirmative action has been contentious and controversial. The courts have been divided on their position of affirmative action policies in institutions of higher education. Unlike the American context, in Canada, there has been much less litigation on this issue. However, similar to the United States, many universities in Canada, especially law schools and medical schools, have established special admissions programs.[10] In Canada, the purpose of these programs has been mostly to increase the enrolment of aboriginal persons, whereas in the American context, the focus of such programs has been mostly to increase the enrolment of African Americans.[11] Furthermore, in the United States, the justification for such programs has been to enhance and

[7] The terms "education equity", "affirmative action", "special program" or "positive discrimination" are used in this thesis as reference to "proactive initiatives or positives remedies to redress institutional or societal discrimination". For a more detailed explanation of each of these terms, see: Colleen Sheppard "Study Paper on Litigating the relationship between equity and equality", Ontario Law Reform Commission, 1993.
[8] Colleen Sheppard "Study Paper on Litigating the relationship between equity and equality", Ontario Law Reform Commission, 1993, at p.10. In order to have a better understanding of the purpose and aspects of education equity, see Ontario Confederation of University Faculty Associations, "Educational Equity" (Spring 1992) 12 Canadian Women's Studies 99.
[9] Ivan Katchanovski, Neil Nevitte & Stanley Rothman, "Race, Gender, and Affirmative Action Attitudes in American and Canadian Universities" (2015) 45:4 Can J High Educ 18 at 18.
[10] *Ibid.*
[11] *Ibid* at 19.

promote a diverse student body in universities. However, in Canada, the key justification for special admissions programs in universities has been to ameliorate access of disadvantaged groups in society. [12]

In the 1970s, affirmative action in higher education was seen as a temporary measure to allow greater access of individuals of minority background into universities. However, in 2016, many universities across Canada and the United States, in particular law schools and medical schools, still continue to adopt preferential treatment in their admissions policies. This is because in both nations, the underlying issue of how to ensure inclusion in higher education in the face of systemic discrimination continues to be of critical concern.[13]

i. United States

One of the key sources for equality and non-discrimination that emerges in the University context debate in the United States is the American constitution, most specifically, the Fourteenth amendment (which includes an Equal Protection Clause), which was passed in the wake of the civil war in the mid1860s.[14] It includes the clause that all states shall provide equal protection of the laws.[15] Public universities are bound by the constitutional requirements of the equal protection clause.[16] In contrast, in Canada, public universities are not bound by the Canadian constitution, in particular, by the Canadian Charter of Rights and Freedoms, because

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[12] *Ibid* at 20.

[13] Frances Henry and Carol Tator, *Racism in the Canadian university: demanding social justice, inclusion and equity, (2009)* University of Toronto Press, Scholarly Publishing Division. Also see: Genevieve Fuji Johnson and Randy Enomoto, *race, racialization and anti-racism in Canada and Beyond, (2007)* University of Toronto Press, Scholarly Publishing Division.

[14] Walter R Allen, "A forward glance in a mirror: Diversity challenged—access, equity, and success in higher education" (2005) 34:7 Educ Res 18 at 20. US Const amend XIV, § 1 [equal protection clause] states that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws*."

[15] *Ibid*.

[16] *Ibid* at 3.

the government does not run universities. As will be observed later on in this thesis, most of the debates around affirmative action programs in the United States involve constitutional cases about whether a special program or treatment based on race is in violation of the equal protection guarantee of the Fourteenth amendment.[17]

In 1961, in the United States, President John F. Kennedy first used the words "affirmative action" in the employment context, more specifically in the context of ensuring racial integration in workplaces, which are federally financed.[18] The political and social movements of the late 1960s gradually caused universities in the United States to voluntarily amend their admissions programs in order to increase minority enrolment.[19] While affirmative action policies were being adopted in the employment context, gradually, affirmative action policies were also implemented in the education context. Interestingly, law schools and medical schools were among the first faculties in universities to adopt affirmative action policies in their admissions. At the same time, it was also law faculties and medical faculties that were the first to find themselves in the middle of a contentious debate both within the courts and among the public. Universities, in particular law faculties, saw affirmative action as a way of insuring greater access of racial and ethnic minorities in the legal profession. However, as will be observed throughout this thesis, affirmative action wasn't openly welcomed in the United States; it was seen as an attack on the "status quo". It caused much debate and controversy among the public, and within the judiciary.

[17] Although most of the cases in the United States on affirmative action programs have focused on the US constitution, there have been nonetheless challenges to universities' preferential treatment programs by using the Civil Rights Act of 1964. The Civil Rights Act of 1964 (Pub.L. 88-352, 78 Stat. 241) includes: Title IV which prohibits discrimination in public schools and colleges; Title VI which prohibits discrimination on the basis of race or national origin by recipients of federal funds; and Title IX which prohibits discrimination on the basis of sex by recipients of federal funds. "Teaching with Documents, the Civil Rights Act of 1964 and the Equal Employment Opportunity Commission", online: National Archives, < https://www.archives.gov/education/lessons/civil-rights-act/>.

[18] Affirmative action emerged on March 6, 1961, when President John F. Kennedy issued Executive Order 10925 in the employment context.

[19] U.S. Department of Education, National center for Education Statistics, *Conceptualizing Access in postsecondary education, report of the policy panel on access*, August 1998, p.5.

ii. Canada

The Canadian experience regarding affirmative action in higher education has been very different from the American one. This difference is due to many factors which will be highlighted in this thesis. One clear difference is in the language that has been used for preferential policies in higher education. In the debate on affirmative action, Canada has adopted the term "education equity" rather than affirmative action. The term education equity emerged in Canada as a byproduct of the term "employment equity". In the early 1980s, Justice Rosalie Abella was commissioned to do a royal commission report on inequality and discrimination in employment, and was given a specific mandate to deal with visible minorities, persons with disabilities, aboriginal people and women.[20] She published a report and recommended that the Canadian government introduce "employment equity" programs in the federal employment contracts program, which reaches into the university sector. In her report she made reference to the debate and backlash on affirmative action in the United States to conclude that it was necessary to change the terms of the debate. She explains in her report that equity initiatives are proactive initiatives that will help identify, understand and remove systemic barriers to inclusion.[21]

In Canada, throughout most of the 20th century, institutions of higher education were reserved for upper class Anglophone Canadian males.[22] Therefore, initially access of minority groups in higher education began with regard to women. In fact, in the 1960s, the debate was with regard to gender, in particular, on how to ensure women's access to higher education.[23] Although women continued to be the focus of affirmative action policies in higher education, in

[20] Judge Rosalie Silberman Abella, *Report of the Commission on Equality in Employment* (Ottawa: Ministry of Supply and Services, 1984) [Abella Report].
[21] *Ibid.*
[22] Neil Guppy, "Access to higher education in Canada" (1984) 14:3 Can J High Educ 79 at 80.
[23] *Ibid* at 81.

the 1970s and 1980s, the focus shifted to ensuring access of other minority groups such as aboriginal persons.[24] Ethnicity and race began to be a factor taken into account. With the adoption of the Canadian Charter of Rights and Freedoms, in particular through section 15, affirmative action began to be viewed as a "core strategic intervention geared toward the struggle for equality".[25]

Similar to the United States, affirmative action programs or education equity initiatives in higher education developed on a completely voluntary basis. Professional programs such as law schools and medical schools were also among the first programs to implement preferential policies in Canada. These professional programs at the university level were viewed as a means of increasing the representation of minority groups in the legal and medical profession.

In contrast to the American experience, there has not been much criticism or litigation on affirmative action in Canada.[26] Nonetheless, it is crucial to highlight the extent to which educational initiatives have developed on the legal terrain in Canada. The legal context highlights the importance of these initiatives; their legality and contribution to remedying deeply rooted inequalities in Canadian society.[27]

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[24] *Ibid* at 81.

[25] Uduak Archibong & Phyllis W Sharps, "A comparative analysis of affirmative action in the United Kingdom and United States" (2011) 2:2 J Psychol Issues Organ Cult 17.
Canadian Charter of Rights and Freedoms, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11., "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[26] Colleen Sheppard, "Challenging Systemic Racism in Canada: Affirmative Action and Equity for Racialized Communities and Aboriginal Peoples" in Elaine Dubordieu ed, *Race and Inequality: World Perspectives on Affirmative Action* (U.K: Ashgate, 2006) 43 at 49.

[27] *Ibid.*

2. Overview of Chapters

Even if there has been less litigation in the Canadian context, affirmative action has been one of the most debated issues in both American and Canadian higher education.[28] Despite race and ethnicity being at the core of the affirmative action debate in universities in Canada and the United States, the experiences of each nation strikingly differ. In order to understand the experiences of each nation, and highlight the lessons that can be extracted from each, this thesis will be divided into three main chapters.

Chapter 1 focuses on the affirmative action debate in the American context. It highlights how, in the United States, the debate on affirmative action has been very contentious and has received significant backlash from the public. Part one of chapter one will highlight how affirmative action expanded from the employment sector to higher education in the late 1960s, and how most of the early initiatives creating special admissions programs began in law schools and medical schools. In this thesis, law school initiatives will be used as the focus of affirmative action programs given the recent important litigation in this domain. Reference will also be made to medical school initiatives since similar initiatives have also taken place in medical schools. Part two explores how diversity has been used as the key justification for affirmative action in higher education in the United States. It will highlight important court cases that set the legal background for university admissions policies, and how diversity became a "compelling state interest" to justify affirmative action in higher education.[29] Part three will conclude the chapter by looking at the most recent developments on affirmative action in higher education, and how the debate in the United States is far from being resolved.

[28] Katchanovski, Nevitte & Rothman, *supra* note 9 at 19.
[29] *Ibid.*

Chapter 2 of this thesis focuses on education equity in higher education in the Canadian context. In Canada, there has been little litigation on affirmative action in higher education, which perhaps explains why there has not been any significant backlash from the Canadian public. There are no comparative studies of race and affirmative action in higher education in the United States and in Canada.[30] In fact, while conducting the literature review for this thesis, it was astonishing to find that there was a gap in research on affirmative action in higher education in Canada. This was striking, considering that many universities across Canada, in particular law schools and medical schools, have adopted special admissions programs, where race or ethnicity is taken into account in considering a candidate's application.[31] Despite this, there has been very little research conducted on initiatives taken by Canadian universities and the justifications for such initiatives. Therefore, chapter two of this thesis will begin by first discussing how "education equity" emerged in Canada. Part two will then discuss some of the special programs and policies adopted by admissions offices, focusing on law schools in Canadian universities. In the third section, an important Canadian university initiative, the Indigenous Blacks & Mi'kmaq (IB&M) initiative, which was created by the Schulich School of Law at Dalhousie University in Nova Scotia, will be discussed in detail. This program will be analyzed as a form of case study. It serves as one of the most important examples and initiatives adopted by a Canadian university to increase the representation of minority groups (in this case Indigenous Blacks and Mi'kmaq) to reduce discrimination. Part four will examine the key justification for affirmative action in Canada -- the amelioration of disadvantaged groups in society. This is most evident in the text of section 15(2) of the Canadian Charter of Rights and Freedoms, which sets out the explicit constitutional guarantee of affirmative action programs in Canada:

[30] *Ibid.*
[31] *Ibid* at 21.

> Section 15(2): "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".[32]

Finally, in part five important legislation and landmark cases by the Supreme Court of Canada that interpret s. 15(2) will be analyzed in length.

Chapters one and two reveal divergent justifications for affirmative action in Canada and the United States. Therefore, chapter 3 will attempt to address and understand the different experiences of these two countries with regard to affirmative action programs, by examining comparative law academic scholarship on the issue. In fact, there has been some scholarship that endeavors to explain this difference in experience. Through the literature, two potential explanations will be examined. The first suggests that the divergent approaches is due to the different conceptions of equality adopted by each country: the United States has adopted a more formal approach to equality whereas Canada has adopted a more substantive approach to equality in the affirmative action debate. The second potential explanation relates to differences in political culture in Canada and the United States. It appears that there is a greater willingness in the Canadian context to rely on group-based categories, unlike the United States, which adheres to an individualistic approach in its culture and legislation. The final section of this comparative chapter will discuss some of the critical questions that emerge in looking at the difference in the affirmative action experience both north and south of the border. Important questions such as the place of merit in admissions, as well as, who truly benefits from special programs will be discussed.

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[32] *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

3. Overview of Thesis and Methodology

Since most of the debate around affirmative action has risen in the context of professional programs in higher education, especially in the American context, mostly law schools and medical schools will be referred to as examples throughout this thesis. However, it is important to note that the use of affirmative action is not unique to professional schools. It has been adopted in other faculties and programs of higher education as well.[33]

Moreover, in this thesis, reference will be made to different universities and admissions policies in the United States and Canada. The schools mentioned throughout this thesis were chosen from different parts of the country to illustrate different types of admissions programs that are currently in place. A comprehensive assessment of affirmative action admissions programs is beyond the scope of this thesis.

A comparative law approach is used in this thesis, because it also allows one to "investigate systematically two or more entities [in this case two countries] with respect to their similarities and differences, in order to arrive at understanding, explanation and further conclusions."[34] Using the comparative approach, especially when analyzing and addressing matters from a legal perspective is viewed as one means of arriving at "legal transformation".[35] When dealing with matters of state and constitutional law, such as affirmative action programs, applying the comparative approach becomes even more relevant and significant, because it

[33] Katchanovski, Nevitte & Rothman, *supra* note 9 at 20.
[34] Reza Azarian "Potentials and Limitations of Comparative Method in Social Science" (2011) 1:4 International Journal of Humanities and Social Science, 113 at 116.
[35] Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014) at 227

allows one to better understand "the moral conclusions of a large number of relatively independent constitutional decision-makers".[36]

Though many countries around the world have adopted affirmative action, Canada and the United States were the two countries chosen for comparison and analysis in this thesis for significant reasons. First, the economic and political systems of both nations allows for Canada to be a "useful point of comparison" with the United States, and vice-versa.[37] Second, both Canada and the United States have adopted extensive affirmative action initiatives in the admissions processes of postsecondary education.[38] Third, Canada and the United States have very similar academic cultures and education systems, especially with regard to the post-secondary sector.[39] Finally, both countries place the same amount of value and importance on the development and advancement of postsecondary education.[40]

Furthermore, both the United States and Canada are two countries that place a great deal of importance on social justice and equal opportunity in access to education. How much preference is placed and the reason for this preference has differed and has caused much discussion. Analyzing and discussing the policies adopted by each country, in light of its own history and challenges, allows for a better understanding of the debate. Therefore, the comparative approach was adopted in this thesis, not so that one can compare and judge which nation has adopted better policies, but rather to allow one to extract and understand the important lessons that can be taken from the experience of each nation when analyzed in light of each other. Although the Canadian and American experience on affirmative action in higher education

[36] Rosalind Dixon "A Democratic Theory of Constitutional Comparison" (2008) 56:4 American Journal of Comparative Law 947, at 956.
[37] *Ibid.*
[38] Katchanovski, Nevitte & Rothman, *supra* note 9 at 19.
[39] *Ibid.*
[40] *Ibid.*

has been very different, on a global level, they are two nations that are interconnected in many ways.[41] Their interconnectedness calls for a comparative study, especially in matters of race and ethnicity.[42]

Moreover, in the comparative method, analyzing closely the "other" state or society leads to a more clear understanding of "one's own history". [43] As such, looking at the "other" can help either country, whether Canada or the United States, to close its own gap in research and policy[44], especially since they are countries of comparison that have progressed and developed in the same geographical area.[45] Though this thesis was not written with the purpose of closing "the gap in research and policy", it was written with the intention of contributing to a discussion on a matter of continuing importance; that of inequality, disadvantage and discrimination in higher education. After all, "any type of academic inquiry that advances our knowledge and understanding – is potentially of great value",[46] especially in trying to move forward in the debate.

[41] To see how Canada and the United States are interconnected in areas of trade, politics, history, and more see: Benjamin Johnson & Andrew R Graybill, *Bridging national borders in North America: Transnational and comparative histories* (London: Durham University Press, 2010).
[42] Ratna Ghosh, "Diversity and Excellence in Higher Education: Is There a Conflict?" (2012) 56:3 Comp Educ Rev 349 at 363 "In Canada and the United States, different groups "have been victims of racism" at different times in history", but have faced similar disadvantage and exclusion.
[43] *Ibid.*
[44] *Ibid.*
[45] Ibid.
[46] Hirschl, *supra* note 35 at 280.

CHAPTER 1

THE AMERICAN CONTEXT: EMERGENCE OF DIVERSITY AS A CENTRAL JUSTIFICATION FOR AFFIRMATIVE ACTION IN THE US

1. Expanding the Scope of Affirmative Action to Higher Education in the United States

Before discussing the key justification for affirmative action programs in the university context in the United States, namely diversity, it is important to first highlight how affirmative action emerged in higher education, in particular in professional programs such as law schools. This will allow for a better understanding of the affirmative action debate in the American context and how diversity gradually became the reason and focus of this debate.

i. Shifting from Abolishing Discrimination to Creating Racial Preferences: Law Schools

In the United States, during most of the 20th century, universities had discriminatory admission policies, which for decades barred minorities from entering institutions of higher education.[47] Most universities admitted minority applicants only if they were forced to. For example, it was only in the 1950s, after a decision rendered by the U.S. Supreme Court, that the University of Texas was required to admit African American students into their law faculty.[48]

[47] Discrimination existed in all levels of education. In the 1950s it was in *Brown* v. *Board of education Topeka*, that the U.S. Supreme Court struck down segregation in the public school system. Up until that point, the U.S. Supreme Court had ruled in the case of *Plessy* v. *Ferguson* in 1896, that segregation was not discrimination. In *Ferguson*, the U.S. Supreme Court had created the idea that you could have racially separate but equal facilities, and that this would not violate the constitution. In other words, the Court held that only equality of treatment was required under the U.S. Constitution. It was only in the 1950's, in the *Brown* v. *Board of Education of Topeka* decision that the "separate but equal" doctrine from the Ferguson case was struck down. For more information see: "Civil Rights Alert, The Struggle to Keep College Doors Open", online: Harvard University, <http://www.law.harvard.edu/civilrights/alerts/access.html.

[48] In *Sweatt v. Painter*, 339 U.S. 629 (1950) the Court made it mandatory for the University of Texas to admit African American students into their Law Program.

After the 1950s, the low enrolment rates of minority students in universities made it obvious that court decisions would not be enough to increase the number of minority applicants in college programs. Clearly, other measures were needed.

In 1964, there were approximately three hundred first-year African American law students enrolled in law schools in the United States, and a total of 701 African American law students.[49] One third of these students however were enrolled in historically black law schools.[50] Overall, 1.3% of the total number of students enrolled in law school in the United States was African American students. At the time, the enrolment of Asians, Puerto Ricans and Mexican-Americans was even lower.[51]

In the Southern states in the 1960s the enrolment of African American students in law schools was noticeably low due to existing widespread discrimination.[52] In fact, many schools in the South excluded African American students directly, while a few law schools had very minimal places reserved for them.[53] As such, most of the litigation against the "separate but equal" doctrine arose initially from southern law schools.[54] As for the northern law schools, interestingly, there was no attempt at all to document the racial discrimination that most likely existed in law school admissions in the northern part of the country as well.[55]

In 1962, the American Association of Law Schools (AALS) Committee on Racial

[49] Richard H Sander, "A systemic analysis of affirmative action in American law schools" (2004) Stanford Law Rev 367 at 375.
[50] *Ibid.*
[51] *Ibid*. For example, "Asians, who have generally been overrepresented in higher education relative to their numbers, made up about 0.7% of the U.S. population in 1970, but only 0.4% of third-year students in law schools in 1971-1972. By 2000, Asians made up 3.8% of the U.S. population but 6.7% of first-year law students." Also see: "Legal Education and Bar Admissions Statistics, 1963-2002" online: American Bar Association, <http://www.abanet.org/legaled/statistics/le_bastats.html>
[52] Krista L Cosner, "Affirmative action in higher education: Lessons and directions from the Supreme Court" (1995) 71 Ind LJ 1003 at 1007.
[53] Sander, *supra* note 49 at 375.
[54] *Sweatt v. Painter*, 339 U.S. 629 (1950); & *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).
[55] Sander, *supra* note 49 at 375.

