## *Superficially Similar but Fundamentally Different: A Comparative Analysis of US and UK Affirmative Action*

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# Superficially Similar but Fundamentally Different: A Comparative Analysis of US and UK Affirmative Action.

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## 1. Introduction

The aspiration that all people should enjoy equality of treatment and opportunity is enshrined in the democratic psyche of the US and the UK and each country has adopted legal measures to secure an equivalent opportunity for individuals to enjoy full societal franchise. In their pursuit of equality both the US and the UK also require or allow that certain previously excluded and underrepresented groups are afforded preferential treatment under the law. In the UK such measures are referred to collectively as positive action, whilst in the US affirmative action is the general term employed. This thesis will use these two terms either in reference to one or both country's policies. The overarching similarities between the US and UK have led a number of commentators to cite the importance of trans-Atlantic cross-referencing in shaping the development of affirmative action. Lizzie Barmes, for example, has suggested that UK positive action 'owes much to the US approach of combating equality through law'.[1] In addition, Bob Hepple considers that 'American precedents and legislation [relating to affirmative action] have been a crucial stimulus to legal development in Europe'.[2] Arguing along similar lines Sean Pager has cited the ECJ's 'American approach' to deciding context-dependent questions relating to positive action,[3] and Daniela Caruso refers to positive action as the 'lesser-known European relative' of US affirmative action, thus explicitly linking European measures, which form the permissible limits for UK positive action, with US legal provisions.[4] Whilst US and UK affirmative action policies share certain similarities this should not obscure fundamental differences in the principles upon which the policies are based, their objectives and their uses, a situation which has also been expressed in the literature,[5] and demonstrated in surveys,[6] concerning US and UK positive action. These

[1] L. Barmes, 'Equality Law and Experimentation: the Positive Action Challenge', *Cambridge Law Journal* (2009) 68(3), pp. 623 – 654, p. 627.
[2] B. Hepple, 'The European Legacy of Brown v Board of Education', 2006 *U. Ill. Rev.* 605, p. 611.
[3] S. Pager, 'Strictness and Subsidiarity: An Institutional Perspective on Affirmative Action at the European Court of Justice', 26 *Boston College Int'l & Comparative Law Review*, 35 (2003).
[4] D. Caruso, 'The Limits of the Classic Method: Positive Action in the European Union after the New Equality Directives', 44 *Harvard Int'l Law Journal* 331 (2003).
[5] See B. Hepple, 'The European Legacy of Brown v Board of Education', *op. cit*., who, having noted the importance of US precedents to European positive action developments, emphasises the differences in each country's legal framework resulting from the importance of context and country-specific influences.
[6] See, for example, R.S. Dhami, J. Squires, and T. Modood, *Developing Positive Action Policies: Learning from the Experiences of European and North America*, (HMSO, Norwich, 2006), pp. 19 – 24, 53 – 80.

differences have meant that the extent to which the two countries can learn from the experiences and practices of the other as regards positive action has previously been limited. However, as well as establishing the extent of the fundamental differences between US and UK positive action this thesis will show that amid the most recent developments the superficially similar but fundamentally differing natures of affirmative action may now offer the potential for useful cross-referencing to be made between the two countries, to help the legal provisions match both the specific problems and the social context encountered within each location. Some more detailed examples which demonstrate further how superficial similarities conceal fundamental differences and the opportunities for cross-referencing in US and UK positive action are considered below.

### 1.1 A Legal Solution for Societal Inequality

Both the US and UK utilise formal legal mechanisms to deal with the 'ever-present and practical…problem of 'equality' in the law'.[7] In addition, both countries have enacted legislation to impose or permit individuals and groups to take action to achieve *de facto* and *de jure* equality. Despite this overarching similarity the formulation and effect of each country's legal framework encompassing these provisions is distinct and arises from different legal sources. In the US, for example, the broad legal basis for equality, out of which affirmative action has grown, states simply that all 'citizens of every race and color ... [have] full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens'.[8] The minimal guidance offered by this declaration has resulted in a significant amount of case law seeking to discern the parameters of affirmative action, which by its nature constitutes an inconsistent and patchy basis for legal development. The nature of the judicial input in US affirmative action has also meant that radical progress in the scope and direction of affirmative action has frequently been followed by conservative judgments which render these gains

[7] N. Dorsen, 'A Lawyer's Look at Egalitarianism and Equality', in R. Pennock and J.W. Chapman (eds.), *Equality*, (Atherton Press, New York, 1967), p. 37.