Discrimination in Law Schools, noted that there wasn't any clear application of a special admission program in law schools outside southern states.[56] It was during the period where civil rights issues were being discussed at large, from 1964 to 1967, that the low enrolment of African American students in law schools was noted as a problem within the legal community.[57] At that time affirmative action programs were barely known to the public.[58] The underrepresentation of minorities, in particular African Americans, in law schools was due to a number of factors, such as: either there were few African American students with strong credentials; or the perception that law schools were reserved only for the elite; or the cost of law school and the minimal financial aids were available.[59] Only a few law schools at the time had created "outreach programs" with the purpose of enrolling African American students. One important initiative, known by the public, was the program created by Harvard in 1965, which had brought black college students to Cambridge for a summer semester.[60]

It was through a report by the American Association of Law Schools in 1964 that the emergence of affirmative action in admissions policies in law schools became noticeable in the U.S. The report explained that there were very few initiatives and efforts being made by laws schools to recruit minority students, namely African American students.[61] However, the writings in the report also showed that law schools were beginning to shift from the notion of abolishing

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[56] *Ibid* at 376.
[57] *Ibid*.
[58] *Ibid*.
[59] *Ibid*.
[60] *Ibid*. Also see: Robert O'neil, "Preferential admissions: equalizing access to legal education*",* (1970) U of Tol. L. Rev. 281 at 301.
[61] Benjamin F. Boyer et al., Report of the committee on racial discrimination: Problem of Negro applicants, 1964 Ass'n Am L. Schs. Proc. 195 at 195; The report suggested that entrance requirements might be lowered to accommodate "the cultural deficiencies" found in African American students' applications to law schools. The report also made reference to objections in lowering admissions policies "The objections, however, deserve serious consideration: (1) Inverse discrimination is unfair to white students; (2) lowering admission standards to help unqualified Negroes is unfair to the Negro student and to the law school; (3) the lack of background and undergraduate training of Negroes generally must be remedied, not in the law schools, but in the elementary schools, high schools and colleges. It is too late when they reach law school".

discrimination to the concept of creating racial preferences in admissions policies. This shift in idea was mostly due to the increase in urban racial violence in the United States.[62] The racial riots, which intensified during the summer of 1965 to 1967,[63] led President Johnson to create the "National Advisory Commission on Civil Disorders"[64] which was chaired by Governor Kerner of Illinois at the time.[65] Executive Order 10925 issued by President John F. Kennedy had put the focus of affirmative action in the United States on the employment sector. However, it was the racial and political tension of the mid 1960s in the United States that led the scope of affirmative action to expand to university admissions.[66] In the wake of the racial riots across the country, professional programs at the university level, starting with law schools and medical schools, slowly began to adopt preferential programs voluntarily, in the hopes of making their admissions processes more inclusive. The adoption of these voluntary initiatives were sparked by two important factors: the release of the Kerner Commission report in March 1968 by the "National Advisory Commission on Civil Disorders" and the assassination of Martin Luther King Jr., in April 1968.[67]

The Kerner Commission report described the racial discrimination that was present across the United States in many areas such as employment and education. In order to prevent racial riots from happening again, one of the proposals in the Kerner Commission report was to

[62] Matthew W Hughey, "White backlash in the 'post-racial' United States" (2014) 37:5 Ethn Racial Stud 721 at 721.
[63] Reynolds Farley, *The Kerner Commission Report Plus Four Decades: What Has Changed? What Has Not?* (National Poverty Center Working Paper Series, National Poverty Center, 2008) at 4.
[64] For more information on National Advisory Commission on Civil Orders, see: United States Commission on Civil Rights, *Toward equal educational opportunity: affirmative admissions programs at law and medical schools*, *held in Washington, D.C., June 1978*. (Washington, D.C.: U.S. Commission on Civil Rights, 1978).
[65] United States Commission on Civil Rights, *Toward equal educational opportunity: affirmative admissions programs at law and medical schools*, *held in Washington, D.C., June 1978*. (Washington, D.C.: U.S. Commission on Civil Rights, 1978).
[66] United States Commission on Civil Rights, *Affirmative action in American law schools a briefing before the United States Commission on Civil Rights, held in Washington, D.C., June 16, 2006.* (Washington, D.C.: U.S. Commission on Civil Rights, 2007) at iv.
[67] Sander, *supra* note 49 at 378. Also see: United States. *Kerner Commission Report of the National Advisory Commission on Civil Disorders* (Washington: U.S. Government Printing Office, 1968).

increase the quality of public school education at all levels for African American students. Without using terminology related to affirmative action, the report suggested that one way of improving education for African Americans was to develop programs that "promote racial integration".[68] Such integration seemed even more necessary following the riots that took place after the death of Martin Luther King Jr. In fact, his death triggered a nation-wide "crisis in race-relations" which had a large influence on law schools adopting racial preference in their admissions programs:[69]

> Many of those running both private and public institutions felt they had to do something rapid and dramatic to demonstrate progress in black access. A large number of colleges and graduate programs, including law schools, therefore initiated or accelerated racial preference programs in 1968 and succeeding years. Ahead of most other disciplines, a number of leaders in legal education had been laying the groundwork for a large-scale racial preferences program a year before King's death. The Council on Legal Education Opportunity (CLEO), organized by the AALS, the Law School Admission Council (LSAC), the American Bar Association (ABA), and the National Bar Association, with funding from the federal Office of Equal Opportunity (OEO) and the Ford Foundation, was created in 1967 to develop large-scale summer programs for promising nonwhite students with low academic credentials.[70]

As a result of the social and political movements mentioned above, it was around 1968-1969 that law schools started to take voluntarily initiatives by establishing special admissions programs in order to allow greater access to minority individuals.[71]

ii. Affirmative Action Initiatives in Law School Admissions

Although most of the special programs in college admissions were devised to enroll "minorities" which included African Americans, American Indians, Mexicans, and Puerto Ricans,[72] the beneficiaries of special admissions programs were mainly African American

[68] Farley, *supra* note 63 at 6.
[69] Sander, *supra* note 49 at 378.
[70] *Ibid.*
[71] *Ibid.*
[72] Clyde W. Summers, *supra* note 6. Also the American Bar Association Commission on Racial and Ethnic Diversity uses the term "minority" to describe "racially and ethnically diverse law students and lawyers (e.g. those persons of African, Hispanic, Asian, Pacific Islander, or Native American ancestry)." American Bar Association

students. This was mostly due to the fact that the United States had a history of slavery, and, affirmative action, which was an outcome of the civil rights movement, was initially viewed and used as a form of reparation for past discrimination.[73] As such, the creation of preferential admissions programs in law schools caused a greater increase in the enrollment of African American Students, than other minority groups.[74] For example, the number of African American students in first-year law schools (other than historically black schools) increased "from about two hundred in 1964-1965, to perhaps five hundred in 1968-1969, eight hundred in 1969-1970, and seventeen hundred in 1973-1974."[75]

In the fall semester of 2001, in the United States, there were approximately 3400 African American students enrolled in first-year classes in law schools across the country.[76] This translated to around 7.7% of the total students enrolled in their first year.[77] In the fall semester of 2013, there were approximately 3600 African American students enrolled in first year law school classes.[78] As it can be observed, the enrolment of African American students in law schools in the late 1960s to mid-1970s increased quickly. However, from the mid-1970s to 2000, and especially after the millennium, the enrolment rates were not that high, despite the creation of more affirmative action programs in law school admissions across the country.[79]

Law Student Division, Diversity Plan, (Approved by the Law Student Division Board of Governors), online: <http://www.americanbar.org/content/dam/aba/administrative/law_students/diversity-plan.authcheckdam.pdf>

[73] Kevin Outterson, "Affirmative Action as Reparations for Slavery and Legal Discrimination: Amicus Brief in Support of Respondents" (2003).

[74] R Palmer, "The Perceived Elimination of Affirmative Action and the Strengthening of Historically Black Colleges and Universities" (2010) 40:4 J Black Stud 762.

[75] Sander, *supra* note 49 at 379.

[76] *Ibid* at 375.

[77] *Ibid*. For more information on enrolments also see American Bar Association's Minority Enrollment Statistics for 1971 to 2002, online at <http://www.abanet.org/legaled/ statistics/minstats.html>

[78] *Ibid*. For more information see statistics from the American bar association, online: <http://www.americanbar.org/content/dam/aba/migrated/legaled/statistics/charts/stats_13.authcheckdam.pdf>

[79] United States Commission on Civil Rights, *supra* note 64.

One of the reasons for this is that over the years, while law schools were trying to eliminate discrimination by attempting to recruit minority students, they were also becoming more and more selective in their admissions processes. Law schools started to become increasingly competitive in their admissions, which in turn, made access to law schools even more difficult for underrepresented people such as African Americans.[80]

Another reason is that while college admissions adopted preferential treatment programs, many legal challenges to affirmative action programs emerged. A backlash against affirmative action began to rise, mostly from white applicants who had been rejected from university programs, in particular from law schools and medical schools.[81]In the midst of the backlash, universities and the courts also began to question how to achieve "fairness" in admissions processes while applying different standards to minority applicants. For instance, the LSAT in the 1970s was viewed as a "culturally biased test" that did not demonstrate the academic ability of minority students.[82] It was only around the late-1970s that law schools started to view the LSAT as a way of determining the potential success of a non-white student.[83] However, some observers argue today that the LSAT is still a culturally biased test, as there are many students who do not have the same opportunities[84] as middle-class white students, due to their socioeconomic background.[85]

By the 1970s, more than half of the law schools in the United States had created an affirmative action program in their admissions policies, where they reserved a number of spots in

[80] Sander, *supra* note 49 at 377.
[81] Hughey, *supra* note 62 at 723.
[82] Michael B Huston, "DeFunis v. Odegaard: Preferential Law School Admissions for Racial Minorities" (1974) 8 Urb Ann 311 at 312.
[83] Sander, *supra* note 49 at 380.
[84] Morley, *supra* note 1 at 209.
[85] Sander, *supra* note 49 at 379.

admissions for people of minority background, mostly for the people of African ancestry.[86] While law schools were taking these initiatives, medical schools were also doing the same. In fact, by the end of the 1960s and early 1970s, more than two-third of all medical schools in the United States had also adopted an affirmative action program in their admissions policies, where a percentage of spots in admissions was reserved for applicants from a minority group.[87] Although the special admissions programs, which reserved a number of spots for minority applicants, varied from one school to another, the underlying motivation for the creation of these programs was the same, that, "differences in academic credentials among qualified applicants are neither the sole nor the best criterion for judging how qualified an applicant is in terms of his potential to make a contribution to the faculty".[88]

Despite affirmative action initiatives adopted by admissions offices of university programs, in particular law schools and medical schools, it wasn't until the late 1970s that the United States finally saw a detailed description of what affirmative action is in higher education. This description was presented in the landmark decision of *Regents of the University of California* v. *Bakke,*[89] a case involving a preferential admissions program to medical school**,** which will be analyzed in length in the next section of this chapter**.** In the *Bakke* decision, affirmative action programs were viewed as temporary measures taken by college admissions to make universities more inclusive. The Court had stated that preferential policies would disappear within a couple of decades. In 2016 universities still continue to adopt and maintain affirmative action policies in university admissions. However, the debate on affirmative action in the United

[86] Morley, *supra* note 1.
[87] United States Commission on Civil Rights, *supra* note 64 at 62.
[88] Regents of the University of California v. Bakke, 18 Cal. 3d 34, 553 P.2d 1152, 1173, 132 Cal. Rptr. 680, (1976), cert. granted, 429 U. S. 1090 (1977) (Tobriner, J., dissenting).
[89] *Regents of the University of California v. Bakke*, 438 US 265 [Bakke]

States has changed over time. What started as a result of the social and political movements in the 1960s became a much more complex matter in the late 1970s with the *Bakke* decision and with the decisions that would follow. As mentioned earlier, affirmative action was initially created and seen as one way of repairing the adverse effects of slavery, which had caused much discrimination for African Americans in the employment and education sector. In the late 1970s and through the landmark decision of *Bakke*, the affirmative action debate in the U.S. rose to another level. Diversity emerged as a compelling purpose and justification for the development of affirmative action programs in higher education.

2. Emergence of Diversity as a Justification for Affirmative Action

In the 1970s, admissions offices in universities in the United States started to make mention of promoting diversity on campus, and the educational benefits it provides for students.[90] Diverse classrooms were seen as essential to advancing research, acquiring quality learning experiences, and problem-solving skills.[91] It was also viewed as fundamental to learning how to live in an increasingly diverse society. As will be analyzed in detail in this section, the *Bakke* case is essential to the affirmative action debate in the United States because it set the legal background for university admissions policies that would arise after 1978.[92] The diversity rationale, which was adopted in the *Bakke* decision, became even more prominent through the decisions that would follow years later. Despite the rising backlash and litigation over affirmative action in the United States, today, diversity continues to be the justification for the use of race and ethnicity in university admissions processes.

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[90] Patricia Gurin, *Defending diversity affirmative action at the University of Michigan* (Ann Arbor: University of Michigan Press, 2004) at 62.
[91] Allen, *supra* note 14 at 220.
[92] Gurin, *supra* note 90 at 63.

i. Diversity in Bakke

Regents of the University of California v. Bakke deals with the case of Allan Bakke, a thirty-five-year-old white male student who had applied two times for the University of California Medical School at Davis, once in 1973 and again in 1974. He was rejected from the program each time.

The Medical School of the University of California at Davis opened in 1968 with an entering class of 50 students. In 1971, the size of the entering class was increased to 100 students, a level at which it remains. No admissions program for disadvantaged or minority students existed when the school opened. After two years, the faculty initiated a special admissions program to increase the representation of "disadvantaged" students in each Medical School class. The medical school at Davis thus had two separate admissions programs: regular admissions and special admissions.[93] Under the regular admissions program, applicants had to have a grade point of at least 2.5 on 4.0; otherwise, the applicant was normally rejected right away.[94] After close consideration by the admissions committee, about one out of every six applicant was called for an interview. Following the interview, the admissions committee on a scale of 1 to 100 rated the candidate.[95] The candidate's score (known as the "benchmark score") was based on the following factors: interview performance, overall undergraduate grade point average, his or her sciences courses grade point average, Medical College Admissions Test (MCAT) scores, extracurricular activities, biographical data and letters of recommendation. Based on the candidate's overall score on 100 and their overall file, the admissions committee would then make offers of admissions to candidates it deemed successful. Under the regular admissions program, the admissions committee would also generate a waiting list and the chair

[93] Bakke, *supra* note 89 at 265
[94] *Ibid.*
[95] *Ibid.*

of the committee had the discretion of including on this list, candidates who were deemed to have "special skills".[96]

The special admissions program had a separate procedure and its special candidates were not ranked against the candidates in the general admissions process. Also, the members of the special admissions committee were different from the members of the regular admissions committee. In fact, the majority of the members in the special admissions committee came from minority groups, whereas the members in the regular admissions committee did not. On the application form to apply to the medical program at Davis, applicants were asked to specify whether they would like to be considered as "economically and/or educationally disadvantaged" and as "members of a minority group".[97] Special candidates did not have to have a grade point of at least 2.5 on 4.0 to apply to the program,[98] they could apply and be accepted into the program with a undergraduate grade point lower than 2.5. Approximately, one out of every 5 special candidates was called for an interview. Following the interview, the candidate was also given a "benchmark" score.[99] The special admissions committee would then transfer the files of the special candidates with the highest benchmark scores to the general admissions committee. The general admissions committee would then look over the dossier of the selected special candidates and would have the discretion of rejecting special candidates who they found did not satisfy certain course requirements or for other discretionary reasons.

At the end of the process, 16 special candidates were admitted into the Medical program of 100 students. During a four-year period, it was noted that 63 candidates were admitted into the Medical program under the special admissions program and 44 under the regular admissions

[96] *Ibid.*
[97] *Ibid.* Minority group in the 1973 and 1974 applications implied being either black, Chicanos, Asian or American Indian. See Bakke, *supra* note 89, at 265-266.
[98] Bakke, *supra* note 89 at 265.
[99] *Ibid.*

program.[100] Also, no disadvantaged whites were accepted under the special program during this four-year period.[101]

Bakke, the respondent, was a white male applicant who applied in 1973 and again in 1974 for the Medical program at Davis.[102] In 1973, he had a score of 468 out of 500 but was rejected from the program since no applicants in the regular admissions program with less than a score of 470 were being accepted after Bakke's application, which had been filed late in the year. However, at the time his application was filed, there were four special admission slots that were unfilled. In 1974, Bakke applied again to the Medical program at Davis. Despite applying early and having score of 549 out of 600, he was rejected from the program once again. Special applicants who had much lower scores than Bakke were admitted into the Medical program both years.[103]

After receiving his second rejection in 1974, Bakke filed an action in state court for mandatory, injunctive and declaratory relief to compel the University of California Medical School at Davis to admit him into the program.[104] Bakke argued before the trial court that the special admissions program operated to exclude him on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment, a provision of the California Constitution, and s 601 of Title VI of the Civil Rights Act of 1964.[105] The Petitioner, the University of California Medical School at Davis, cross-claimed for a declaration that its special program was lawful. The state court ruled that the special program functioned as a racial quota, due to the fact that minority applicants in that program were rated only against each other, and 16

[100] *Ibid.*
[101] *Ibid* at 266.
[102] Cosner, *supra* note 52 at 1017.
[103] Bakke, *supra* note 89 at 266.
[104] *Ibid.*
[105] *Ibid* at 266-267.

spots out of 100 were allocated for only them.[106] The court also ruled that the University could not take into account race in its admissions policy, and that the program violated the Federal and State constitutions and Title VI of the Civil Rights Act of 1964. Nonetheless, the court did not order that Bakke be admitted into the medical school at Davis.[107]

By applying a strict scrutiny standard, the California Supreme Court concluded that "the special admissions program was not the least intrusive means of achieving the goals of the state of integrating the medical profession and increasing the number of doctors willing to serve minority patients."[108] The Court also held that the University's special admissions program violated the Equal Protection Clause. Also, since the University could not satisfy the burden of demonstrating that Bakke, without the special program, would not have been admitted, the court ordered his admission to the Medical program at Davis.

Before the Supreme Court, the question to be addressed was whether the University of California violated the Fourteenth Amendment's equal protection clause, and the Civil Rights Act of 1964, by using an affirmative action policy for admission to its medical school.

The Justices of the Supreme Court were very divided in their decision in *Bakke*.[109] Although the decision was rendered 5-4, there was no single majority opinion. In brief, four of the nine judges agreed that any racial quota system supported by the government was in violation of the Civil Rights Act of 1964 and unconstitutional. Justice Powell, who agreed with the four judges on this point ordered that the University admit Bakke into their medical program. However, Justice Powell also stated that the use of racial quotas by the University violated the equal protection clause of the Fourteenth amendment.

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[106] *Ibid.*
[107] *Ibid.*
[108] *Ibid.*
[109] Cosner, *supra* note 52 at 1018.

Justice Powell who announced the judgment of the court found that "Title VI proscribes only those racial classifications that would violate the Equal Protection Clause if employed by a State or its agencies.[110] He explained that "since the petitioner could not satisfy its burden of proving that respondent would not have been admitted even if there had been no special admissions program, he must be admitted."[111] Despite finding in Bakke's favor, Justice Powell held that universities could use race as a factor to create and uphold a diverse student body:

> Race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include 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. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.[112]

Justice Powell made reference to Harvard College's admissions policy as an acceptable and justifiable program, which takes race into account to achieve diversity in higher education:

> In recent years, Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. . . .in practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer.[113]

Justice Brennan, Marshall, White, and Blackmum stated that in order to address and correct societal discrimination, racial preferences should be allowed and taken into account in higher

[110] Bakke, *supra* note 89 at 281-287.
[111] Bakke, *supra* note 89 at 267.
[112] Bakke, *supra* note 89 at 317.
[113] Cosner, *supra* note 52 at 1018. Also see: Bakke, *supra* note 46. Note: Harvard College's admission policy conveys a race neutral conception of diversity.

education.[114] However, they stressed that it should be allowed temporarily.[115] Justice Rehnquist, Burger, Stevens and Stewart on the other hand held that taking into account race violated Title VI of the 1964 Civil Rights Act.[116]

The four justices in the dissent held that the use of race as a criterion in admissions decisions in higher education was constitutionally permissible. Despite their lengthy discussion, the Court, overall, did not create any clear test to be able to differentiate between illegal discrimination "from the legal pursuit of diversity".[117] The *Bakke* decision in reality allowed schools a high degree of discretion.[118] In fact, a study by political scientists showed that the *Bakke* decision initially had no impact on creating a diverse student body, as the enrolment of non-whites in law school and practices employed by law school admissions had not changed at all.[119] The study found that the only effect of the *Bakke* case on achieving diversity on campus was the increase in range of racial and ethnic groups to receive Justice Powell`s idea of `plus consideration` in admissions.[120] Also, another effect that the Bakke decision had on special programs was that race was the main factor taken into account in trying to achieve a diverse student body in law schools.[121] Other factors, if any, were often ignored in law school admissions.