[8] Civil Rights Act 1866 (14 Stat 27) passed 9th April 1866. The equality commitment articulated in the Act was added to the Constitution by the Equal Protection Clause of the Fourteenth Amendment, adopted 9 July 1868, in response to Congressional uncertainty over its ability to legislate in the terms of the 1866 Act. The Fourteenth Amendment was similarly broad in its commitment to equality which afforded persons born or naturalised in the US 'equal protection of the laws'.

impotent.[9] In addition, the US Constitution is largely unchangeable by normal political processes, because of its hallowed position as one of the country's founding documents. By contrast, UK positive action provisions are drawn from a range of national and supranational sources, including domestic legislation, the EC Treaty,[10] and are also influenced by the country's commitment to the European Convention on Human Rights and Fundamental Freedoms ('ECHR') resulting from its membership of the Council of Europe.[11] In addition, 'soft law'[12] has been important in governmental promotion of positive action in the UK.[13] The result of these influences is that UK positive action is able to evolve through ordinary legal and governmental processes. Despite the existing differences in the nature of legal provisions in the US and UK there may be increasing scope for the two countries to use the experiences and measures adopted in the other. The US, for example, may be able to borrow the UK's 'soft law' approach, as a means of enabling affirmative action to develop more fluidly, whilst the UK's enactment of the Equality Act 2010, with its greater legislative focus on positive action, may indicate its movement closer to the US' focus on statutory affirmative action provisions, as opposed to keeping most forms of positive action confined to non-legally binding instruments.

### 1.2 The Primacy of Race and Gender within Positive and Affirmative Action

Key forms of affirmative action in the US and UK are the pursuit of either racial or gender equality. This similarity is, however, quickly eclipsed by differences in how each country deals with concerns relating to race and gender and the extent to which the focus of positive action has broadened as this area of law has matured. US affirmative action has continued to prioritise preferential treatment for ethnic minorities,[14] most notably African Americans, and only hesitantly expanded into new areas amid opposition to such

[9] For example, see the decisions in *United Steelworkers v Weber* 443 US 267 (1986) and *Wygant v Jackson Board of Education* 476 US 267 (1986) by which the gains for affirmative action in the former decision were cancelled-out by the latter.
[10] The most pertinent provisions for positive action in the EC Treaty are the general anti-discrimination provision in art 13 and art 141(4) which exclude positive action from the principle of equal treatment.
[11] See ECHR, as amended by Protocol No 11 (Rome 4 XI, 1950), art. 14 which assures that all individuals equal enjoyment of its rights 'without discrimination on any grounds'. This provision is inserted into UK domestic law by the Human Rights Act 1998 (c. 42), s. 1(2) and Schedule 1.
[12] 'Soft law' refers here to non-legally binding governmental instruments, including publications to encourage the use of positive action. See L. Barmes, 'Equality and Experimentation: the Positive Action Challenge', *Cambridge Law Journal* (2009) 68(3), pp. 637 – 641 referring to the role of soft law in UK positive action.
[13] See, for example, Cabinet Office, 'Delivering a Diverse Civil Service, A 10-Point Plan' (2005). See also Cabinet Office, 'Promoting Equality, Delivering Diversity. A Strategy for the Civil Service' (July 2005).
[14] See M.E. Levin, 'Is Racial Discrimination Special?' 15 *Journal of Value Inquiry* 225 (1981), pp. 227 – 8.

developments.[15] By contrast, from its original focus on gender and race,[16] UK positive action has subsequently adopted provisions protecting individuals on a range of additional grounds.[17] The breadth of the UK approach has been confirmed by the Equality Act 2010, commencement of which began in July 2010[18] with the substantive provisions, including the general positive action requirement, having come into force in October 2010.[19] This Act brings together previous anti-discrimination legislation prohibiting discrimination on the grounds of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.[20] The inclusion of this wide range of protected characteristics gives the different forms of unlawful discrimination, and consequently the grounds upon which positive action can be based,[21] an equal legislative footing.[22] The focus on affirmative action aimed at benefitting African Americans reveals the extent to which the US still feels a debt to individuals within this racial group for the discrimination suffered by them during and since slavery. By contrast the UK's evolution of positive action from focusing solely on gender and race-based equality to encompassing a range of forms of action reflects the more even focus on remedying all aspects of societal inequality in legislative provisions. Looking forward, the US may learn from the UK's parallel legal treatment of all protected groups, and use it as a way of avoiding criticism of affirmative action from non-benefited minorities. The UK in turn could take inspiration from the nature of the US' positive action afforded to African Americans to tackle the worst instances of inequality, while maintaining protection across all groups.