Despite the lack of clarity from the Court on its position on affirmative action programs in admissions policies in universities, following *Bakke*, the courts nonetheless continued to use the diversity rationale as a compelling purpose and justification for affirmative action programs

[114] Bakke, *supra* note 89 at 369
[115] *Ibid.*
[116] *Ibid* at 267
[117] Sander, *supra* note 49 at 383.
[118] *Ibid.* Michael B Huston, *supra* note 82 at 312.
[119] Mark J. Sullivan, "Affirmative Action and Minority Enrollments in Medical and Law Schools by Susan Welch and John Gruhl," (2001) 1 U. Md. L.J. Race Relig. Gender & Class 143 at 144.
[120] *Ibid.*
[121] Allen, *supra* note 14 at 20.

in higher education.[122] Furthermore, after *Bakke*, it wasn't only in institutions of higher education that diversity was taken into account to justify preferential policies. Diversity was also considered as an important purpose and justification for affirmative action programs in other areas and industries.[123]

3. Diversity in the Wake of the Bakke

Since the *Bakke* decision, universities in the United States have used the diversity rationale as a justification for the creation and adoption of affirmative action programs.[124] However, due to the sharply divided position of the justices of the U.S. Supreme Court and the lack of clarity on preferential programs in law school admissions, following the Bakke decision, many law schools found themselves vulnerable to law suits. Bakke had provided no concrete guidelines on how to ensure the constitutionality of affirmative action programs.[125] Students who were rejected from professional programs, such as law schools, challenged the schools` preferential admissions programs by arguing that race was the sole factor taken into account in admissions programs. In most of these lawsuits, the applicants questioned whether the purpose of achieving diversity on campus (as brought forward by Justice Powell in Bakke), was a compelling state interest under the Constitution. They argued that even if the goal of achieving

[122] Roy L Brooks, "Affirmative Action in Higher Education: What Canada Can Take from the American Experience" (2005) 23 Windsor YB Access Just 193 at 196.
[123] Cosner, *supra* note 52 at 1022. Also: For instance, in 1990, in the decision of *Metro Broadcasting Inc. v. Federal Communication Commission*, 497 U.S. 547 (1990), the U.S. Supreme Court accepted two Federal Communication policies that would favor racial minorities when distributing broadcast licenses. The Federal Communication Commission (FCC) had implemented these policies to promote broadcast diversity. They argued that there wasn't much minority participation in the broadcast industry and that this situation was unfavorable to minority audiences as well as to viewers.
[124] Kimberly West-Faulcon, "The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws" (2009) Univ Pa Law Rev 1075 at 1147.
[125] Brooks, *supra* note 122.

diversity was a compelling state interest, the preferential programs being adopted by most schools were not tailored enough to meet this goal.[126]

i. Hopwood v. University of Texas Law School

In the wake of *Bakke*, one of the cases to question whether diversity was a compelling state interest was the decision of *Hopwood* v. *University of Texas Law School.*[127] In this decision, Cheryl Hopwood and three other white plaintiffs sued the University of Texas' law school admissions program, which placed preferential treatment on applicants of African American or Mexican American origin. It allocated 5% of its first-year spots to African American students and 10% to Mexican-American students.[128] The 5th U.S. Court of Appeals found that diversity, because of its benefits in a university's student body, was a compelling justification for admissions program in higher education.[129] However, the Court also ruled that the law school's admissions program was not narrowly tailored enough to meet the program's purpose of achieving diversity because it used a percentage quota reserved for only minority students.[130] The court struck down the percentage quota in question and yet stated that race preferences were needed to achieve diversity. The Court was once again unclear on its position of affirmative action programs in school admissions. On the one hand, it recognized diversity as a compelling interest for this program, but it argued, on the other hand, that race preferences affect the rights of "innocent third parties" such as the plaintiffs in this case.[131] By stating the latter, the *Bakke* decision became ignored in Louisiana, Mississippi and Texas, as the Fifth circuit had jurisdiction

[126] Sander, *supra* note 49 at 387.
[127] *Hopwood v. Texas*. 78 F.3d 932 (5th Cir. 1996) [Hopwood].
[128] Laura C Scanlan, "Hopwood v. Texas: A backward look at affirmative action in education" (1996) 71 NYUL Rev 1580 at 1597.
[129] Cosner, *supra* note 52 at 1019. It also argued that the admissions program attempted to remedy past discrimination see arguments on p. 1019.
[130] Scanlan, *supra* note 128.
[131] Cosner, *supra* note 52 at 1020.

in these states.[132] The Supreme Court allowed the ruling to stand by declining to hear the appeal. However, one year later, in 1997, the Attorney General in Texas stated that all public universities in Texas have to apply "race-neutral" measures in their admissions policies.[133]

The Hopwood case caused many to believe that the Court was stepping away from racial preferences as a means of achieving diversity in universities.[134] However, the landmark cases that followed proved otherwise.[135]

ii. Gratz v. Bollinger

Following *Bakke*, another fundamental decision on the affirmative action debate in the United States is the decision of *Gratz* v. *Bollinger*.[136] Petitioners, Gratz and Hamacher, two Caucasian Michigan residents, applied for the University of Michigan's College of Literature, Science and the Arts (LSA) in 1995 and 1997.[137] Although both petitioners were qualified, they were both denied admission to the LSA. The university placed African-Americans, Hispanics and Native Americans under the category of "underrepresented minorities" and the university admitted normally every qualified applicant from these groups.[138] The university had created a point system where its applicants needed to score at least 100 points out of 150 to guarantee admission.[139] However, the university accorded an automatic 20 points to underrepresented

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[132] *Ibid.*
[133] In 1997, the former Lieutenant Governor of Texas, William P. Hobby Jr., requested a clarification from Texas Attorney General on how *Hopwood* would apply to universities. The Attorney General issued a formal opinion that Hopwood would apply to all "internal institutional policies" (in other words policies beyond admissions) in all public universities in Texas. For more information see: Kenneth L Marcus, "Diversity and Race-Neutrality" (2008) 103 Northwest Univ Law Rev Colloquy 163 at 166.
[134] Marcia G Synnott, "Evolving Diversity Rationale in University Admissions: From Regents v. Bakke to the University of Michigan Cases, The" (2004) 90 Cornell Rev 463 at 465.
[135] In 2003, Supreme Court ruling in *Grutter* v. *Bollinger* 539 U.S. 306 (2003) [Grutter], invalidated the Hopwood decision.
[136] *Gratz v. Bollinger*, 539 U.S. 244 (2003) [Gratz]
[137] *Ibid* at 244.
[138] *Ibid.*
[139] *Ibid.*

minorities.[140] A student with a perfect SAT score was only accorded 12 points. The Petitioners filed a class action alleging that the university's use of racial preferences in undergraduate admissions programs violated the Equal Protection Clause of the Fourteenth Amendment.

In a 6-3 majority ruling, the Court decided that the University of Michigan's point system which gave 20 points extra to underrepresented minorities was unconstitutional. The Court ruled that the university's use of race in its affirmative action admission policy was not narrowly tailored to achieve diversity.[141] The Court found that the fact that the university automatically distributed 20 points, or one-fifth of the points needed to guarantee admission, to every "underrepresented minority" applicant solely because of race was not narrowly tailored to achieve educational diversity. They stated that the "predetermined point allocations" in the university program was unconstitutional because it meant that the "diversity contributions of applicants cannot be individually assessed."[142] However, the Court did not establish what is meant by applications that are "individually assessed".[143]

iii. Grutter v. Bollinger

At the same time, in the same year, the Court ruled differently in another decision dealing with an affirmative action admission program at the university level. In the *Grutter* decision, the petitioner, Barbara Grutter was a white Michigan resident who had applied to the University of Michigan Law School in 1996. In December 1997, she filed a suit in the United States District Court for the Eastern District of Michigan against the Law School, the Dean of the Law School and the Director of the Admissions at the Law School. She argued before the Court that the

[140] *Ibid.*
[141] Gratz, *supra* note 136 at 244
[142] *Ibid* at 279.
[143] Sander, *supra* note 49 at 389.

respondents had discriminated against her on the basis of race and that this was a violation of the Fourteenth Amendment.[144] She further contended that her law school application had been rejected because the law school had used race as a "predominant" factor.[145] In other words, the law school would give applicants who belong to certain minority groups "a significantly greater chance of admission than students with similar credentials from disfavored racial groups".[146] The Law School, in other words, had a "plus" system giving more points to certain students from a minority background. The Law School argued that there was a compelling state interest to ensure that students from underrepresented minority groups, such as African Americans and Hispanics, were part of the faculty's student body to ensure diversity. Therefore, once again diversity was the instrumental justification for using race and ethnicity in the school's admissions. The law school stated that the aim of their special admissions processes was to "ensure that these minority students do not feel isolated or like spokespersons for their race; to provide adequate opportunities for the type of interaction upon which the educational benefits of diversity depend; and to challenge all students to think critically and reexamine stereotypes."[147] The Petitioner, on the other hand, argued that the law school had "no compelling interest to justify their use of race in the admission process". [148]

Thus, the question before the Court was whether the University of Michigan's Law School's use of race - to obtain "the educational benefits that flow from a diverse student body" - was justified by a compelling state interest. [149]

[144] Grutter, *supra* note 135 at 306
[145] *Ibid.*
[146] *Ibid.*
[147] Grutter, *supra* note 135 at 380.
[148] Grutter, *supra* note 135 at 317.
[149] *Ibid.*

The Court ruled in a 5-4 majority that the Law School had a "compelling interest" in promoting diversity. Justice O'Connor writing for the majority stated that an admissions process that uses race, that may favor underrepresented minority groups, and that also takes into account other factors assessed on an individual basis for every student, does not entail a "quota system" which would have been unconstitutional under the Bakke decision. Justice O'Connor explained that the "Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body."[150]

Justice Ginsburg and Justice Breyer agreed with the majority but did not hold the Court's belief that affirmative action policies would not be necessary twenty-five years down the line.[151]

Justice Thomas, Chief Justice Rehnquist, Justice Kennedy, and Justice Scalia dissented by stating that the Law School's use of race as a "predominant" factor, or "plus" system, was in reality like a quota system which had been struck down as unconstitutional in the *Bakke* decision.[152] Chief Justice Rehnquist argued that the admissions process adopted by the Law School appeared to be a quota system because the percentage of African American applicants was nearly identical to the percentage of African American applicants that were admitted to the law faculty.[153]

Overall, it appeared that the decision of *Gratz* and *Grutter* had put an end to the court's divided position on the use of race to achieve diversity.[154] In summary, in the *Grutter* decision, the Court was faced with a plus system in the University of Michigan's Law school admissions

[150] *Ibid* at 343.
[151] *Ibid.*
[152] *Ibid* at 346.
[153] *Ibid* at 379 to 381
[154] Robert A Sedler, "Special Feature - The Future of Affirmative Action: Gratz and Grutter in Context- Affirmative Action, Race, and the Constitution: from Bakke to Grutter" (2004) 92:1 Ky Law J 219 at 219.

program, where race was only one among many factors taken into consideration in admitting candidates to the faculty. The Court, in a 5-4 decision, upheld the affirmative action program on the basis that student body diversity was a compelling state interest and that therefore the strict scrutiny test was met. The strict scrutiny test, although not mentioned in the constitution or American legislative history, allows for a state to make "race-conscious decisions" for justifiable reasons – or a "compelling state purpose" to achieve a stated end result.[155] The Court ruled that having a student body composed of underrepresented minority groups was a "narrowly tailored means of achieving that interest, thereby satisfying the test."[156] The compelling interest in the *Grutter* decision was diversity and since the Court ruled that race did not function as a quota system, but rather as a "plus" factor in the minority candidate's individual assessment, the school's affirmative action program was considered constitutional.

However, in the *Gratz* decision, the Court ruled that the school's point system (which accorded an automatic 20 points to every underrepresented minority applicant) although was created with the same purpose of achieving diversity, the Court held that it did not pass the strict scrutiny test, as it was "not narrowly tailored to achieve diversity".[157] In other words, it was unconstitutional because race was the key factor taken into account for every underrepresented minority candidate and thus functioned as a quota.

The decision of *Grutter* and *Gratz* was referred by Justice Scalia as the "Grutter-Gratz split doubleheader",[158] because on the one hand the Court ruled that the preferential policy at the law school of the University of Michigan was constitutional but on the other hand the same university's policies at the undergraduate level was ruled as unconstitutional. These two cases

[155] See: *Adarand Constructors Inc. v. Pena*, 515 U.S. 200 (1995); *United states v. Paradise*, 480 U.S. 149, 166 (1987) [Adarand]
[156] Brooks, *supra* note 122 at 195–196.
[157] *Ibid* at 196–197.
[158] *Grutter v. Bollinger,* 123 S.Ct. 2325 (2003) at 2349 (Scalia, J., dissenting)

settled that the deciding factor was based on how much "individual review" was given to each application.[159]

The *Bakke* decision set the ground for the affirmative action debate by stating that diversity is a compelling justification for taking race into account in admissions processes. *Gratz* and *Grutter* upheld the diversity rationale, as long as the use of race in an affirmative action admission policy is narrowly tailored enough to achieve diversity. Although it appeared as though *Grutter* and *Gratz* ended the affirmative action debate on higher education in the United States, the cases that came after 2003 proved otherwise.[160]

4. The Aftermath of Grutter and Gratz

About a month after the *Grutter* and *Gratz* decisions were rendered, university staff from the top forty-eight universities across the United States joined together and attended a conference organized by Harvard University and the University of Michigan in order to examine and consider their admissions policies in light of the *Gratz* and *Grutter* cases.[161] The attendees at the conference, which included high university officials and administrators, spoke of how their admissions policies could be modified to meet the criteria of *Bakke, Gratz* and *Grutter*. The attendees also discussed how achieving the goal of "race-blind admissions" in twenty-five years (as Justice O'Conner had pointed out) "would require broad institutional and social changes".[162] At the conference, it was predicted that the admissions policies at universities would likely face

[159] John Munich, "The Grutter-Gratz split doubleheader: The Use of Student Race in School Admission, Attendance, and Transfer Policies at the K-12 Level" (Paper delivered at the Kennedy School of Government, Harvard University conference titled 50 Years after Brown: What Has Been Accomplished and What Remains to Be Done, 23-24 April 2004) [unpublished].

[160] In a related educational context, but in the context of desegregating schools we see that the court was very reticent to allow race to be used as a mechanism to achieve diversity. The Court ruled in 5-4 decisions that programs which considered race in order to achieve diversity when assigning students to schools were unconstitutional. See: *Parents Involved in Community Schools v. Seattle School District* No. 1, 551 U.S. 701 (2007), and *Schuette v. Coalition to Defend Affirmative Action By Any Means Necessary (BAMN)* 572 U.S. (2014).

[161] Synnott, *supra* note 134 at 497.

[162] *Ibid.* Also see: Patrick Healy, "College Leaders Share Affirmative Action Ideas at Harvard" *The Boston Globe* (17 July 2003) A17.

further political and judicial challenges, in the years that would follow.[163] The participants had rightfully predicted this point because after the *Grutter* and *Gratz*, affirmative action programs in universities rose to new challenges.

Firstly, in the wake of *Grutter* and *Gratz*, the affirmative action debate rose to the legislative level. Since the Courts had upheld affirmative action programs, politics started to be used as a means to eliminate special programs. After *Grutter* and *Gratz*, petitions and referendums took place to modify the Constitution of the State of Michigan. For instance, in 2006, the electorate in Michigan passed the Michigan Civil Rights Initiative (also referred to as Proposal 2), which prohibited race as a factor in Law School admissions. Proposal 2 was similar to the California Civil Rights Initiative, which was adopted by the State of California in November 1996 to prohibit the use of race in public education.

At the judicial level, among many other examples, in 2006, a Chinese student from Yale University filed a civil rights complaint against Princeton University because he claimed that race was used as a factor to reject his application from their school.[164] Similarly, in 2012, a student at Louisiana State University and a student at Southern Methodist University filed a lawsuit against the University of Texas Admissions policy claiming that the University had a "race-conscious policy" in their admissions that violated the US constitution.[165]

i. Schuette v. Coalition to Defend Affirmative Action by Any Means Necessary

[163] Synnott, *supra* note 134.
[164] Anastasia Erbe, "Amid Chrge of Bias, Rapelye Stands Firm", *The Daily Princetonian* (30 November 2006), online: <http://dailyprincetonian.com/2006/11/30/16798/>".
[165] *Fisher v. University of Texas*, 570 U.S., Also see: "Fisher v. University of Texas at Austin challenges affirmative action in higher education", *The Daily Texan* (21 February 2012), online: <http://www.dailytexanonline.com/news/2012/02/21/fisher-v-university-of-texas-at-austin-challenges-affirmative-action-in-higher

In a more recent case by the U.S. Supreme Court, *Schuette v. Coalition to Defend Affirmative Action By Any Means Necessary (BAMN),*[166] several defendants challenged the state-based constitutional ban that had been passed by referendum through a popular vote in the state of Michigan in November 2006.[167] A day after the referendum, interest groups formed a group called the Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality by Any Means Necessary (hereinafter referred to as the Coalition). The Coalition argued before the district court that the proposition to amend the state constitution to prohibit "all sex-and race-based preferences" in public education violates the Equal Protection Clause of the Fourteenth Amendment. The U.S. Court of Appeals for the Sixth Circuit held that the proposition to amend the state constitution was unconstitutional.

The question before the U.S. Supreme Court was whether the amendment to the state's constitution to prohibit race-and sex-based discrimination and preferential treatment in public university admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment. Justice Kennedy, for the Court, delivered the majority judgment by stating that the amendment to the state's constitution did not violate the Equal Protection Clause. However, the Court did not elaborate much on its position of the amendment, and definitely not on affirmative action programs. Instead, they avoided the topic of affirmative action programs by stating that the case was not about the constitutionality of race-conscious admissions, but rather about whether voters of a state can decide to prohibit the use of race preferences in school admissions.[168] They said that a state can decide that they want absolute equal treatment[169] of

[166] *Schuette v. Coalition to Defend Affirmative Action By Any Means Necessary (BAMN)* 572 U.S. (2014) [Schuette].
[167] *Ibid.*
[168] Writing for the majority Justice Anthony Kennedy in *Schuette* states in the decision "This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it."
[169] Charles J. Russo, "Analysis of Comparative Higher Education Law" in Charles J. Russo, ed, *Handbook of Comparative Higher Education Law*, (Lanham, Maryland: R&L Education, 2013) 363 at 365.

everybody and that you shouldn't take race into account in admissions processes. Once again, however, the Court was very much divided in its decision. For instance, Justice Roberts Jr. stated that the use of race preferences might do more harm than good as it will bring support to racial awareness. Justice Scalia, on the other hand, stated that the Court should not be dividing the country into "racial blocs" by determining what policies are to be adopted. He argued that since the amendment prohibits the use of racial preferences, it directly offers equal protection under the law rather than denying such protection. Justice Thomas and Justice Clarence agreed with Justice Scalia. Justice Breyer also agreed that it is the state voters and not the courts that should determine race-conscious policies.

It was the dissenting opinion of Justice Sotomayor that brought much attention to the debate of affirmative action programs in higher education. In the *Schuette* case, Justice Sotomayor emerged as a proponent of affirmative action.[170] She argued that one of the reasons for the existence of the Equal Protection Clause of the Fourteenth Amendment was because the democratic process of voting does not offer enough protection against the oppression of minority groups.[171] She stated that the equal protection clause refers not only to the treatment of different groups under existing laws but also to the protection against the implementation of new laws that would oppress minority groups, for instance, on the basis of race. She argued that the amendment would prevent universities from applying special race-preference admissions programs, and would therefore disregard one of the main purposes of the Equal Protection Clause.[172] Justice

[170] Justice Sotomayor's position on affirmative action is also seen in her recent autobiography where she mentions that she personally benefited from special admissions programs. See: Sonia Sotomayor, *My Beloved World a Memoir by Sonia Sotomayor,* (New York: Knopf, 2013). Justice Ginsburg also joined Justice Sotomayor in her dissent.
[171] Schuette, *supra* note 166 at 1651.
[172] Schuette, *supra* note 166 at 1654. Justice Sotomayor states in the Schuette decision that the Constitution "does not guarantee minority groups victory in the political process. It does guarantee them meaningful and equal access to that process. It guarantees that the majority may not win by stacking the political process against minority groups permanently."