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[15] For example, Evan Gerstman has suggested that the passage in 1992 of Colorado's Amendment 2, which stated that homosexuality was not to be a protected class, had more to do with popular reluctance to expand the scope of civil rights than opinion regarding homosexuality. See E. Gerstman, *The Constitutional Underclass, Gays, Lesbians and the Failure of Class-Based Equal Protection*, (University of Chicago Press, Chicago, 1999), p. 103. Amendment 2 has subsequently been declared unconstitutional by the Supreme Court in *Romer v Evans* 517 US 620 (1996).

[16] Sex Discrimination Act 1975 (c. 65) ('SDA'), ss. 47 and 48 and Race Relations Act 1976 (c. 74) ('RRA'), ss. 37 and 38.

[17] See Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660; Employment Equality (Age) Regulations 2006 SI 2006/1031; Employment Equality (Age) Regulations (Amendment) Regulations 2008 SI 2008/573; and Employment Equality (Sexual Orientation) Regulations 2003 SI 2003/1661.

[18] The Equality Act 2010 (Commencement No. 1) Order 2010, No. 1736 (c. 91). See also The Equality Act 2010 (Commencement No. 2) Order 2010, No. 1996 (c. 104) and The Equality Act 2010 (Commencement No. 3) Order 2010, No. 2191 (c. 109).

[19] The Equality Act 2010 (Commencement No. 4, Savings, Consequential, Transition, Transitory and Incidental Provisions and Revocation) Order 2010, No. 2317 (c. 112).

[20] Equality Act 2010 (c. 15), s. 4.

[21] *ibid,* s. 158.

[22] A number of the key positive action provisions in the 2010 Act were subject to additional consideration by the coalition government, including the public sector equality duty (s. 149) and positive action in recruitment and promotion (s. 159). See www.equalities.gov.uk/equality_bill.aspx. Accessed 08.10.10.

## 1.3 The Key Foci of Equal Opportunities

Within both the UK and the US affirmative action is similarly found in three key contexts: education, employment and executive action. However, the forms of affirmative action utilised in these areas and the extent to which each has been prioritised or marginalised have varied. In the US the executive was the first major public forum for affirmative action, before expanding to include remedial measures in employment and education-based action.[23] More recently judicial conservatism has curtailed the educational use of affirmative action by requiring that it fulfil very high standards for constitutionality, whilst measures within the employment context have continued to be controversial, and therefore marginally used. By contrast the clear legal framework for executive action means that it retains an important position within US affirmative action.[24] In UK law the primary legislative provisions for positive action provide for voluntary action to be taken in the employment context, a characteristic that will continue following the full commencement of the Equality Act 2010.[25] The UK executive has also used positive action, but this has mainly been limited to particular circumstances, as opposed to as part of a general policy. Further illustrating the limited contexts in which UK positive action has been used is that education-based action has arisen only as a result of the individual endeavours of institutions, as opposed to any legislative provision. Directly comparing the two countries therefore, the UK's focus on the employment context contrasts to the US' range of contexts for action. A greater cross-referencing between the US and UK may develop once the UK's governmental duty to promote equality and the promotion and recruitment tie-break measures are commenced, as these may open the door to the use of US-style action.