Sotomayor's dissenting opinion stepped away from the rigid interpretation of the Equal protection clause adopted by the other justices on the bench. Her analysis to some extent reflected Canada's approach to affirmative action initiatives - that of ameliorating the conditions of disadvantaged groups in society:

> The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society.[173]

ii. Fisher v. University of Texas

In 2016, in the most recent affirmative action decision in the United States, *Fisher v. University of Texas*,[174] In a majority decision of 4-3, Justice Kennedy, Ginsburg, Breyer and Sotomayor in *Fisher* upheld the *Grutter* case by stating that race and ethnicity can be used as a factor to ensure a compelling state interest of a diverse student body. Based on the Texas House Bill 588, the University of Texas accepts admissions of students in the top 10% of each Texas High School's graduating class (the program is referred to as the Top 10 Percent). Abigail Fisher, the plaintiff in the Fisher case, was in the top 12% of her graduating high school class. Students who don't fall in the top 10%, like Abigail Fisher, can still be accepted based on their grades, social activities, family circumstances and race and ethnicity. This second group of students makes about 25% of the admission slots.[175] Abigail Fisher filed a lawsuit claiming that the University of Texas violated her rights under the Equal Protection Clause and Fourteenth Amendment, by using race as an admissions factor to admit students into the university.[176]

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[173] Schuette, *supra* note 166. (Sotomayor J., Dissenting).
[174] *Fisher v. University of Texas*, 579 U.S. (2016) [Fisher].
[175] Christina Sterbenz., "Justice Alito Spent 50 Pages Railing Against Affirmative Action in College Admissions- These are his Main Points", (23 June 2016), online: <http://www.businessinsider.com/alito-dissent-fisher-v-texas-2016-6>
[176] *Ibid.*

Justice Kennedy for the majority explained that the University of Texas' admissions program, which takes the top 10% of each Texas High School's graduating class promotes diversity because there is a high level of segregation in the public school system in Texas. As such, the Court ruled that the compelling state interest of diversity was achieved by the University's admissions policy. Justice Alito, for the dissent, stated on the other hand that under the Top 10 Percent admissions program, only the top performing minority students at majority Black and Hispanic schools are admitted. He expressed that under the Top 10 Percent program, the University of Texas was thus favoring only a certain type of "diverse" student, namely applicants coming from wealthy families. He argued that under such a program it wasn't clear what role race plays in admissions, as the school was only focusing on the number of minority students on its campus and nothing more. He stated that this went against what affirmative action is all about because "affirmative action programs were created to help disadvantaged students",[177] rather than "benefit advantaged students over impoverished ones".[178] Overall, the *Fisher* decision reaffirmed the Court's position of diversity being the key justification for using race in admissions policies. However, the very divided opinion of the Court once more means that the debate on affirmative action is far from being resolved and that the Courts are likely to face more legal challenges in the years ahead.

In fact, despite *Fisher*, the debate on affirmative action is still ongoing in the United States. Under the recommendation of the American Bar Association, all accredited law schools in the United States have the obligation of promoting diversity on campus and in classrooms. The main method adopted by law schools to achieve this goal is using preferential treatment in

[177] *Ibid.*
[178] Lee C. Bollinger, "Affirmative Action Isn't Just a Legal Issue. It's Also a Historical One. *The New York Times* (24 June 2016), online: http://www.nytimes.com/2016/06/25/opinion/affirmative-action-isnt-just-a-legal-issue-its-also-a-historical-one.html.

admission programs.[179] However, due to the backlash from the public, and the contentious nature of the debate, some universities have become hesitant in using preferential treatment in their admissions policies.[180] Some have even gone to the extent of banning them. In fact, currently, eight states have banned affirmative action programs in admissions policies in universities, six states of which placed the said ban through a statewide referendum.[181] Interestingly, around 30 percent of all American high school students come from these eight states.[182] The State of Texas placed a ban against affirmative action programs from 1996 to 2003. Some universities also voluntarily dropped race-based affirmative action programs in their admissions policies.[183]

Despite the ongoing debate on affirmative action in higher education, and the many opponents to it, overall, in the United States, affirmative action had a positive impact on increasing the access of minorities in higher education.[184] For example, affirmative action programs in law school admissions policies in the United States were the underlying reason for the presence of diversity in law school classrooms.[185] Affirmative action programs had played a noticeable role in the student body of even the most selective types of law schools.[186] For example, without an affirmative action policy in place, it was noted that less than one percent of

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[179] American Bar Association Law Student Division, Diversity Plan, (Approved by the Law Student Division Board of Governors), online: <http://www.americanbar.org/content/dam/aba/administrative/law_students/diversity-plan.authcheckdam.pdf>.
[180] Jesse Rothstein & Albert H Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?*, Working Paper 14276 (National Bureau of Economic Research, 2008).
[181] California, Washington, Michigan, Nebraska, Arizona, and Oklahoma all passed bans through voter referenda. Florida passed the ban by an executive order issued by Governor Jeb Bush. In New Hampshire, the ban of race-based affirmative action was passed through a legislative bill. For more information see: Halley Potter, "What Can We Learn from States That Ban Affirmative Action?" *The Century Foundation*, (26 June 2014) online: <http://www.tcf.org/work/education/detail/what-can-we-learn-from-states-that-ban-affirmative-action>.
[182] *Ibid.*
[183] *Ibid.* For instance, the University of Georgia dropped their affirmative action program in their admissions policies and made the change permanent.
[184] Rothstein & Yoon, *supra* note 180 at 697.
[185] *Ibid.*
[186] *Ibid.*

the students at elite law schools would be black.[187] Yet, such programs continue to remain under scrutiny and widely debated at the judicial and political level in the United States.

Overall, in the United States, diversity emerged as the key justification for special programs because it was considered as a less controversial justification than historic societal disadvantage. Although diversity has been used as a compelling purpose for using affirmative action in higher education, as can be observed by the decisions rendered by the US Supreme Court, the United States is far from resolving the affirmative action debate. The landmark rulings from *Bakke* to *Gratz* and *Grutter* to *Fisher* altered higher education in the United States. As the debate on affirmative action continues to unfold in the United States, policies, legislation and court decisions that are yet to come will no doubt continue to shape the landscape of American higher education. As Justice Kennedy has pointed out: "it remains an enduring challenge to our nation's education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity".[188]

[187] *Ibid.*
[188] Fisher, *supra* note 174 (Justice Kennedy).

CHAPTER 2

"AMELIORATING DISADVANTAGED GROUPS IN SOCIETY" AS A KEY JUSTIFICATION FOR AFFIRMATIVE ACTION IN CANADA

1. Emergence of Affirmative Action in Canada: Anti-Discrimination Laws to Equity Programs

Similar to the American experience, in Canada inequalities are deeply embedded in a history of exclusion and prejudice.[189] Before World War II, human rights in Canada had received little attention in party platforms and public debate,[190] and antidiscrimination legislation barely existed.[191] After World War II, there was an emergence of human rights policies in Canada to advance equality rights and more importantly to offer protection against discriminatory policies.[192] In Canada, human rights policies are administered and applied at the provisional, federal and territorial level, through special human rights commissions and legislation. One of the main duties of these commissions is to handle issues related to discrimination and to develop and advance programs in domains, such as public education, employment, as well as in areas of systemic discrimination and affirmative action.

In Canada, anti-discrimination laws only began to emerge in the 1960s and 1970s.[193] It was during this same period that human rights commissions were beginning to develop in different provinces across Canada, in order to investigate discrimination complaints and publically fund legal representation to victims of discrimination.[194] Anti-discrimination laws

[189] Sheppard, *supra* note 26 at 43.
[190] Robert Brian Howe & David Johnson, *Restraining Equality: Human Rights Commissions in Canada* (University of Toronto Press, 2000) at 3.
[191] *Ibid.*
[192] See: Morton Weinfield "The Development of Affirmative Action in Canada" (1981) 13:2 Canadian ethnic studies 23.
[193] Sheppard, *supra* note 26 at 43.
[194] John Hucker, "Antidiscrimination Laws in Canada: Human Rights Commissions and the Search for Equality" (1997) 19:3 Hum Rights Q 547 at 548.

focused on individual complaints of discrimination because there was an assumption that "retroactive redress for aberrant human rights violations would suffice to ensure equality in societal institutions".[195] This assumption, however, was challenged after the 1970s, since it became evident that anti-discrimination laws were not enough to address the historically rooted discrimination in Canadian society.[196]

As in the case in the United States, in Canada too, affirmative action commenced to be implemented initially in the employment sector. In the 1970s, it was noted that the anti-discrimination laws did not address the condition of the continued under-representation of women, persons with disabilities, Aboriginal peoples and racialized communities in the employment sector.[197] Hence, in order to address the lack of representation of these groups in accessing equal employment opportunities, a Royal Commission on Equality in Employment was set up in 1983.[198] In keeping in mind the debates in the United States on affirmative action, the commission was asked to assess whether the federal government of Canada should endorse affirmative action initiatives, to which it replied positively.[199]

In 1984, Judge Rosalie Silberman Abella was appointed by the Royal Commission to inquire into the most equitable means of promoting access to employment opportunities and eliminating systemic discrimination against women, aboriginal persons, disabled persons and visible minorities. Her inquiry focused on an examination of employment practices of 11 crown

[195] Sheppard, *supra* note 26 at 46.
[196] Hucker, *supra* note 194 at 549.
[197] *Ibid.* Also see: Gary S Becker et al, eds, *Discrimination, affirmative action, and equal opportunity: an economic and social perspective* (Vancouver, B.C., Canada: Fraser Institute, 1982).
[198] The Royal Commission was set up to "inquire into the most efficient, effective and equitable means of promoting employment opportunities, eliminating systemic discrimination and assisting all individuals to compete for employment opportunities on an equal basis". See: Sheppard, *supra* note 26 at 46 and Abella Report, *supra* note 20.
[199] Sheppard, *supra* note 26 at 46.

corporations.[200] Following her inquiry, Rosalie Abella released a ground-breaking report in Canadian employment history called "Equality in Employment – A Royal Commission Report".[201] This report was indeed important, for it served as a starting point in understanding affirmative action in Canada.

In her report, Rosalie Abella stated that systemic discrimination requires systemic remedies.[202] She pointed out that what is needed is a systemic approach to discrimination in order to acknowledge that the systems and practices we adopt may have negative impacts on certain groups in our society.[203] According to Rosalie Abella, remedial measures of a systemic nature are the purpose of equity initiatives and affirmative action. They are designed to "improve the situation for individuals who, by virtue of belonging to and being identified with a particular group, find themselves unfairly and adversely affected by certain systems or practices".[204] In other words, Rosalie Abella remarked that affirmative action is understood as a systemic remedial strategy designed to "put an end to the hegemony of one group over the economic spoils"[205] and to remedy historical embedded inequalities.[206]

Instead of using the term "affirmative action" which was employed at the time in the United States, Abella began to use the term "employment equity" in her report.[207] In so doing, Abella changed the terms of the debate, since "equity," according to her, implied that "to do nothing in the face of institutionalized inequity and exclusion is to perpetuate systemic

[200] The crown corporations were: Petro- Canada, Air Canada, Canadian National Railway Company, Canada Mortgage and Housing Corporation, Canada Post Corporation, Cana- dian Broadcasting Corporation, Atomic Energy of Canada Limited, Export Development Corporation, TelegIobe of Canada Limited, The de Havilland Aircraft of Canada Limited, and the Federal Business Development Bank. See: Abella Report, *supra* note 20.
[201] Abella Report, *supra* note 20.
[202] Sheppard, *supra* note 26 at 46; Hucker, *supra* note 194 at 550.
[203] Abella Report, *supra* note 20 at 9.
[204] *Ibid.*
[205] Abella Report, *supra* note 20 at 10.
[206] Sheppard, *supra* note 26 at 47.
[207] Abella Report, *supra* note 20.

discrimination".[208] She indicated in the report that in Canada, "we may not wish to use quotas and we should therefore seriously consider calling it something else if we want to avoid some of the intellectual resistance and confusion" of the United States.[209] In other words, Abella preferred the term "employment equity" because "affirmative action" in the United States was linked to an inaccurate and rigid job quota system. Abella made reference to the negative reaction that people often faced when they heard of "affirmative action" programs because people often felt that it is a term that referred to interventionist government policies and an imposition of quotas.[210]

Following the report by Abella, the federal government adopted the Employment Equity Act in 1986.[211] The purpose of this legislation was to ameliorate the condition and access of disadvantaged groups in the work force.[212] Equity in this Act implied more than simply treating people equally, it also included adopting special measures to insure equality. According to this legislation, employers now had the obligation of developing equity plans (or affirmative action initiatives) in the employment sector, in order to increase the representation of members of minority groups in the workplace.[213]

Although the above information is related to employment rather than education, the legal development in the employment sector is nonetheless important to mention because there have been no major legislative initiatives for affirmative action in the education domain in Canada.[214] Instead, there have been several policy approaches, which have been developed solely on a

[208] Sheppard, *supra* note 26 at 47.
[209] Abella Report, *supra* note 20 at 7.
[210] *Ibid*.
[211] Employment Equity Act (S.C. 1995, c. 44) [Employment Equity Act]. Note: The Employment Equity Act was amended in 1995.
[212] Abigail B Bakan & Audrey Kobayashi, "Affirmative action and employment equity: Policy, ideology, and backlash in Canadian context" (2007) 79 Studies Political Economy 145 at 146-147.
[213] Employment Equity Act, *supra* note 211.
[214] Ghosh, *supra* note 42 at 349-350.

voluntary basis.[215] Similar to the United States, over time, equity programs in the employment sector shifted to the education sector, and in keeping in mind the same terms of the debate, educational equity emerged in higher education in Canada.

2. Initiatives in Law School Admissions in Universities across Canada

In Canada, though education is run exclusively under the provincial jurisdiction, most universities receive funding from the Federal government and are therefore obliged to adopt equity policies in their hiring processes.[216] However, when it comes to admissions policies, there are currently no provincial or federal government policies in Canada that require universities to adopt special programs in their admissions processes.[217] As such, exactly like in the United States, affirmative action in higher education developed solely on a voluntary basis in universities across Canada.

Although there have been no major legislative initiatives for affirmative action in the education sector in Canada, starting in the late 1980s, universities across Canada nevertheless started to implement special programs in their admissions policies to increase the number of minority groups in Canadian universities.[218] Similar to the United States, professional programs in Canada, such as law schools and medical schools were among the first to adopt special admissions programs for people of minority background.[219] As will be discussed throughout this chapter, the purpose of these education equity programs was to improve the conditions of disadvantaged groups in society. However, unlike the United States, the focus of these special

[215] Sheppard, *supra* note 26 at 47, 50.
[216] Carol Agócs & Catherine Burr, "Employment equity, affirmative action and managing diversity: assessing the differences" (1996) 17:4/5 Int J Manpow 30 at 34.
[217] Ghosh, *supra* note 42 at 349.
[218] Katchanovski, Nevitte & Rothman, *supra* note 9 at 20.
[219] Larry Chartrand et al, "Law Students, Law Schools and Their Graduates" (2001) 20 Windsor Yearbook of Access to Justice 211 at 212.

programs in Canada has been to increase the representation of aboriginal persons,[220] rather than African Americans.

Furthermore, unlike the United States, currently, in Canada there is a gap in research regarding the number of special admissions programs in universities across Canada, as well as the effectiveness of these programs for applicants of minority background.[221] In chapter one of this thesis on the United States, the *Bakke* decision was analyzed in length because it gave a detailed idea and understanding of the structure of special admissions programs in American universities. Since there have been no similar decisions or research conducted on the structure and composition of special admissions programs in Canada, in this section some of the admissions policies of law schools in universities across Canada will be examined with the aim of a better understanding of the current affirmative action initiatives in Canadian universities. It should be noted that the information provided below was not examined with the purpose of filling the gap in research on Canadian university admissions policies, but rather to serve as examples to better comprehend what types of special admissions policies are currently in place in Canada and how they are structured. In addition, the universities mentioned below provide a selective sampling of admissions policies in law schools from different parts of the country and the material that has been analyzed here was received from the university online websites.

[220] Aboriginal population in Canada include First Nations (630 bands), Metis, and Inuit. For more information see: Ghosh, *supra* note 42 at 358.
[221] Katchanovski, Nevitte & Rothman, *supra* note 9 at 21-22.

Admissions and Special Programs in Law schools across Canada

UNIVERSITY	Specifies # of spots available for admissions category	Category for aboriginal applicants	Refers to diversity in admissions policy	Section specifically mentioning education equity in admissions policy	LSAT requirement
University of Ottawa		✓	✓	✓	✓
McGill University		✓	✓		-
University of Toronto	✓ *	✓	✓		✓
University of Saskatchewan	✓ **	✓	✓		✓
University of British Colombia		✓	✓		✓
Dalhousie University	✓	***	✓		✓

*The admissions policy specifies that on average seven aboriginal students enter the Faculty of Law each year, and a total of 21 across all three years.
**There is no quota or strict numbers of spots reserved for aboriginal students but on average 17 applicants receive offers in the aboriginal category and around 10 of those applicants register in first year law school.
*** A quota is used: every year twelve students from the Indigenous Blacks and Micmacs communities (six Black and six Micmac) are accepted.
Note: McGill University does not request the LSAT as applications are also accepted from students from the province of Quebec (who come from CEGEP).

The table above provides an overview of admission policies in law faculties of six universities across Canada. From the table above, it can be observed that each university has a specific category reserved for aboriginal applicants. However, it appears that besides Dalhousie University, the other universities do not use a quota system nor do they specifically mention how many spots are reserved for special category applicants. It was also noted that every university

made reference to diversity, in particular about having a firm commitment to ensuring diversity within their admissions and university. The table above was created to provide a general understanding of current admissions policies in leading universities across Canada. However, in order to better understand and assess more carefully the admissions policies of each university, a detailed analysis is provided below.

Starting with the Nation's Capital, in its first year admissions it was noted that the University of Ottawa's Common Law section at its Faculty of Law has a separate admissions process called "specific category applicants" assigned specifically for applicants of aboriginal ancestry.[222] However, a person of aboriginal ancestry does not have to apply through the specific category, and can choose instead to apply through the "general category applicants". The Aboriginal candidate applying to the "specific category applicant" is required to submit the same documents and information as an applicant from the "general category applicant".[223] Furthermore, the admissions committee has the discretion of admitting the student unconditionally or on the basis that they successfully complete the "Program of Legal Studies for Native People" offered by the University of Saskatchewan, or "Le Programme predoit pour les Autochtones" offered by the University of Ottawa for French-speaking aboriginal applicants. In addition, the faculty does not specify how many aboriginal students are taken in the "specific category applicants", or if faculty staff of aboriginal ancestry sit on the admissions committee. In addition, it was noted that the University of Ottawa's faculty of law has also established a separate admissions category called "Access students". As part of its mission on education equity, this admissions category was designed to facilitate the access of students in law school

[222] *Faculty of Law- Common Law Section, Aboriginal Applicants,* online: University of Ottawa <https://commonlaw.uottawa.ca/en/students/admissions/admissions-criteria/first-year-applicants/aboriginal-applicants>.
[223] Documents that are submitted are: personal statement, curriculum vitae and reference letters.

"who have experienced barriers of a systemic, ongoing nature, or who are from groups which have experienced identifiable social or economic barriers to education". An applicant is admissible in this category if s/he fits the description provided by the Ontario Human Rights Code, which states that "every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, color, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or disability".[224] Applicants who apply through this category have to nonetheless provide the same information as applicants from the general category.[225] Finally, the University of Ottawa makes no mention of how many students it admits per year from the "Access Applicants" category.

Another university that was analyzed was McGill University. It was observed that McGill University's faculty of law admissions policy also had a separate admissions category reserved for Aboriginal applicants.[226] The applicant is required to self-identify as an aboriginal person on their application form, and submit the same documents as a general category applicant. Like other universities across Canada, the McGill Faculty of law website does not specify how many students apply in this category, or how many are admitted. However, they expressly state that the faculty is committed to equity and diversity by providing applicants a session on diversity on campus.[227] They also declare that they strongly welcome and encourage "people with disabilities, racialized people, indigenous people, gender non-conforming and trans people, LGBQ people,

[224] R.S.O. 1990, c. H.19, s.1; 1999, c.6, s.28 (1); 2001, c.32, s.27 (1).
[225] *Faculty of Law- Common Law Section, Access Applicants,* online: University of Ottawa <https://commonlaw.uottawa.ca/en/students/admissions/admissions-criteria/first-year-applicants/access-applicants>.
[226] First Nations, Inuit and Metis apply in this category. It also includes 'Status,' 'Treaty,' 'Registered', 'Non-Status,' and 'Non-Registered' Aboriginal persons. For more information see: *Law Admissions, Admissions Policy,* online: McGill University <https://www.mcgill.ca/law-admissions/undergraduates/admissions/policy>.
[227] *Law Admissions, Admissions Policy,* online: McGill University <https://www.mcgill.ca/law-admissions/undergraduates/admissions/policy>.

women and people from economically disadvantaged background" to apply to their faculty of law.[228] Special consideration is given to applicants who fit this definition, but how much consideration is placed, or how many spots are reserved for such applicants is not mentioned, as the decisions are made on a discretionary basis.

Another example is the University of Toronto's Faculty of Law special admission program. Besides their general admissions category, they also have a special admissions category reserved for aboriginal students. Their website explicitly states that they have no minimum or maximum quota or spots reserved for applicants of aboriginal ancestry. However, they specify that on average seven aboriginal students enter the Faculty of Law each year, and a total of 21 across all three years.[229] Regarding the applicant's GPA and LSAT score, their website indicates that there is no cut-off grade in place for aboriginal applicants. Instead, they mention that the application review process is "sensitive" and that many factors beyond grades and LSAT scores are looked into when assessing the applicant's file. There is no mention of which factors are taken into consideration; they state that they particularly rely on the personal statement to gain better insight into the applicant's background.