The three brief examples cited above reveal how many of the similarities thinly veil profound and fundamental differences existing at the heart of US and UK affirmative action, and that in comparing the two countries, especially in relation to the more recent developments, it is apparent that there is some scope for instructive cross-referencing. This conclusion is important in contextualising likely future developments in this area of law. This thesis will show why the fundamental differences between US and UK positive

[23] Equal Employment Opportunities Act (Public Law 92 – 261) of 1972 and see also *Carter v Gallagher* 452 F. 2d 315 (8th Cir. 1971).
[24] See section 2.3.1 below.
[25] See Equality Act 2010, s. 158 and also s. 159 which will allow positive action in relation to recruitment and promotion, once commenced.

action have developed and how they have affected the use and operation of affirmative action in each country. In order to set this exploration in context this thesis will start by exploring present parameters of affirmative action in the US and UK. This thesis will then demonstrate that the reasons for these differences centre upon three specific factors: the principles upon which the laws are based; their developmental contexts; and the nature of the permissible uses of affirmative action in each country. This thesis will end by considering the factors which may influence future development of affirmative action and will show that the fundamentally different nature of the law in each country may diminish if the differing legal provisions are loosed from their country-specific moorings and used to better effect on the opposite side of the Atlantic.

## 2. The Parameters of Affirmative and Positive Action in the US and the UK

As a foundation for exploring the fundamental differences between US and UK affirmative action it is first necessary to establish what is meant by the two terms, and in particular how they will be used within this thesis. This chapter will therefore begin by exploring the semantic differences that infuse this area of law with nuances and consider what these reveal about each country's attitudes towards affirmative action policies. Having set out the linguistic parameters of affirmative and positive action the main part of this chapter will summarise the current laws and academic arguments that make-up the contemporary positive action framework in both the US and the UK, thus setting the scene for an exploration in the rest of this thesis of how these situations have arisen, why they have resulted in fundamentally different legal provisions in each country and this situation might lead to future cross-referencing between the two countries.

### 2.1 The Language of Affirmative and Positive Action

Before embarking on the substantive analytical elements of this thesis it is important to give some consideration to differences in the language of positive action. In doing this it quickly becomes apparent that again there is little consensus between the US and UK with the semantic nuances providing further evidence of the different views regarding affirmative action that exist within and between the two countries. One may, for example, use the term 'reverse discrimination'[26] although this arguably conveys a criticism of the action to which it refers, irrespective of its motives, as a result of the emotive history of prejudicial discriminatory treatment.[27] Two additional terms, 'positive discrimination' and 'benign discrimination', are also problematic both because of their use of 'discrimination' and because they presuppose that the treatment in question works towards a desirable end goal of social policy, the attainment of which justifies the means employed to attain it.[28] What constitutes a worthy end goal necessarily requires a subjective assessment which may itself be conditioned by the very discriminatory

[26] For example see P.G. Polyviou, *The Equal Protection of the Law*, (Gerald Duckworth and Co., London, 1980), p. 349; R. Dworkin. *Taking Rights Seriously*, (Gerald Duckworth and Co., London, 1987), ch 9; R. Dworkin, *A Matter of Principle*, (Harvard University Press, Cambridge, Mass, 1985), chs 14 – 16; and R.J. Richards, *The Sceptical Feminist*, (Routledge & Kegan Paul, London, 1980), pp. 107 – 8.
[27] K. Greenawalt, *Discrimination and Reverse Discrimination*, (Alfred A Knopf Inc, New York, 1983), pp.16 – 17.
[28] G. Pitt, 'Can Reverse Discrimination be Justified?' in B. Hepple and E.M. Szyszczak (eds.), *Discrimination: The Limits of Law,* (Mansell Publishing Limited, London, 1992), p. 282.

background in which the policy has become necessary. In order to move away from the highly emotive connotations of intentionally discriminating against one person to benefit another some commentators have referred to 'differential treatment'[29] and 'preferential hiring' [30] although these emphasise differences between individuals and that such measures, whilst preferring one individual, are necessarily detrimental to another. The terms 'positive action'[31] and 'affirmative action'[32] will be used within this thesis because they are among the most widely understood and least nuanced transatlantic terms for this subject. Despite the relatively non-nuanced nature of these terms Katherine Cox has suggested that the UK government adopted 'positive action' in favour of 'affirmative action' because of the controversy associated with the latter term in the US.[33] Therefore use of 'positive action' within the UK shows that from the outset authorities were seeking to distinguish UK provisions from US affirmative action. Despite this the two terms will be used as synonyms in line with Gary Clabaugh's suggestion that the interchangeable use of the different phrases constitutes 'a harmless idiomatic difference between British and American English like lorries becoming trucks'. [34] Clabaugh's assertion is linguistically convenient for the purposes of this thesis and supports the assertion that there are superficial similarities between the two legal frameworks, although, as will be shown, affirmative action and positive action are very distinct legal and social constructs in each country.