The University of Saskatchewan's faculty of law also has a special admission category reserved for aboriginal persons. Their website states that there is no quota or strict number of spots reserved for aboriginal students but that on average 17 applicants receive offers in the aboriginal category and that around 10 applicants register in first year law school.[230] Applicants in this category have to complete the general category application procedure but include proof of

[228] *Ibid.*
[229] *Faculty of Law, Aboriginal Law Admissions FAQs,* online: University of Toronto<http://www.law.utoronto.ca/admissions/jd-admissions/aboriginal-applicants/aboriginal-law-admissions-faqs>.
[230] *College of Law, Aboriginal Applicants,* online: University of Saskatchewan <http://law.usask.ca/programs/law-degree/aboriginal-applicants.php>.

aboriginal ancestry. In the American context the terminology used in the jurisprudence of affirmative action in university admissions, was that universities admissions policies use race and ethnicity as a "determining factor" or as a "plus factor" in the admissions process. The University of Saskatchewan's faculty of law website uses similar terminology by stating that having aboriginal ancestry is viewed as a "positive factor" while reviewing the applicant's file.[231] However, there is no mention of what "positive factor" entails and how much of a weight it has during the admissions review process.

Another example of a special admissions program is the one offered at the University of British Colombia's faculty of law. They, too, have a specific admissions category called the "discretionary category" where they state that a limited number of spots are reserved each year (in first year law) for "applicants who may have relevant achievements and experiences, but because of special factors in life, may not satisfy one or more of the requirements for regular applicants."[232] They also state that the Admissions Committee "has the discretion to respond to such circumstances by taking into account factors, such as disability or special needs, financial disadvantage, age (generally for applicants over 30 years of age), membership in a historically disadvantaged group, and any other factors that the applicant wishes the Committee to consider."[233] These factors are looked into along with other factors, such as employment history, community involvement and other achievements. Furthermore, normally personal statements of regular category applicants are 750 words, but for applicants in the "discretionary category" a two to three page personal statement is required, as more emphasis is placed on the personal statement of the applicant in this category. Furthermore, besides the "discretionary category",

[231] *Ibid.*
[232] *Peter A. Allard School of Law, Applicant Requirements,* online: the University of British Colombia <http://www.allard.ubc.ca/application-requirements-frequently-asked-questions>.
[233] *Ibid.*

their website states that applicants of aboriginal background are strongly encouraged to apply for the indigenous category to study in the indigenous legal studies program. [234] Aboriginal applicants who apply in this category are also automatically considered in the regular category as well.

As was seen in the American context, it is not only the law schools that have established special admissions program. Special programs also exist in other professional programs in Canada, in particular, in medical schools.[235] In fact, it has been noted that there is much more information available in terms of data on the number of applicants who are accepted through special admissions programs in Canadian medical schools. For example, according to a report published in 2008 by the Indigenous Physicians Association of Canada[236], many Canadian universities have a strict number of seats reserved for only students of aboriginal ancestry. For instance, the University of Ottawa's medical faculty has reserved 8 seats for aboriginal students, McGill University has 4 seats reserved for aboriginal applicants, and the University of Saskatchewan has 10% of its first year seats reserved for aboriginal students (8 out of 80 seats). The University of Toronto has no formal policy in place and neither does the University of British Colombia. However, for the latter, an additional essay and interview is required for applicants of aboriginal ancestry, and there is flexibility for the MCAT score but no flexibility for the GPA score. Dalhousie University also has specific requirements. According to their affirmative action policy, an applicant of Aboriginal descent will be admitted if their letters of reference and interview are acceptable, and have met the minimum academic admissions criteria

[234] *Peter A. Allard School of Law, How to Apply to the Indigenous Legal Studies Program,* online: The University of British Colombia <http://www.allard.ubc.ca/indigenous-legal-studies/ils-how-apply-indigenous-program>
[235] See: Stéphane Brutus et al, "Attitudes toward affirmative action in the United States and Canada" (1998) 12:4 J Bus Psychol 515.
[236] Summary of Admissions and Support Programs for Indigenous Students at Canadian Faculties of Medicine, March 2008, online: The Association of Faculties of Medicine of Canada <https://www.afmc.ca/pdf/IPAC-AFMC_Summary_of_Admissions_&_Support_Programs_Eng.pdf>.

(a 3.3 GPA in two successive years prior to applying, five full courses in each year; a score of 24 in the MCAT with 8 in each category).

Whether a special admissions program has been adopted in law schools or medical schools, all across Canada the purpose and justification for these programs has been to ameliorate the conditions of disadvantaged groups in society.[237] Diversity, which was seen as the key justification in the American university context, has not taken much place in the creation of special admissions programs in Canada. Instead, ameliorating disadvantaged groups in society has been the key purpose. This justification is most visible in the next section of this chapter where a historic initiative in Canadian higher education will be analyzed at length.

3. The Indigenous Blacks & Mi'kmaq (IB&M) Initiative

One of the most important affirmative action initiatives in Canadian higher education highlighting the justification of ameliorating the condition of disadvantaged groups in society was created in the 1980s by Dalhousie University's Faculty of Law. According to Richard F. Devlin and A Wayne MacKay, the Indigenous Blacks & Mi'kmaq Initiative (IB&M Initiative) was created to challenge racism in the Canadian legal culture, education and profession.[238] In the 1980s, the chairperson of the admissions committee and the associate dean of Dalhousie law school had presented a proposal to the "American Law School Admissions Council" (LSAC) to receive funding from the "Minority Enrolment Challenge Grant Programme For Innovative projects".[239] In their proposal, they argued that there was a low representation of minorities in

[237] See: Patrick Clancy & Gaële Goastellec, "Exploring access and equity in higher education: Policy and performance in a comparative perspective" (2007) 61:2 High Educ Q 136.
[238] Richard F Devlin & A Wayne MacKay, "Essay on Institutional Responsibility: The Indigenous Blacks and Micmac Programme at Dalhousie Law School, An" (1991) 14 Dalhous LJ 296 at 296-297.
[239] *Ibid.*

legal education and in the profession in Atlantic Canada. They made specific reference to the underrepresentation of Blacks and First Nations, and asked for a three-year funding in order to create a regional programme that would increase minority enrolment in law school.[240] They argued that they would achieve this objective through three different means. Firstly, they stated that the Director of the program would promote legal education in minority communities and "recruit" students from these communities. Secondly, they emphasized that the law school would create a six-week pre-law course for students from minority communities, such as Mi'kmaqs and Blacks. Finally, they argued that they would modify their law school curriculum to include tutorials, summer school and additional upper year course offerings that are "of relevance to minority students".[241] Their proposal, however, was rejected by the LSAC on the grounds that it was not innovative enough.[242]

Despite the fact that the project failed to receive funding, the preparation process of the proposal had created close ties between the law school and members of the Black and Mi'kmaq community. In fact, after the proposal, the union of Nova Scotia Indians (a private foundation) and the confederacy of mainland Mi'kmaqs along with Dalhousie University funded the 'Micmac Professional Careers Project' (MPCP) in order to increase the enrolment of Mi'kmaqs in professional programs at Dalhousie University.[243] A workshop by the MPCP sparked discussions between faculty staff and members of the Mi'kmaq community on how Dalhousie University's Faculty of Law needed to undergo change in order to allow Mi'kmaq students to have a successful entry and completion of law school.

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[240] Devlin & MacKay, *supra* note 238 at 299.
[241] Devlin & MacKay, *supra* note 238 at 298. Also see: Carol Aylward, "Adding Colour - A Critique of: An Essay on Institutional Responsibility: The Indigenous Blacks and Micmac Programme at Dalhousie Law School" (1995) 8 Can J Women Law 470. [Alyward].
[242] Devlin & MacKay, *supra* note 238 at 298-299.
[243] Devlin & MacKay, *supra* note 238 at 299.

Events taking place outside the law school also sparked discussions amongst the faculty at Dalhousie on the need to increase the representation of minorities and under-represented communities in legal education. In light of the local demographics, specifically, the large numbers of Indigenous Blacks and Mi'kmaqs, the focus of these discussions was on increasing their representation in the legal domain. Following the MPCP workshops, Dalhousie University's president created a Task Force on Access for Blacks and Native People. The task force created a report called "Breaking Barriers" which focused on the importance of removing barriers that minority groups face in trying to access higher education.[244] The report emphasized that the Indigenous Blacks and Mi'kmaqs for decades had been excluded from higher education due to the "elitist ivory tower" that was present in the university context.[245] In order to allow better access, the report argued that the Indigenous Blacks and Mi'kmaqs were "deserving of educational equity in the form of specifically tailored programmes".[246] The report made reference to ameliorating the condition of disadvantaged groups in society by creating an affirmative action initiative in admissions policies to allow better access of minority group in universities.[247]

Although the *Breaking Barriers* report had a large influence on the creation of the IB&M initiative, it was the Marshall Inquiry that had an even greater influence.[248] The Marshall inquiry began as a result of a 17-year-old Mi'kmaq teenager from Nova Scotia, named Donald Marshall Jr., who had been wrongfully convicted of murder in Sydney, Nova Scotia. In May 1971, Donald Marshall Jr., was in a park at night when he witnessed the stabbing of another 17-year-old teenager by the name of Sandy Seale. The stabbing was in reality committed by a 59-year-old

[244] Wayne A. MacKay, *Breaking Barriers: Report of the Task Force on Access for Black and Native People* submitted to Dr. H.C. Clark, President of Dalhousie University (21 September 1989) [Breaking Barriers Report]
[245] Devlin & MacKay, *supra* note 238 at 300.
[246] *Ibid.*
[247] Breaking Barriers Report, *supra* note 244 at vii.
[248] See: Barrington Walker, *The African Canadian Legal Odyssey: Historical Essays* (University of Toronto Press, 2012).

man named Roy Ebsary who was in the same park that night with another man named James MacNeil.[249] The four police officers who arrived on the scene of the crime did not search the area where the crime had been committed, nor did they question any of the witnesses that were present that day.[250] Furthermore, the detective in charge of the investigation created a theory that Donald Marshall Jr., was the one who had stabbed Sandy Seale and looked for evidence in this regard. Two other teenagers were present on the scene that day, but the police officers did not take their statements carefully because one of them was on probation and the other teenager had mental health problems.[251] Seeing the vulnerability of the teenagers, the police officers used "oppressive questioning tactics" to coerce false statements from the teen witnesses, which led to Donald Marshall Jr., being charged with murder.[252]

The legal system continued with deliberate errors in law and misjudgments because the crown prosecutor in Marshall's trial did not interview the teenagers who had given inconsistent statements to the police officers, and did not inform the defense counsel of these inconsistencies.[253] The judge hearing the trial also made errors in law by misinterpreting the evidence and legislation.[254] All in all, Donald Marshall Jr., was convicted and sentenced to life in prison after only a three-day trial, within less than six months after his arrest had taken place.[255] Ten days after the conviction, James MacNeil, who had been at the park on the night of the crime, approached the police station to admit that he saw Roy Ebsary commit the crime. With

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[249] Jr Royal Commission on the Donald Marshall, Prosecution (NS) & T A Hickman, *Royal Commission on the Donald Marshall, Jr. Prosecution: commissioners' report : findings and recommendations.* ([Halifax, N.S.]: The Commission, 1989). [Royal Commission on the Donald Marshall, Jr. Prosecution] Also see: The Wrongful Conviction of Donald Marshall, Jr. online <http://www.nsbs.org/archives/unpublished/81150.pdf>
[250] *Ibid.*
[251] Michelle Williams-Lorde, "The IB&M initiative : reflections on 20 years" (2009) 27: 4 Soc Rec 33.
[252] The Wrongful Conviction of Donald Marshall, Jr., *supra* note 249.
[253] William Wicken, *Mi'kmaq Treaties on Trial: History, Land and Donald Marshall Junior* (University of Toronto Press, 2002) at 143.
[254] Alyward, *supra* note 241 at 472.
[255] Devlin & MacKay, *supra* note 238 at 299.

this information, the RCMP opened a new investigation, which was, however, only limited to doing a polygraph test on James MacNeil.[256] In addition, the police station and the RCMP did not notify Marshall's defense counsel nor the crown prosecutor in charge of the appeal, that they had new information on the crime. As such, this new information was not considered in Marshall's appeal, which led to Marshall's appeal being dismissed by the Nova Scotia Court of Appeal.[257] It was only in 1981, when Donald Marshall Jr., learned that Roy Ebsary admitted to having committed the crime that the case reopened. However, by this time Donald Marshall Jr., had already spent 11 years in prison.

Donald Marshall Jr., was only completely exonerated in 1990, following a royal commission created by then Justice Minister Jean Chretien.[258] The Marshall inquiry stated that Donald Marshall Jr., was a victim of racial discrimination, as well as a victim of the incompetence, and deliberate and wrongful acts of members of the justice system.[259] The commission concluded that the "justice system failed Donald Marshall Jr. at virtually every turn from his arrest and wrongful conviction for murder in 1971 up to and even beyond his acquittal by the Court of Appeal in 1983".[260]

The proceedings before the royal commission made it evident that Donald Marshall Jr., had suffered in the hands of an unjust and discriminatory legal system, comprised of attorneys, crown prosecutors, judges and police officers. During the proceedings, although Dalhousie Law School was not mentioned nor acknowledged as having any involvement in Donald Marshall's wrongful conviction, the Marshall inquiry had nonetheless created "a sense of guilt by

[256] The Wrongful Conviction of Donald Marshall, Jr., *supra* note 249.
[257] *Ibid.*
[258] Royal Commission on the Donald Marshall, Jr. Prosecution, *supra* note 249.
[259] *Ibid.*
[260] The Wrongful Conviction of Donald Marshall, Jr., *supra* note 249.

institutional association" since most of people involved in the case were graduates of Dalhousie Law School.[261] As such, the Marshall inquiry led the Faculty of Law at Dalhousie University to feel a kind of institutional responsibility towards the public and legal profession, that perhaps as a law school, they had failed in training and teaching their students to uphold and ensure a fair legal system, free of discrimination and bias. However, even beyond the faculty, the Marshall inquiry had also created a province-wide sense that the legal profession, and legal education, was in need of change.[262] This feeling caused the faculty to begin the talks of creating an equitable program that would allow better access of the two main minority groups in Nova Scotia, Indigenous Blacks and Mi'kmaqs. The Faculty of Law, along with the MPCP, created academic hearings where open discussions about racism in the Canadian legal system were carried out at length.[263] Important sessions took place in the school, such as how affirmative action and law schools can combat racism. Several sessions took place, alongside committees where representatives from the Black and Mi'kmaq communities participated in trying to find an open and equitable solution.[264] This close collaboration and the effect of the Marshall inquiry led the University of Dalhousie's Faculty of Law in 1989 to create the Indigenous Blacks and Mi'kmaq initiative.

The initiative was undertaken with the purpose of fighting racism in the Canadian legal system, which had been confirmed in the Marshall inquiry.[265] The founders of the initiative clearly stated that inequality was a key factor in racism. The school created the IB&M initiative

[261] *Ibid.*
[262] Williams-Lorde, *supra* note 251 at 34.
[263] *Ibid.*
[264] Devlin & MacKay, *supra* note 238 at 300.
[265] Williams-Lorde, *supra* note 251 at 34.

to ameliorate disadvantaged groups in society (indigenous blacks and Mi'kmaqs), as they saw this as a primary means of challenging and fighting inequality in the legal profession.[266]

In the first year of the IB&M initiative, the programme was advertised at large in Mi'kmaq and black communities across Nova Scotia, through discussions, pamphlets, brochures and posters hung up in the community. In its first year, three Mi'kmaqs and three black students were admitted to Dalhousie University's Law School. Gradually, over time, the affirmative action program established a quota: every year twelve students from the Indigenous Blacks and Mi'kmaqs communities (six Black and six Mi'kmaqs) would be admitted to the Law School. The quota of 12 students was decided based on the percentage of Blacks and Mi'kmaqs in Nova Scotia population.[267] However, Carol Alyward argues that, "a true education equity programme" should not use a quota system but rather admit as many qualified students as applied.[268]

The IB&M initiative is still ongoing today at Dalhousie University's Faculty of Law.[269] Currently, other Blacks and Aboriginal students from across Canada are encouraged to apply. This programme was founded with the purpose of ameliorating disadvantaged groups in society and to challenge and fight societal discrimination. It was a programme that was seen as a key method to facilitate better access of Blacks and Mi'kmaqs at Dalhousie Law School. However, the programme has become much more than this. This programme raised some critical questions, such as what is the purpose of special admissions programs in universities across Canada. Are they created to tackle disadvantage in the legal profession or legal education, or rather both? Should special programs be created for the local community like in the context of the IB&M

[266] Devlin & MacKay, *supra* note 238 at 302.
[267] Williams-Lorde, *supra* note 251 at 34.
[268] Alyward, *supra* note 241 at 472.
[269] Charles C Smith, "Who is Afraid of the Big Bad Social Constructionists - Or Shedding Light on the Unpardonable Whiteness of the Canadian Legal Profession" (2007) 45 Alta Law Rev 55 at 56-57.

initiative where we see that the program was founded with the purpose of increasing access of members of the Nova Scotian community (Indigenous Blacks and Mi'kmaqs), or, should special programs be created to challenge and tackle disadvantages in law schools and in the legal profession at large by admitting as many different types of members of minority groups without a community-based focus? Finally, the IB&M initiative also causes one to ask the question of whether special programs stigmatize students by placing a specific label on them in their university admissions and throughout their studies. As Universities across Canada continue to adopt special programs, these important questions call for further research, in order to better assess the purpose, effect and outcome of educational equity programs.

Furthermore, unlike the American experience, although Canada has not been resistant to criticism and political discourses against affirmative action,[270] it is also important to highlight the extent to which educational initiatives have developed in a legal context. The legal context highlights the importance of affirmative action initiatives; their legality and their current effects in addressing deeply rooted inequalities in Canadian society.[271] As will be observed in the next section, the basis of affirmative action programs in Canadian higher education has been equality legislation.[272] It is through equality legislation, in particular the adoption of the Canadian charter that the main focus of affirmative action initiatives in higher education in Canada became "to improve and elevate the conditions of disadvantaged groups in society".[273] Analyzing the legal context within which educational equity programs emerged will help us better understand the justification that has emerged for special programs in universities across Canada.

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[270] Sheppard, *supra* note 26 at 49.
[270] Abella Report, *supra* note 20 at 7.
[271] Sheppard, *supra* note 26 at 46.
[272] Ghosh, *supra* note 42 at 358.
[273] Brooks, *supra* note 122 at 199.

4. Emergence of Ameliorating Disadvantaged Groups in Society as a Key Justification for Affirmative Action

i. Affirmative Action in Higher Education in the Pre-Charter Era

In the pre-charter era, one of the first Canadian cases in which it was argued that a special program violated the anti-discrimination provisions of human rights legislation, arouse in the late 1970s. In the case of *Bloedel v. University of Calgary*[274], Marlene Bloedel claimed that the University of Calgary's admissions policies discriminated against her on the basis of race because she was a non-native. Bloedel was not admitted to a university program offered on a reserve by the University of Calgary because she lacked certain course prerequisites. The University of Calgary established this program to fill the educational vacuum, which had existed in the case of young Native people, living on the Reserves who, for various reasons, could not have had the same opportunities for educational advancement at the university level, as non-native people.[275] In other words, the program had been created with the purpose of ameliorating disadvantaged groups in society, and in this case, aboriginal persons. Although this decision was rendered before the adoption of the Canadian Charter, the justification for affirmative action in Canada, "ameliorating the conditions of disadvantaged groups in society" was seen even before equality legislation emerged in the Canadian constitution.

Also in the pre-charter era, it can be observed that human rights legislation in Canada already employed terminology that recognized the importance of ameliorating disadvantaged groups in society. For example, section 14(1) of the Ontario Human Rights Code clearly states that:

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[274] *Bloedel v. University of Calgary* [1980] 1 C.N.L.R. 50
[275] Sheppard, *supra* note 8 at 41-42.

> 14.— (1) A right under Part I [non-discrimination provisions] is not infringed
> by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

According to this section, an affirmative action program is not discrimination and is valid if it satisfies one of the three options: (1) if it is a program which relieves hardship or economic disadvantage, (2) if it is a program which helps disadvantaged people or groups achieve or try to achieve equal opportunity, or (3) if it is a program which helps eliminate discrimination. Regardless of which option is met, all three options are based on societal discrimination, in particular, on the purpose of eliminating the prejudice and disadvantage faced by certain groups in society.[276]

Another example of a provision in the pre-charter era that clearly demonstrates through its wording the justification of ameliorating disadvantaged groups in society in Canada and the presence of redressing societal discrimination as the basis of affirmative action programs is section 86 of the Quebec Charter of Human Rights and Freedom.

Section 86 of the Quebec Charter of Human Rights and Freedom reads as follows:

> **"**The object of an affirmative action program is to remedy the situation of persons belonging to groups discriminated against in employment, or in the sector of education or of health services and other services generally available to the public. Non-discriminatory.
>
> An affirmative action program is deemed non-discriminatory if it is established in conformity with the Charter."[277]

[276] "Your guide to special programs and the Human Rights Code" (December 2013) online: Ontario Human Rights Commission <http://www.ohrc.on.ca/en/your-guide-special-programs-and-human-rights-code?page=dfgg-6_.html>.
[277] Section 86 Charter of Human Rights and Freedoms, CQLR c C-12, online: CanLII <http://canlii.ca/t/52llv>.

According to a report by the commission des droits de la personne et droit de la jeunesse, the purpose of adopting this provision in Quebec was to allow disadvantaged groups in Quebec society to "catch up more quickly" in order to compensate for a cumulative disadvantage.[278]

In Quebec, the implementation of an affirmative action program by the Quebec government meant that it was important to first identify the cumulative effects of systemic discrimination and its underlying practices. They stressed that "special measures" or "special programs" could only be set up in the areas of employment and education once the first step of "identification" was completed. These special measures would allow group-based preferences to be given to members of groups that have been discriminated in the past and have been victims of societal discrimination.[279]

ii. Affirmative Action in Higher Education in the Post Charter Era

In looking at the Canadian Charter, and in looking at the legal context of affirmative action initiatives in higher education in Canada, section 15 of the Canadian Charter of rights and freedoms, was adopted to guarantee equality rights in Canada.[280] Human rights legislation as well as the Canadian Charter demonstrates how affirmative action and equity programs have received "constitutional and legislative endorsement across Canada".[281] Section 15 of the Canadian Charter states that:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[278] Affirmative Action Programs in Quebec : Review and Prospects (Quebec: Commission des droits de la personne et des droits de la jeunesse du Quebec, 1998).
[279] *Ibid.*
[280] Wendy Robbins & Katherine Side, "Institutionalizing inequalities in Canadian universities: The Canada research chairs program" (2007) 19:3 NWSA J 163 at 164.
[281] Sheppard, *supra* note 8 at 25.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[282]

Section 15(1) of the Canadian Charter is the clause that guarantees the basic protection against discrimination, while section 15(2) sets out the explicit constitutional guarantee of affirmative action programs in Canada.[283] In drafting the Canadian Charter, the government well understood the debates that were taking place in the United States over the constitutionality of affirmative action and the Canadian government wanted to ensure that those kinds of debates would not prevent a development of a special initiative or program to advance substantive equality.[284] For this reason, in addition to section 15(1) the legislator decided to include section 15(2). In other words, Section 15(2) was added to guarantee the constitutionality of affirmative action programs in Canada and "to insulate such programs from potential challenges by those claiming they constitute a form of "reverse discrimination."[285]

Although section 15(2) of the Canadian Charter provides the constitutional guarantee of affirmative action programs in Canada, public universities across Canada are considered to not be governed by the Charter because of their independence from the government. In early Charter decisions, normally students who had their rights infringed had to take their case to the university in question or to Human Rights Tribunals. This is still the case today; however, debates of whether the Charter applies to universities has re-surfaced significantly in recent years.

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[282] *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.,
[283] A Wayne MacKay, "Marriage of Human Rights Codes and Section 15 of the Charter in Pursuit of Equality: A Case for Greater Separation in Both Theory and Practice, The" (2013) 64 UNBLJ 54 at 55.
[284] Sheppard, *supra* note 26 at 44-46.
[285] Sheppard, *supra* note 26 at 50. Also See: Beatrice Vizkelety, *Proving Discrimination in Canada* (Toronto: Carswell, 1987).

The Supreme Court of Canada first discussed the question of whether the Charter applies to public universities twenty-five years ago. In 1990, the Court released two decisions, *McKinney v. University of Guelph*[286] and *Harrison v. University of British Columbia*[287], where they decided that the Charter did not apply to Universities because they stated that such institutions are free from government control. In the same year, the Court ruled in *Stoffman v. Vancouver General Hospital*[288] and *Douglas/Kwantlen Faculty Association v. Douglas College*[289] that the Charter applied to community colleges and hospitals. In McKinney, the Court concluded vaguely that the Charter's applicability to universities depended on the activities of the University and that some activities could be considered as acts of the government:

> There may be situations in respect of specific activities where it can fairly be said that the decision is that of the government, or that the government sufficiently partakes in the decision as to make it an act of the government.[290]

Although universities promote academic freedom, our society has changed over the years, so much so, that preserving the rights of students has become even more important today.[291] With some recent decisions from the province of Alberta, the question of whether the Charter applies to Universities has re-emerged. In the case of *Pridgen* v. *University of Calgary*, *R. v. Whatcott,* and *Wilson v. University of Calgary*, the courts held that the Charter did apply to Universities.[292] However, recent cases in the province of Ontario and British Colombia ruled differently.[293] Presently, provisions in human rights statutes that are parallel to s. 15(2) apply to educational

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[286] *McKinney v. University of Guelph*, (1990) 3 SCR 229
[287] *Harrison v. university of British Colombia,* (1990) 3 SCR 451
[288] *Stoffman v. Vancouver General Hospital* (1990) 3 SCR 483
[289] *Douglas/Kwantlen Faculty Association v. Douglas College* (1990) 3 SCR 570
[290] *Mckinney & eldridge v. British Colombia (AG)*, (1995) 7 BCLR (3d) 156 at 273-274.
[291] For a detailed analysis of the cases mentioned above see: Franco Silletta, "Revisiting charter application to universities" (2015) 20 Appeal 79 at 80.
[292] *Ibid.*
[293] The following cases: *In Lobo v. Carleton University*, 2012 ONSC 254, *Telfer v. Univesity of Western Ontario*, 2012 ONSC 1287, and *AlGhaithy v. University of Ottawa*, 2012 ONSC 142 and *BC Civil Liberties Association v. University of Victoria*, 2015 BCSC 39, all ruled that the Charter does not apply to public universities and chose to not apply the recent decisions from the province of Alberta.

equity programs in universities. However, the question of whether the Canadian Charter applies in the context of educational equity initiatives in universities has so far not emerged within the courts. The divisive views of the justices in this matter cause one to examine the possibilities, and question the applicability of section 15(2) to special programs in universities. In order to understand the possible applicability of section 15(2) to universities, it is important to assess the interpretation that the Supreme Court of Canada has given to section 15(2) claims.[294]

5. The Supreme Court of Canada's Analysis in Assessing Section 15 Claims: R. v. Kapp

The Canadian Charter became law in 1982, but section 15 only came into effect in 1985. This was to allow provinces enough time to ensure that their legislation was in conformity with section 15 of the Canadian Charter.[295] The first section 15 case to be rendered by the Supreme Court of Canada was in 1989 in *Andrews* v. *Law Society of British Columbia*.[296] However, it was only ten years later, in *Law* v. *Canada (Minister of Employment and Immigration)*[297] that the Supreme Court designed a three-step framework to assess section 15 claims. The test set out in *Law* was later revised in the *R. v. Kapp*[298] decision.

In *Law,* the Supreme Court stated that establishing whether differential treatment amounts to discrimination, requires one to assess the impact that the treatment has on the claimant's human dignity.[299] Furthermore, the Court stated that in assessing whether differential

[294] There are parallel provisions to s. 15(2) in human rights legislation. Human rights legislation must ultimately comply with the Charter, see: *Vriend v Alberta,* (1998) 1 S.C.R. 493
[295] Clancy & Goastellec, *supra* note 237 at 137.
[296] *Andrews* v. *Law Society of British Columbia*, (1989) 1 SCR 143 [Andrews]
[297] *Law v. Canada (Minister of Employment and Immigration)*, (1999) 1 S.C.R. 497 [Law]
[298] *R. v. Kapp*, (2008) 2 S.C.R. 483 [Kapp]
[299] Law, *supra* note 297 at para 51.

treatment amounts to discrimination, four "contextual factors" must be taken into account: (1) pre-existing disadvantage, (2) the relationship between the grounds and the claimant's characteristics or circumstances, (3) whether the law has an ameliorative purpose or effect, and finally (4) the nature of the interest affected.[300] With regard to the first factor, Justice L'Heureux-Dube expressed that a distinction that affects an already disadvantaged group is likely to be discriminatory. The Court concluded that this would likely be the most compelling factor leading to the conclusion that a differential treatment amounts to discrimination.[301] The concern expressed by Justice L'Heureux-Dube illustrates the idea that disadvantaged groups in society from the start face a pre-existing disadvantage, and thus reinforcing the purpose of section 15(2). However, it was in discussing the third factor – whether the law has an ameliorative purpose or effect – that the Supreme Court of Canada reaffirmed its position that section 15(1) does not preclude the government from ameliorating the disadvantages experienced by the grounds listed in section 15(1).[302]

What's interesting to note is that in the years of *Andrews* and *Law*, the Court barely touched on the role and application of section 15(2). In 2000, in *Lovelace*, the Court had the opportunity to assess the role and substance of this section, but instead it simply held that section 15(2) served as an "interpretative aid" in understanding section 15(1), rather than an exemption to the equal treatment rule.[303] It was only nine years after *Law,* that the Supreme Court of Canada

[300] *Ibid* at para 63-75.
[301] *Ibid* at para. 63.
[302] "Equality Rights and the Canadian Pension Plan Law v. Canada" (online: prepared for the Ontario Justice Education Network by Counsel for the Department of Justice), <http://ojen.ca/sites/ojen.ca/files/sites/default/files/resources/Law%20English.pdf>.
[303] *Lovelace v. Ontario*, (2000) 1 S.C.R. 950. [Lovelace]

reconsidered the role of section 15(2).[304]

In 2008, in *R v. Kapp*, the Supreme Court of Canada reassessed the issue of how equality claims should be analyzed and in doing so they reassessed the relationship between section 15(1) and section 15(2). *R.v. Kapp* is a landmark decision in Canada because it was the first time that the highest court in the country assessed the application of section 15(2) with regard to affirmative action programs.[305] Although the controversies around affirmative action programs in Canada have so far not risen in the context of Canadian University admissions policies, nonetheless, in the *Kapp* decision, we see them arising with respect to a special program for aboriginal fishers. In the examples provided earlier on university admissions policies in Canadian law schools, it was noted that mostly all law schools have a special admissions category reserved for students of aboriginal ancestry. Although the *Kapp* decision is related to a special program for aboriginal fishers, the legal analysis provided by the Supreme Court on the purpose and effect of this program would likely not be that different if the decision had been rendered in an educational context. This is due to the fact that, whether the case is rendered with regard to fishers or students, in both scenarios, preference is placed on people of minority background, for the purpose of ameliorating their conditions in society.[306]

Therefore, in order to better understand the application of section 15(2) of the Canadian Charter on preferential treatment programs in Canada in the higher education context, it is important to look closely at the decision of R. v. Kapp. The *Kapp* case arose because a communal fishing license had been granted to three aboriginal bands. The license gave the

[304] *Equality Rights since 1985, Centre for Constitutional Studies*, online: University of Alberta <http://ualawccsprod.srv.ualberta.ca/ccs/index.php/constitutional-issues/the-charter/equality-rights-section-15>
[305] Sophia Moreau, "R. v. Kapp: New Directions for Section 15" (2008) 40 Ott Law Rev 283 at 283-284.
[306] *Ibid* at 289.

aboriginal bands the exclusive right to fish for salmon at the mouth of the Fraser River for a 24-hour period.[307] However, non-aboriginal fishers, which were the appellants in this case, contested this program and argued that the program discriminated against them on the basis of race.[308] The government defended the licensing program on the basis that it was intended, in part, to ameliorate the conditions of a disadvantaged group.[309]

The Court in the *Kapp* decision held its commitment and position in *Andrews* with regard to substantive equality - that substantive equality does not mean that everyone is treated equally.[310] Secondly, the Court held that section 15(2) "seeks to protect efforts by the state to develop and adopt remedial schemes designed to assist disadvantaged groups."[311] The Court also held that section 15(2) "tells us, in simple and clear language, that s. 15(1) cannot be read in a way that finds an ameliorative program aimed at combatting disadvantage to be discriminatory and in breach of s. 15."[312] In other words, the Court stated that section 15(2) protects ameliorative programs against what the Court called "reverse discrimination."[313]

Essentially, in *R* v. *Kapp*, the Court stepped away from this idea of section 15(2) serving as an interpretative aid to section 15(1). Instead, the Court gave section 15(2) a much more prominent role.[314] Before the *Kapp* decision, in previous cases, the Courts had treated section 15(2) together with section 15(1) in that discrimination did not include ameliorative programs. In

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[307] Kapp, *supra* note 298 at para 1.
[308] *Ibid* at para 2.
[309] *Ibid.*
[310] *Ibid* at para 15.
[311] *Ibid* at para 33.
[312] *Ibid* at para 38.
[313] Martha Butler, *Section 15 of the Canadian Charter of Rights and Freedoms: The Development of the Supreme Court of Canada to Equality Rights Under the Charter*, online: Library of Parliament Research Publications (2013) <http://www.parl.gc.ca/Content/LOP/ResearchPublications/2013-83-e.htm?cat=law#txt29> Note: This was the explanation the Supreme Court provided in its next section 15(2) decision in *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*. See: Alberta, *supra* note 317.
[314] *Ibid.*

the *Kapp* decision, the Court chose to give independent meaning to section 15(2). The Court concluded that if the government can prove that an impugned law or program has an ameliorative purpose, a section 15(1) inquiry is not needed.[315] In other words, the Court devised a test for determining when a program is ameliorative and therefore shielded from the scrutiny under section 15(1):

> A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds.[316]

The Court also stated that for part one of the test, ameliorative or remedial purposes do not need to be the only purpose of the special program.[317] Although controversies around affirmative action programs in the University context have not risen in Canada, if the Charter were to apply, it would likely be this same test derived by the Supreme Court in the *Kapp* decision that would apply in the context of university admission processes.

In 2011, the Supreme Court of Canada elaborated more on the definition of section 15(2) in *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*.[318] This was the first case since *Kapp*, where the Court applied the section 15(2) test which it had derived few years back. In *Cunningham,* the Supreme Court heard a claim brought by Metis people who were removed from the Peavine Metis Settlement's membership when they had registered for status

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[315] *Ibid.*
[316] *Kapp*, *supra* note 298 para 40-41. The Court in *Kapp* created a "unified approach" to section 15: "Once a claimant has demonstrated that an impugned law or program imposes differential treatment based on an enumerated or analogous ground, the government may argue pursuant to section 15(2) that the law or program has an ameliorative purpose targeting a disadvantaged group". In this case, "the program will be constitutional and will not be subject to any further scrutiny. Only where the government fails to meet its burden [burden of proof] under section 15(2) will the law or program be subject to section 15(1), where the claimant can show that the distinction is discriminatory because it perpetuates prejudice or stereotyping". See: Jena McGill, "Section 15(2), Ameliorative Programs and Proportionality Review" (2013) 63:2 S.C.L.R. 521 at 530.
[317] Moreau, *supra* note 305 at 285.
[318] *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37 [Alberta]

under the Indian Act.[319] The Court held that there was no discrimination. Once again, in this decision section 15(2) is applied with regard to aboriginal people rather than in the education context. However, this decision is worth mentioning because the Supreme Court examined and discussed, in much greater detail, the objective of section 15(2):

> The underlying rationale of s. 15(2) is that governments should be permitted to target subsets of disadvantaged people on the basis of personal characteristics, while excluding others. … Section 15(2) affirms that governments may not be able to help all members of a disadvantaged group at the same time, and should be permitted to set priorities. If governments are obliged to benefit all disadvantaged people … equally, they may be precluded from using targeted programs to achieve specific goals relating to specific groups. The cost of identical treatment for all would be loss of real opportunities to lessen disadvantage and prejudice.[320]

Overall, the Court in *Cunningham* stated that if the conditions in the *Kapp* section 15(2) test are met, specifically that the program is truly ameliorative and that there is a link between the program and the disadvantage suffered by the target group[321], then section 15(2) "protects all distinctions drawn on enumerated or analogous grounds that 'serve and are necessary to' the ameliorative purpose."[322] This greater analysis and elaboration of section 15(2) by the Court reinforced the idea that section 15(2) can protect a wide range of ameliorative programs from "Charter scrutiny".[323]

Although, the cases on section 15(2) have not been rendered in the context of university admissions programs in Canada, it is interesting to see that despite the changes in interpretation of section 15(1) and 15(2) by the Court, the key justification for affirmative actions programs in Canada has remained the same. The Court in its decisions from *Andrews* to *Kapp* to *Cunningham* has upheld the idea that the purpose of affirmative action programs is to ameliorate the

[319] *Ibid.*
[320] *Ibid* para 41.
[321] Butler, *supra* note 313.
[322] Alberta, *supra* note 318 at para 45.
[323] Butler, *supra* note 313.

conditions of disadvantaged groups in Canadian society.[324] This justification has also been used in the creation and adoption of special admissions programs in the higher education context.[325] Through initiatives such as the IB&M initiative, which emerged as a result of the Marshall inquiry, it was noted that special programs were a response to recognition of systemic discrimination in Canada. Although these programs have not been under scrutiny in Canada, for reasons which will be analyzed in length in chapter three of this thesis, all in all, the underlying justification for the creation of affirmative action initiatives in university admissions across Canada has been to ameliorate disadvantaged groups in society.

[324] See: Oscar Espinoza, "Solving the equity–equality conceptual dilemma: a new model for analysis of the educational process" (2007) 49:4 Educ Res 343.
[325] MacKay, *supra* note 283 at 83-85.

CHAPTER 3

UNDERSTANDING THE DIFFERENCES

The issue of affirmative action has been most widely debated in higher education for several reasons. Contrary to elementary and secondary school education, institutions of higher education, such as colleges and universities, have been for years in the hands of the most elite in society, which has led to significant differences in accessing higher education, and in particular, in satisfying admissions criteria.[326] Affirmative action programs created to facilitate access have upset "the status quo".[327] Despite this, both in Canada and the United States, legal officers, students, professors, faculty administrators and university members at large are often faced with questions of how to ensure equality, equity and diversity inside the classroom and on campus, or how to ensure equal opportunity in higher education for individuals coming from less-privileged groups in society. Comparing and understanding the differences in approaches and outcomes of two very different yet very similar countries will allow us to reflect on what equal opportunity entails, and question whether special programs "help level the playing field". Reflecting and examining the approaches adopted by the two countries in this chapter will not resolve the affirmative action debate, but it will help to understand why the experience of each country is strikingly different, as well as, help to examine some important questions that emerge from the affirmative action debate.

Throughout chapters one and two of this thesis, we have seen that there are two different justifications for affirmative action and education equity that emerged in Canada and the United States. On the one hand, in the American context, the only justification for deviating from equal

[326] Ghosh, *supra* note 42 at 350.
[327] Colleen Sheppard, "Equality rights and institutional change: Insights from Canada and the United States" (1998) 15 Arizona Journal of International & Comparative Law 143 at 161.

treatment is a compelling state interest of diversity. In contrast, in the Canadian context, embedded in the very text of the constitution and human rights legislation is a justification of ameliorating the conditions of disadvantaged groups and redressing historical group based disadvantages in society.

In examining the literature on affirmative action in Canada and the United States, it was noticed that there hasn't been much analysis in the literature regarding the differences in the experiences between these two countries. However, there has been some scholarship that endeavors to explain the different experience of Canada and the United States. This chapter explores reasons, which have been advanced, and some of the ways in which we can understand why different approaches have emerged in Canada and the United States.

One explanation, which has emerged in the literature, is that we can understand these differences by looking at the differences in the conceptions of equality, in particular, how each country interprets equality rights with regard to affirmative action programs. Another explanation, which emerges in the literature, is that in looking at the political culture in Canada and the United States, it appears that there is a greater willingness in the Canadian context to rely on group-based categories, unlike the United States, which has an adherence to an individualistic approach in its culture and legislation.[328] Besides these two important explanations, some ongoing critical questions, which have risen in the affirmative action debate, will also be explored.

[328] Colleen Sheppard, "Equality in Context: Judicial Approaches in Canada and the United States", 39 University of New Brunswick L.J. 111 at 111.

1. Conceptions of Equality in the Affirmative Action Debate

The term "equality rights" is used time and again in Canadian law and jurisprudence. It is employed less in the United States because the terminology used to represent equality rights has often been "equal protection".[329] Regardless of the term, both "equality rights" and "equal protection" generally means "a government must not discriminate against its citizens by treating some of them differently from others."[330] There exists different views on what form of equality should apply in modern democratic states.[331] Canada and the United States find themselves at opposite ends of the spectrum when it comes to how they apply equality rights to race-based affirmative action programs. In looking at the differences in the experiences of the two countries in the affirmative action debate, it appears that the United States has adopted a formal approach to equality rights when it comes to race-based affirmative action programs, whereas Canada has adopted a substantive approach to equality rights for the same matter.

A formal approach to equality rights means that a "person's individual physical or personal characteristics should be viewed as irrelevant in determining whether they have a right to some social benefit or gain."[332] This was the approach used by the courts in the American experience on affirmative action in chapter one. The American courts, in their analysis on affirmative action, began with the idea that a white applicant and a non-white applicant applying for a program in an institution of higher education ought to be treated the same. The American experience highlighted that the government is not supposed to discriminate against some people,

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[329] Allen, *supra* note 14 at 19. Becker, *supra* note 197.
[330] Roozbeh B Baker, "Balancing Competing Priorities: Affirmative Action in the United States and Canada" (2009) 18 Transnatl Contemp Probs 527 at 528. For more information also see: Peter W. Hogg. *Constitutional Law of Canada* 5th ed (Scarborough, Ontario: Thomson/Carswell, 2007).
[331] The Ideas of Equality and Non-Discrimination: Formal and Substantive Equality, (online: Equal Rights Trust, 2007) <http://www.equalrightstrust.org/ertdocumentbank/.pdf>,
[332] *Ibid.*

and that every individual is supposed to be treated equally under the law.[333] In the American context on affirmative action, the idea of equality for the Court entailed that everyone is treated the same as a starting point.[334]

The formal approach is discussed in some scholarship on equality rights in the affirmative action debate. Colleen Sheppard explains in detail the formal approach to equality rights in the United States, which is reflected in the affirmative action debate. She explains that U.S. constitutional law has adopted a formal approach where the concept of equality entails "sameness of treatment".[335] In other words, in the United States, "to be treated equally is to be treated the same".[336] She explains two underlying reasons for the emergence of this approach. The first is due to the legacy of slavery in the United States, where even after the abolition of slavery, discrimination of Blacks continued to take place.[337] An approach to equality where equality is sameness of treatment was seen as a way to solve the problem. By applying an approach where equality is "sameness of treatment", the United States believed that discrimination of Blacks would be resolved as every individual would be equal under the law and no discriminatory differential treatment would occur.[338] The second historical reason, which led the United States to adopt a sameness approach to equality, was the "emergence of the modern regulatory state".[339] In the aftermath of the depression, the definition of equality as "sameness of treatment" was slightly modified to "provide protection against arbitrary or unreasonable differences in treatment".[340] While equality in the form of sameness in treatment

[333] Espinoza, *supra* note 323 at 358.
[334] Baker, *supra* note 330 at 529.
[335] Sheppard, *supra* note 328 at 117.
[336] *Ibid.*
[337] *Ibid* at 113.
[338] *Ibid.*
[339] *Ibid* at 114.
[340] *Ibid.*

still applied, it evolved to require similar treatment for similarly situated persons.[341] Sheppard explains that these two underlying reasons set the foundation for a formal approach subsequently to emerge in issues of equality like affirmative action.[342]

Other scholars have also written about the formal approach to equality adopted by the United States. According to Rudy Baker, the American approach to affirmative action reveals the United States' firm position that equality means equal protection before the law.[343] She states that the U.S. Supreme court, in particular Justice Scalia and Justice Thomas, advance that "equality is just that - equal treatment - no distinction ought to be allowed".[344] Rudy Baker explains that Justice O'Connor's majority ruling in the *Grutter* case is actually not that different from the statements made by Justice Scalia and Justice Thomas. She states that Justice O'Connor in *Grutter* adopted a formal approach because he ruled that the University of Michigan Law School's special program was only constitutional because the law school admissions program looked at each applicant, at an individual basis, and did not classify individuals solely on race.[345] In fact, according to Baker, the only reason why the U.S Supreme Court did not strike down the affirmative action program in the University of Michigan Law School was because no quota system was used, and each applicant was assessed individually. The fact that each applicant was assessed individually meant for the Court that each person was treated equally under the law as a starting point to equality.

Stephen F. Ross also makes reference to the formal equality doctrine used in affirmative action cases in the United States. He states that, in the decisions rendered by the U.S. Supreme

[341] *Ibid*
[342] *Ibid.*
[343] Baker, *supra* note 330 at 529.
[344] *Ibid* at 540.
[345] *Ibid.*

Court, the Court makes it clear that any form of exclusion causes one to step away from the notion that everyone must be treated equally under the law.[346] Similar to Rudy Baker, he states that according to the formal approach to equality rights adopted by the United States, the courts start their analysis by stating that in theory there is no exception to equality.[347]

However, to say that the Court's analysis on affirmative action was strictly that of formal equality would be inaccurate. Not all the justices of the U.S. Supreme Court adopted a solely formal approach to equality. In fact, one of the reasons why the affirmative action debate has been very divided in the United States is due to where the justices stand with regard to the American conception of equality as being "sameness of treatment". Three positions have emerged with regard to affirmative action in the US courts.[348] The first position is that of Justice Scalia who argues that the constitution should be color-blind. He argues that there shouldn't be one preference for one race and another preference for another race, and that all individuals should be treated the same in order to be in compliance with the Equal Protection Clause of the Fourteenth Amendment. According to Justice Scalia, trying to redress past racial discrimination by using race-conscious measures would result in discriminating against individuals from historically privileged groups.[349] Justice Thomas is also of the colorblind constitution opinion as he thinks that affirmative action harms for instance African Americans by stigmatizing them as having only got into a university program because of their race.[350] The second position of the Court is the idea that affirmative action programs are indeed a deviation from equal treatment but

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[346] *Ibid.*
[347] Stephen F Ross, "Charter Insights for American Equality Jurisprudence" (2002) 21 Windsor YB Access Just 227 at 232.
[348] Sheppard, *supra* note 328 at 117.
[349] *Ibid* at 114.
[350] See: Jonathan L. Entin., "Justice Thomas, Race, and the Constitution Through the Lens of Booker T. Washington and W.E.B. Du Bois., (2011) 88 University of Det Mercy L. Rev. 755.

that they are justified as an exception for various reasons - the key reason being diversity.[351] This would be viewed as the middle view of the Court. The idea is that there is a specific history of institutional racism, in particular, in a workplace, or in a school, and that this racism has to be remedied.[352] One way to do so, which is one of the reasons for having such programs is to remedy past discriminations at the institutional level. The middle of the spectrum means that affirmative action is seen as an exception to equality (an exception to the sameness of treatment) and as a remedy for past discrimination. Finally, the third position of the court is the idea of affirmative action being an integral part of equality. This is a completely different conception of equality that appears in the dissent of the Court but one that reflects the substantive approach to equality adopted by the Canadian courts. It's the idea that affirmative action isn't about providing preferential treatment that discriminates against historically privileged groups, but rather that affirmative action is about remedying historical and ongoing discrimination.[353] Sheppard explains that some justices such as Justice Marshall, Brenan, Blackmun and Sotomayor in the U.S. Supreme Court have been open to accepting societal discrimination as a justification for affirmative action. In fact, these dissenting justices have accepted remedying societal discrimination as an objective for affirmative action.[354]

It is this third and last position of the American courts that is adopted and seen more clearly in the Canadian context on affirmative action. By having at its core the purpose of

[351] Sheppard, *supra* note 328 at 118. Justice Powell, O'Connor and Kennedy express this view (middle of spectrum) in *Wygam v. Jackson Board of Education*, 476 U.S. 267 (1986); in *City of Richmond v. J.A. Croson Co*., and in *Johnson v. Transportation Agency,* 480 U.S. 616 (1987).
[352] *Ibid.*

[353] The opinions of Justice Marshall, Brennan, Blackmun and Sotomayor in the following cases support the idea that affirmative actin is about remedying historical and ongoing discrimination. See for example *Regents of Caifornia v. Bakke*, 438 U.S. 265 (1978); *Wygam v. Jackson Board of Education*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co., and Johnson v. Transportation Agency*, 480 U.S. 616 (1987); *Schuette v. Coalition to Defend Affirmative Action By Any Means Necessary (BAMN)* 572 U.S. (2014) and *Fisher v. University of Texas*, 579 U.S. (2016).
[354] *Ibid* at 120.

remedying historical and societal discrimination, the literature shows that Canada has adopted a substantive form of equality rights rather than a formal one.

Firstly, in chapter two, it was observed through the text of the Charter that the wording in section 15(2) focuses on ameliorating the conditions of disadvantaged groups in society. In fact, due to the wording of the text, the Supreme Court of Canada in its affirmative action cases, namely the *Kapp* case, demonstrated how being treated unequally doesn't immediately mean being discriminated. Judy Baker explains the Canadian approach by stating that the analysis of the Supreme Court in affirmative action programs doesn't start with the idea that everyone should be treated the same, but rather starts with the idea of ameliorating past discrimination[355] (or ameliorating the conditions of disadvantaged groups in society) as a starting point for special programs.

In other words, the approach adopted by the Courts in Canada is that, excluding groups who have been generally "favored" in society, for the purpose of ameliorating the conditions of groups who have been discriminated in the past does not lead to discrimination right away.[356] Therefore, in the affirmative action debate, the starting point in Canada for equality rights is the idea of improving the situation of people who have been discriminated against in the past (or people who have been a victim of societal discrimination), rather than the American approach of having equal treatment under the law.

Justice l'Heureux Dube of the Supreme Court of Canada, defines substantive equality as:

> […] the underlying goal of achieving an equality of outcome or substance among all members of society regardless of their differences. […] This ideal can be contrasted with the concept of

[355] Baker, *supra* note 330 at 529.
[356] *Ibid.*

> "formal equality" of sameness of treatment in the law, which does little to overcome patterns of social disadvantage and indeed, may perpetuate them.[357]

Sheppard explains in detail what is meant by substantive equality in affirmative action in Canada. She explains that a substantive approach to equality prompts one to look at the social conditions of groups in society.[358] She states that through the substantive approach for equality in affirmative action cases, the courts in Canada take into account the objective of remedying societal discrimination by looking beyond the individual level, and by looking at the greater context of exclusion and prejudice that certain groups in society face.[359] She adds that a substantive approach to equality adopted by the Canadian courts allows for a better assessment of whether equality has been met because it "embodies a right to have one's group differences acknowledged and accommodated in laws, and social and institutional policies and practices".[360] Furthermore, in contrast, Sheppard explains that the U.S. Supreme Court, by adopting a formal approach to equality, disregards the objective of remedying societal discrimination (ameliorating the conditions of disadvantaged groups in society) as a basis for affirmative action because they focus on a more "institutionally specific goal".[361] As mentioned earlier, she explains however that some justices in the U.S. Supreme Court have been open to accepting societal discrimination as a justification for affirmative action. For example, the views of Justice Marshall, Brennan, Blackmun and Sotomayor to some extent reflect Canada's substantive approach to equality. These dissenting justices have accepted remedying societal discrimination as an objective for affirmative action.[362] Colleen Sheppard, explains, how these three justices, in particular, Justice Marshall in *Bakke,* questions whether the idea of "sameness of treatment" can meet the

[357] C. L'Heureux Dube, "Making a Difference: The pursuit of Equality and a Compassionate of Justice," (1997) 13 South African Journal on Human Rights 335 at 338.
[358] Sheppard, *supra* note 8 at 17.
[359] *Ibid.*
[360] *Ibid.*
[361] Sheppard, *supra* note 328 at 119.
[362] *Ibid* at 120.

"pervasive disadvantaging of the past".[363] Justice Marshall also expresses concern for the American conception of formal equality by stating that it is too "abstract" and "decontextualized".[364] Similar to Justice Marshall, Justice Blackmun also appears to be at unease with the American conception of equality:

> I suspect it would be impossible to arrange an affirmative action plan in a racially neutral way and have it successful. To ask that is to ask the impossible. In order to get beyond racism, we must first take race into account. And in order to treat some persons equally, we must treat them differently. We cannot - we dare not - let the Equal Protection Clause perpetuate racial supremacy.[365]

Despite the dissenting opinion in the American courts, one of the reasons why the courts in the United States have adopted more of a formal approach to equality rather than a substantive one, when it comes to race-based affirmative action programs, is because under the formal approach to equality, the debate in the United States on affirmative action has revolved around the idea of how a special program will meet a "strict scrutiny test" to become an exception to equal treatment under the law.[366] In Canada, however, a substantive approach to equality has been adopted because the debate has been centered on how one defines equality and how affirmative action is an integral part of this definition, and not an exception to it.[367]

In the United States, generally, race-based classifications undergo "a strict scrutiny test".[368] In fact, as was seen in chapter one, American jurisprudence has applied routinely the "strict scrutiny test" to race-based affirmative action programs in university admissions.[369] According to the "strict scrutiny test" the state must demonstrate that there is a "compelling

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[363] *Ibid.*
[364] Sheppard, *supra* note 328 at 120.
[365] Bakke, *supra* note 89 at 407.
[366] Baker, *supra* note 330 at 531.
[367] *Ibid.*
[368] *Richmond v. J.A. Croson Co.*, (1989) 488 U.S. 469 at 493
[369] Baker, *supra* note 330 at 531.

interest" for the affirmative action program to exist.[370] In the American experience on affirmative action in higher education, the compelling state interest was justified through the use of diversity as a justification for the special program in question.[371] However, as was seen in the American jurisprudence, race-based classifications had to be narrowly tailored enough to uphold diversity as a compelling state interest.[372] The Court in *Grutter* resolved the matter and explained that admissions policies were narrowly tailored if a quota system was not adopted, and if each applicant was individually assessed in the admissions process.[373] The Court in adopting this position was firm on its use of a formal approach to equality rights because everyone had to be treated equally under the law as a starting point. Overall, in the American experience, the Court has been against the idea of using a quota system because they stated that a quota system violates the Equal Protection Clause of the 14th Amendment. According to Baker, the idea was that a quota system stepped away from the starting point in American equality rights, which is that everyone should have equal treatment from the start.[374] However, in the Canadian context on affirmative action, the Supreme Court of Canada allowed the use of quotas (in the employment context in particular) as a means of ensuring substantive equality.[375] For example, in the case of *Action travail des femmes*, a quota system, where one out of every four hired employees had to be a woman, was approved because the Court concluded that such a quota system ensured ameliorating the conditions of previously excluded groups in society.[376]

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[370] Ronald D. Rotunda & John E Nowak, *Treatise on Constitutional Law: Substance and Procedure,* 5th ed (Thomson-Reuters-West, 2012) at 56.
[371] Grutter*, supra note* 135 at 328
[372] Adarand, supra note at 155.
[373] Grutter*, supra note* 135 at 337
[374] Baker, *supra* note 330 at 535.
[375] Sheppard , *supra* note 8 at 24.
[376] *Ibid.*

Furthermore, Ross explains that the analysis of the courts in the United States with regard to affirmative action programs was about weighing state interests.[377] He states that the competing interests were diversity versus ensuring equal treatment under the law. According to Baker, in Canada, however, the focus, is not about "balancing competing interests" when it comes to affirmative action programs, but rather it is about what the program in question is trying to achieve.[378] The answer to this question in Canada is not whether the affirmative action program achieves a compelling state interest (of diversity) to justify the existence of a program, but rather whether the affirmative action program is ameliorative and targets a disadvantaged group from one of the enumerated or analogous grounds of discrimination in section 15(1).[379]

Furthermore, in Canada, the analysis and effect of equality rights on affirmative action programs is quite different. It was initially the decision, *Lovelace v. Ontario*[380], by the Supreme Court of Canada, which established a mechanism for equality rights guaranteed by section 15(1) and 15(2) of the Canadian charter. Although this mechanism was revised in later decisions, the Court explained that an affirmative action program was not an exception to equality but rather "an expression of equality".[381] Justice Iacobucci explained that affirmative action programs that are created with the purpose of ameliorating disadvantaged groups in society is in essence "what equality is all about".[382] The mechanism adopted by the Supreme Court in *Lovelace* was later revised in *R v. Kapp.*[383] The Supreme Court in *Kapp*, reinforced Canada's substantive approach to equality by explaining that if a special program is ameliorative and targets disadvantaged

[377] Ross, *supra* note 347 at 232.
[378] Baker, *supra* note 330 at 538.
[379] *Ibid* at 538-539.
[380] Lovelace, *supra* note 302 at 987
[381] Lovelace, *supra* note 302 at 1008.
[382] *Ibid.* Also see: Sheppard, *supra* note 8 at 2.
[383] Butler, *supra* note 313.

groups[384] the program in question is non-discriminatory.[385] Thus, there is no violation of section 15(1) equality guarantee because the special program's purpose is met. Overall, the *Kapp* decision caused the state to have a "very broad discretion in designing and maintaining affirmative action programs".[386]

As was seen in this section, one reason for the difference in the experiences of the two nations is due to the interpretation of equality guarantees adopted by each country. The American approach to equality with regard to race based affirmative action programs uses a formal approach to equality as a basis for these programs. This is most evident in the interpretation of equality adopted by the Courts in the United States, which have stated that the Fifth and Fourteenth Amendment prohibit any formal distinction, regardless of whether a preferential program is an outcome of racism or discrimination.[387] Even, most of the U.S. Supreme Court's civil rights cases, which have tried to adopt or uphold "progressive measures" have done so by remaining within a framework of formal equality.[388] On the other hand, the Canadian approach to equality with regard to race based affirmative action programs is substantive because of the very definition of equality and affirmative action in the Canadian Charter and Canadian cases, such as the *Kapp* decision.

[384] A disadvantaged group that falls within one of the enumerated or analogous grounds of discrimination in section 15(1).
[385] Butler, *supra* note 313.
[386] Moreau, *supra* note 305 at 285.
[387] Ross, *supra* note 347 at 249.
[388] For more information see: Owen M. Fiss, "Groups and the Equal Protection Clause" (Paper delivered at conference held at the Institute for Advanced Study, in Princeton, N.J., June 1975) (1976) 5 Phil. & Pub. Aff. 107. Also see: Samuel Issacharoff and Pamela S. Karlan, "Groups, Politics, and the Equal Protection Clause", (2003) 58 U. Miami L. Rev. 35.

2. Differences in Political Culture in the Affirmative Action Debate: A Group-based versus Individualistic Approach

Another important reason, which explains why the affirmative action experience in Canada and the United States is strikingly different, is because it appears that there is a greater willingness in the Canadian context to rely on group-based categories, unlike the United States, which has an adherence to an individualistic approach with regards to equality and affirmative action programs.

In looking at the political culture of Canada and the United States, scholars such as Hartz, Horowitz and Lipset have asserted that while Americans and Canadians are among the most similar persons on earth, Americans are considered more as individualists who have an "achievement-oriented" and "self-oriented" culture, whereas Canadians are considered more "collectivity-oriented" than Americans.[389] Lipset explains that Americans have a culture where they tend to apply "a general standard" to individuals at an individual basis, rather than the Canadian approach which treats individuals differently based on their membership in a particular class or group.[390] Other scholars such as Patrick Monahan and Clifford Geertz have also argued that American law focuses on the protection of individual rights rather than group based rights. Similar to statements made by Hartz and Horowitz, Patrick Monahan, in his book, titled *Politics and the Constitution*[391], explains that the United States has applied a culture that focuses on the individual rather than on a group: "[in the United States], life is the individual pursuit of happiness rather than membership in a body politic. All roads converge on the atomistic, pre-

[389] Seymour Martin Lipset, *Revolution and Counterrevolution: Change and Persistence in Social Structures* (New York: Basic Books, Inc., 1968) at 48.
[390] Seymour Martin Lipset, *Continental Divide: The Values and Institutions of the United States and Canada* (New york: Basic Books, Inc., 1990) at 39-41.
[391] Patrick J. Monahan, *Politics and the Constitution: The Charter, Federalism, and the Supreme Court of Canada* (Agincourt, Ontario: Carswell, 1987).

political individual maximizing his or her self-interest"[392] Monahan even warns in his book that Canada should be cautious of adopting an American "political tradition" because Canada's political culture which is of "collectivist nature" cannot fit "within a purely individualistic framework".[393]

In the context of affirmative action, the US Supreme Court in its analysis consistently focused on the individual. This was most evident in its statements that every individual should be treated equally under the law and that stepping away from this standard would imply stepping away from the equal treatment rule.[394] The American Constitution alone is known to focus on the individual.[395] For example, the wording used in the equal protection guarantee of the Fourteenth Amendment makes reference to prohibiting unequal protection to "any person" rather than "any groups" or "any individuals".[396] In fact, Sheppard explains that a formal approach to equality rights, adopted by the US Supreme Court, is "assurance that individuals are treated as individuals rather than members of social groups".[397] On the other hand, the debate and language used in Canada for affirmative action has been focused on group rights. This is most visible in the text of its constitution which clearly states the term "disadvantaged groups" rather than individual.

In fact, according to Ross, Canada has a history of political culture that recognizes group-based differences, which are embedded in the terminology used in Canadian law.[398] In particular,

[392] *Ibid* at 91-96. For more information: Patrick Monahan discusses the Hartz-Horowitz thesis in detail in pages 91 to 96.
[393] *Ibid* at 92
[394] Ross, *supra* note 347 at 249
[395] *Adarand, supra* note 155 at 239. Also see: Ross, *supra* note 347 at 249-250.
[396] The *Adarand* case explains how the American constitution protects a "person" not a "group". See: Adarand, *supra* note 155 at 226.
[397] Sheppard, *supra* note 8 at 16.
[398] *Ibid.*

the language employed in different provisions in the Canadian constitution and human rights legislation in Canada highlight the presence of group-based differences in these provisions.[399]

Ross explains that section 15(2) of the Canadian Charter, which endorses affirmative action, focuses directly on the term "disadvantaged individuals or groups". In looking at the text of section 15(2), he explains that the term "disadvantaged individuals or groups" was employed to cause one to reflect on group based social, economic and political disadvantage.[400] Such disadvantage involves poverty, prejudice, unequal opportunity, and a history of exclusion, for individuals or groups of individuals.[401] The term "individuals" is also mentioned in section 15(2) to cover group inequalities and to be as inclusive as possible.[402] Section 15(2) in fact doesn't only cover institutional programs, but rather "any law, program or activity". It was even intended to cover for instance situations, such as an employer from a small business hiring one person of aboriginal ancestry through a special program.[403]

It is also significant that in addition to s. 15(2), other provisions in the Canadian Constitution also explicitly make reference to Canada's culture of recognizing group rights. As Sheppard explains, "First Nation communities, religious communities, and cultural communities are integral to the Canadian conception of a multicultural pluralistic society".[404] Both Sheppard and Ross refer to section 23 of the Canadian Charter, which guarantees minority language educational rights, as an example of how Canada's political culture recognizes group-based

[399] *Ibid.*
[400] Ross, *supra* note 347 at 254. Also see : Pierre Bosset and Madeline Caron, "Un Nouvel Outil de Lutte Contre la Discrimination: Les programmes d'Accès à l'égalité" (1987) 21 R.J.T. 71 at 112.
[401] Sheppard, *supra* note 8 at 20.
[402] Canada. Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, minutes of proceedings and evidence (1980-81), 48:44.
[403] *Ibid.*
[404] Sheppard, *supra* note 327 at 158-159.

differences.[405] Section 23 highlights the group-based differences of Canada's French and English linguistic minorities by creating categories of entitled parents who can become beneficiaries of publicly-funded minority language education.[406] Section 23 was adopted with the purpose of preserving the two official languages in Canada, as well as the culture of the minority language communities. Similar to affirmative action in Canada, providing equal access in either official language in Canada doesn't mean that there has to be the same exact education with the same exact resources and facilities[407] - this once again highlights the presence of substantive equality in Canadian law, because not everyone has to be treated the same in order to ensure equality. Sheppard explains that equality in the form of equal treatment of individuals regardless of their "group affiliations" goes against the idea of affirmative action, because affirmative action is a concept that "includes differential treatment of individuals according to their group".[408]

Sheppard also explains that the text of section 15(2) directly endorses affirmative action programs to remedy group based disadvantages, rather than an American conception of equality which focuses on remedying an individual right. She explains that in looking at the text of Canadian and American legislation, as well as its political culture, equal rights in the United

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[405] See: Canadian Charter of Rights and Freedoms, *supra* note 32, ss. 23.(1) reads:

Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

Also see: Sheppard, *supra* note 327 at 159 & Ross, *supra* note 347 at 254.

[406] The different groups are: parents, who learned and still use the official minority language in the province in which they reside, parents who received their education in either English or French in Canada and reside in a province in which the language they were educated in is the minority language in the province, and parents who have a child who has received primary or secondary education in English or French in Canada, can request to make all of their children receive schooling in that same language. Also see: "Minority Language Educational Rights", online: the Charter in the Classroom, Students, Teachers and Rights, <http://www.thecharterrules.ca/index.php?main=concepts&concept=10&sub=interpretation>

[407] *Ibid.*

[408] Sheppard, *supra* note 328 at 117.

States has been viewed as an "individual right to equal treatment without regard to group membership(s)."[409] The United States has adopted an approach where they tend to focus on the "individual character of rights" rather than the "significance of historical and continuing patterns of group-based disadvantages".[410] In fact, the US Supreme Court has directly stated that it cannot as a judicial power analyze the status of group-based categories in society. For instance, in *Bakke*, Justice Powell stated that "the kind of variable sociological and political analysis necessary to produce such rankings [among groups] simply does not lie within the judicial competence".[411] Also, in the case of *Wygant*, Justice Powell expressed his concern of recognizing group based categories, by stating that such categories are "insufficient and over expansive".[412]

In addition, one of the reasons why the wording employed in section 15(2) of the Canadian charter makes references to "ameliorating disadvantaged groups in society" is because section 15 was adopted in 1982, at a time when the debate on affirmative action was quite heated south of the border. In order to avoid this debate, the Canadian legislature was careful in the terminology it used, as it wanted to ensure that the debates taking place south of the border would not cross to the north.[413]

Furthermore, the *Bakke* decision had already been decided by the US Supreme Court when Canada adopted section 15 of the Canadian Charter. Justice Powell in Bakke had made it clear that group based differences and ameliorating racial disadvantage had no place in the Fourteenth Amendment:

> The clock of our liberties, however, cannot be turned back to 1868. It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. "The Fourteenth Amendment is not directed

[409] Sheppard, *supra* note 327 at 155.
[410] Ibid at 158-159.
[411] Bakke, *supra* note 89 at 296.
[412] *Wygant v. Jackson Board of Education*, (1986) 476 U.S. 267 at p.1848
[413] Ross, *supra* note 347 at 254.

> solely against discrimination due to a 'two class theory'- that is, based upon differences between 'white' and Negro."[414]

Overall, the American interpretation of the fourteenth amendment has been focused to equal treatment based on the individual, which as a result, has not allowed much room for group based categories. The US Supreme Court has been clear in interpreting the "separate but equal" doctrine: "under our constitution, the government may never act to the detriment of a person solely because of that person's race."[415] In the United States, in a country where there is a legacy of slavery, it is interesting to see how diversity has become the rational for affirmative action to justify preferences, rather than ameliorating the conditions of disadvantaged groups in society. On the other hand, in Canada, the text of the constitution makes direct reference to group based categories. With regards to the equality guarantee, individuals are treated as members of social groups rather than on an individual basis.

The group-based versus individual focus of equal rights is also linked to debates around merit. Much of the litigation in the higher education context in the United States has been due to the fact that many white university applicants have felt threatened of losing their spot in university admissions to a non-white applicant.[416] Although in Canada many special programs currently exist with regard to aboriginal applicants, especially in law schools and medical schools, advantaged groups in Canada have not yet taken the matter to the courts. Even if there has been less litigation in Canada, similar sentiments are likely to be present in the Canadian context, such as a white applicant believing that it is "unfair" or "unjust" of having an aboriginal student enter law school for instance through a special program, and the effect of not having this

[414] Bakke, *supra* note 89 at 294-295.
[415] *Fullilove v. Klutznick,* (1980) 448 U.S. 448 at 525.
[416] Ivan Katchanovski, Neil Nevitte & Stanley Rothman, *supra* note 9 at 19-20.

special program extended to him or her as well.[417] In Canada, very few complaints have been made in this regard, and none of said complaints have made it to the Supreme Court. One cannot help but question why.

One key possibility is due to the discussion regarding the place of merit in admissions criteria, where merit is understood in a very narrow sense to imply only grades. Persons, who oppose affirmative action programs in higher education, normally do so, on the basis that they believe that such programs step away from merit standards, meaning grades. In fact, much of the litigation in the United States on affirmative action in universities has resulted from white applicants feeling that universities are stepping away from the idea that all applicants, whether from a minority group or not, should be considered on an individual merits basis and a "racially neutral manner".[418] The United States appear to be less tolerant of stepping away from merit standards, to include race in university admissions. Justice Scalia asserted this feeling within the Court by stating that stepping away from merit standards (which he refers to as "this American principle") causes one to play, according to him, "with fire".[419] On the other hand, in Canada, there appears to be greater tolerance around the idea of stepping away from merit standards.[420] This of course does not imply that an individual selected through a special admissions program does not meet the exigent requirements of law school or medical school. It simply means that merit standards are not the only factor taken into account in an individual's university application, as was seen in the section on education equity in Canadian universities in chapter two. Patrick Clancy has written about how focusing solely on merit standards fails to examine

[417] Maria Wallis, "Racism in the Canadian University: Demanding Social Justice, Inclusion, and Equity; (review)" (2009) 41:1-2 Can Ethn Stud 249 at 255.
[418] *DeFunis v. Odegaard,* 416 U.S. 312, 338 - 339 (1974) [DeFunis]
[419] Ross, *supra* note 347 at 246.
[420] Brooks, *supra* note 122 at 204-205. Also see: Ivan Katchanovski, Neil Nevitte & Stanley Rothman, *supra* note 9 at 19.

"differences in the opportunity structure" regarding admissions to higher education.[421] He argues that merit standards need to be "augmented" by preferential policies.[422] Therefore, he suggests that:

> The rationale is that since access to higher education is, to varying degrees, competitive, it will always privilege those with superior economic, social and cultural resources. One response is to redefine merit as the distance between the academic levels reached by students and the diverse handicaps faced by them, whether in terms of their personal characteristics, family, community or schooling experiences. This expanded definition of equality of opportunity also applies to the nature of the higher education to which access is granted. The goal here is to organize access so that the student body is not only widened in the higher education system as a whole, but also within the most prestigious institutions.

Outside the university context, stepping away from merit standards is also noticeable in other practices in Canada. For instance, it is a well-known fact that the Liberal Party in Canada has a tradition of selecting and alternating between an English Speaking and French Speaking leader of the party.[423] Another example is the selection criteria and appointment of Justices to the Supreme Court of Canada, where there are certain constraints (though not strictly formal) regarding the Justices who are chosen from different provinces.[424] Without a doubt, the leader of any party or a justice to the Supreme Court of Canada exceeds beyond the merit standards required for such a qualified post, but it appears that Canada has adopted a culture of balancing between merit standards and other factors, to try to promote an inclusive society.

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[421] Patrick Clancy & Gaële Goastellec, *supra* note 237 at 136-154.
[422] *Ibid* at 139.
[423] Ross, *supra* note 347 at 246.
[424] "By Statute, three of the justices must be members of the Quebec bar. By tradition, three others come from Ontario, and one each from the Maritime Provinces, the Prairies, and British Columbia. As to the smaller provinces, usually a nominee will succeed a justice from another province. Traditionally, one Quebec judge has been an Anglophone. One Ontario judge has often come directly from the bar, while another has traditionally come from the Ontario Court of Appeal." See: Ross, *supra* note 347 at 246.

CONCLUSION

Throughout this thesis, it was observed that the experience in Canada and the United States has been quite different with regard to affirmative action in higher education. There has been a critical divergence in the justifications advanced and endorsed for affirmative action and education equity in these two countries.

In the United States, the Courts have used diversity as a compelling state interest to advance and support the use of race conscious policies in admissions. Racial preferences have been adopted in many professional programs, such as law schools and medical schools, in universities across the United States. Such preferences, however, have been under much scrutiny and have found themselves as part of the most contentious debates regarding affirmative action in the United States. Through the litigation on affirmative action in higher education, the Courts have advanced diversity as the key justification for special programs. Diversity was advanced and discussed at length by the American Supreme Court in the *Bakke* decision, where Justice Powell held that universities could use race as a factor to create and uphold a diverse student body. In the wake of *Bakke*, in particular, in *Grutter* and *Gratz*, diversity continued to be used as the key justification for affirmative action. Diversity emerged as the key justification for special programs because it was considered as a less controversial justification than historic societal disadvantage. Although the U.S. Supreme Court, as well as, the public has been much divided, in opinion, on the use of race in admissions policies, the latest Supreme Court decision, *Fisher* v. *University of Texas,* confirmed and held again that race and ethnicity could be used as a factor to ensure a compelling state interest of a diverse student body. However, despite *Fisher*, the divided views of the judiciary and legislature on the debate on affirmative action in higher education in the United States demonstrate that the debate is far from being resolved.

However, to say that the United States is not trying to promote an inclusive society would be completely false and inaccurate. Although the debate on affirmative action has stirred much controversy south of the border, the divided views of the justices of the US Supreme Court do not represent the entire debate, or the entire view of the nation. Indeed, through its constitution and political culture and history, Canada appears to place a greater importance on substantive equality and group based differences in the affirmative action debate. However, sociological evidence shows that the United States are in reality more accepting of stepping away from "assimilationist traditions", when compared with Canada.[425]

Furthermore, although Bakke served as an essential decision that shaped the affirmative action debate in the United States, one cannot help but mention that the decision is based mostly on the opinion of one justice alone, that of Justice Powell. Justice Powell's decision shaped the affirmative action debate due to the fact that his analysis was in the "middle" of the spectrum and because his analysis was the most detailed on formal equality. The American debate has been very much linked and dependent on the divisive views of the Court. Though it may result in a form of exaggeration, as Stephen Ross has pointed out, it is possible to say that had the composition of the American bench been different, perhaps the US Supreme Court could have had a five-justice majority that applied the Equal Protection Guarantee in a way not so different from the Supreme Court of Canada's application of Equality rights.[426]

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[425] *Ibid* at 249. Even if Canada adopted the Charter in 1982 and section 15 to remedy past disadvantage and discrimination, a study from 1989 showed that 61% Canadians thought that minority groups should change their culture "to blend with the larger society", compared to only 51% of Americans feeling this way. See: S.M. Lipset, *Continental Divide: The Values and Institutions of the United States and Canada* (New York: Routledge, 1990) at 187. The percentage has not changed much today. See Ivan Katchanovski, Neil Nevitte & Stanley Rothman, *supra* note 9 at 19-20.

[426] Ross, *supra* note 347 at 250.

On the other hand, in Canada, it appears that there has been less litigation on affirmative action in higher education. To begin with, though the two terms imply the same in result; the term employed in the Canadian context has been education equity rather than affirmative action. The term education equity was advanced for the first time by Justice Rosalie Silberman Abella in 1984 in order to avoid the rigid use of quotas and to "avoid some of the intellectual resistance and confusion" that was taking place in the United States at the time.[427] Though there hasn't been much litigation on affirmative action or education equity in Canada, many professional programs such as law schools and medical schools have nonetheless adopted special programs in their admissions policies. These special programs have been adopted with the purpose of ameliorating the conditions of disadvantaged groups in society, which is advanced as the key justification for affirmative action in Canada through the text of its constitution. Special programs in Canadian universities have been adopted mostly with the purpose of increasing the representation of aboriginal persons in higher education. One of the most important affirmative action or education equity initiatives in Canadian higher education highlighting the justification of ameliorating the condition of disadvantaged groups in society has been the IB&M initiative at Dalhousie University's faculty of law. The initiative was undertaken with the purpose of fighting racism in the Canadian legal system, which had been confirmed in the Marshall inquiry. Though cases on affirmative action in Canada have not been rendered in the education context, the justification for special programs in Canada, as advanced by the Supreme Court of Canada in *Kapp*, has been that of ameliorating disadvantaged groups in society, rather than diversity.

In examining the literature on affirmative action in Canada and the United States, it was noticed that there hasn't been much analysis in the literature regarding the differences in the

[427] Abella report, *supra* note 20 at 7.

experiences between these two countries. However, there has been some scholarship that endeavors to explain some of the ways in which we can understand why different approaches have emerged in Canada and the United States. One explanation, which has emerged, is that it appears that Canada and the United States have adopted different conceptions of equality. On the one hand, it appears that the United States has adopted a formal approach to equality, whereas, Canada has adopted a substantive approach to equality. Another explanation that emerges in looking at the experience of each country is that it seems that Canada has adopted a political culture where it has a greater willingness to rely on group-based categories in looking at affirmative action. On the other hand, it appears that the United States has an adherence to an individualistic approach. Despite these two underlying explanations for the different approaches adopted by Canada and the United States with regard to affirmative action, another reason for their difference in experience is the evident fact that there has been less of an attack on the status quo in Canada in comparison to the experience in the United States.

Finally, it is important to mention that although Canada places greater importance on substantive equality and group based categories, many areas of concern still needs to be addressed. For example, although Canadian universities have adopted preferential treatment to increase the representation of aboriginal students in university programs, not much is said, nor researched on how many students actually benefit from these policies. Furthermore, once a student is able to "get through the door"; little is known on the actual effects of a special program, as well as the challenges faced by the administrators and the beneficiaries of these programs.

Another important concern, which needs to be addressed north of the border, is regarding how one defines a disadvantaged group and who is included in this group. An affirmative action

program can only meet its purpose of "ameliorating the conditions of disadvantaged groups in society" if persons that are truly disadvantaged are really included in the identified group. Anita Indira Anand has written about this point and in particular about whether special programs in Canada are effective in addressing racial disadvantage.[428] Anand argues that preferential policies should target the poor and in particular visible minorities.[429] She argues that identifying disadvantaged groups can often cause persons who should be beneficiaries of a special program to be excluded while undeserving individuals benefit from the same program.[430] She gives the example of Japanese and Korean Canadians who have high academic grades and thus normally face less unemployment in Canada.[431] However, she explains that aboriginals have a high unemployment rate and not many finish their secondary or post secondary education.[432] Therefore, according to Anand, affirmative action programs should target the poor (without taking into account skin colour), and only target visible minorities that are "economically disadvantaged".[433] Anand's suggestion that affirmative action programs should target the economically disadvantaged, without regard to skin colour, may address better who is included in disadvantaged groups because those who are privileged in racial groups would not be able to benefit from special programs.

In looking south of the border, questions regarding who truly benefits from special programs have also emerged. Sean A. Pager has written about the "quadrangle" of race in the United States, as "disentitling the deserved and entitling the undeserved" from preferential

[428] Anita Indira Anand, "visible minorities in the multi-racial state: when are preferential policies justifiable?" (1998) 21 Dalhousie L.J. 92.
[429] *Ibid* at 95.
[430] *Ibid*119-120.
[431] *Ibid.*
[432] *Ibid* at 120-121
[433] *Ibid* at 125

policies.[434] Pager explains that the "quadrangle" are Native Americans, Hispanics, Asians and Blacks, which are known as the "quasi-official" minorities in the United States.[435] Pager critiques the quadrangle by stating that its boundaries are indeterminate, the heterogeneity of these groups are too extreme, and that certain groups may be advantaged over others.[436]

Furthermore, south of the border, Angela Onwuachi-Willig has argued that in examining black applicants for admission to higher education, they shouldn't be treated as one group, but rather special programs should put an emphasis on the "ancestral heritage" of black applicants or on the "legacy blacks".[437] Onwuachi-Willig states that the "legacy blacks" are individuals who are the descendants from slaves in the United States.[438] She argues that the black category in admissions has to be reexamined closely because there is a higher number of first and second generation black applicants and those of mixed-race who study at "elite educational institutions", compared to legacy blacks.[439] Nonetheless, Onwuachi-Willig argues that all blacks should be targeted in preferential policies but that academic achievements and economic and historical considerations regarding this racial category should be taken into account. It can be noted that Onwuachi-Willig's statements about legacy blacks and ancestral heritage were observed in the IB&M initiative by Dalhousie University's Faculty of Law, because the IB&M program was designed to target Indigenous Black Nova Scotians, meaning individuals coming from a historically Black and Mi'kmaq community in Nova Scotia.

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[434] Sean A pager, "Antisubordination of whom?" what India's answer tells us about the meaning of equality in affirmative action," (2007-2008) 41 U.C. Davis L. Rev. 289 at 303.
[435] *Ibid* at 303.
[436] *Ibid* at 303-319.
[437] Angela Onwuachi-Willig "The Admission of Legacy Blacks", (2007) 60 Vand. L. Rev. 1141 at 1160.
[438] *Ibid* at 1149.
[439] *Ibid* at 1145.

Overall, Onwuachi-Willig, like Anand and Pager argues that it is important to assess who fits within the categories in order to ensure that the non-disadvantaged do not benefit from a preferential policy that should have been targeted to the truly disadvantaged.[440]

All in all, the complex and deep-rooted inequalities of our society call for future research and development of policies and measures to tackle ongoing systemic discrimination in higher education and society at large. Although there is much more litigation and research on affirmative action programs in higher education in the United States, a formal and individualistic approach to equality is certainly not enough to tackle the realities of inequality and exclusion, especially in a nation that has a legacy of slavery. Canada's substantive approach to equality can perhaps shape more the American thinking on affirmative action as the debate continues to unfold. However, the Canadian and American experience on affirmative action have been so different due to the reasons mentioned in this thesis that these differences cannot be measured to conclude that one experience or approach should be favored over the other. What each country can do, nonetheless, is, take insight from the experience of its neighboring country, in order to perhaps revise where it stands in looking forward.

[440] Pager, *supra* note 433 at 310.

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