## 2.2 The Legal Framework for Affirmative Action

The popular conception of affirmative action is that it consists of quotas designed to award employment and educational access to underrepresented minority groups. This narrow perception, however, does not reflect the broad range of affirmative action policies that are legally sanctioned across the US and UK, and which permit a range of

[29] As adopted by S. Poulter and J. Montgomery in B. Hepple and E.M. Szyszczak (eds.), *Discrimination: The Limits of Law op. cit.*
[30] As used by R.K. Fullinwider, *The Reverse Discrimination Controversy: A Moral and Legal Analysis,* (Rowman and Littlefield, Totowa, N.J., 1980), pp.10 – 13 and C. McCrudden, 'Rethinking Positive Action', (1986) 15 *Industrial Law Journal* 219, p. 223.
[31] The first legislative reference to 'positive action' in the UK is in the explanatory memorandum for the Sex Discrimination (Election Candidates) Act 2002 (c. 2).
[32] The first US legislative use of the phrase 'affirmative action' was in the National Labor Relations Act 1935, s.10(c) where it was used to define the powers of the National Labor Relations Board to determine remedies in labour disputes.
[33] K. Cox, 'Positive Action in the European Union: From Kalanke to Marschall', 8 *Columbia Journal of Gender and Law* 101(1998), p. 105.
[34] G. Clabaugh, 'Positive Discrimination', *Educational Horizon*, (Spring 1995).

purposive actions in the public and private sector that use race, ethnicity, or gender as a consideration in order to expand opportunities or provide benefits to members of groups that have suffered discrimination.[35] It is therefore clear that despite the popular perception of positive action a wide range of measures fall within its parameters, as will be shown in the following paragraphs.

### 2.2.1 Affirmative Action in the US

US affirmative action plans utilise a broad variety of methods to benefit underrepresented ethnic minorities and women. What the evolution of US action shows, however, is that in the absence of clear statutory or regulatory provisions for affirmative action measures programmes have often been declared unlawful. In addition, where clear guidelines do exist and affirmative action programmes are implemented this frequently provokes a high level of popular condemnation, which may be disproportionate to the actual incidences of its use. The range of available forms of positive action is summarised below.

#### 2.2.1.1 Federal Contract Compliance Programmes

Since the early 1960s executive orders have required federal agencies to actively pursue positive action policies. The largest federal affirmative action programme under US law was based on Executive Order 11246[36] and required federal contractors and subcontractors with 50 or more employees to develop an affirmative action plan within 120 days of securing a contract for more than $25,000 or face losing the contract and being barred from tendering for future contracts.[37] To fulfil the affirmative action obligations contractors had to conduct a utilization study counting women and minorities in each department and each occupational category and compare this to their proportion

[35] A similar definition was used in G. Stephanopolous, et. al, *Review of Federal Affirmative Action Programs, Report to the President, 19th July 1995*, (Government Printing Press, Washington D.C., 1995). The European Commission has also illustrated a broad understanding of positive action describing it as encompassing 'all measures which aim to counter the effects of past discrimination, to eliminate discrimination and promote equality of opportunity between women and men, particularly in relation to types or levels of jobs where members of one sex are significantly underrepresented'. See Communication from the Commission to the European Parliament and the Council on the Interpretation of the Judgment of the Court of Justice on 17 October 1995 in Case C-450/93 *Kalanke v Freie Hansestadt Bremen*, COM (96) 88 at 3.

[36] Executive Order 11246 (30 Fed Reg 12319) issued in 1965. In 1967 Executive Order 11375 (32 Fed Reg 14303) extended the provisions to women.

[37] Executive Order 11246, *op. cit.,* s. 203.

within the 'availability pool'.[38] The affirmative action plan also had to include a set of targets for the achievement of minority representation and specify the procedures that would be adopted to achieve equal inclusion, although meritocratic hiring was retained and quotas were avoided.[39] The requirements of the executive orders were further entrenched in 1972 by the Equal Employment Opportunities Act, which required the development of equal opportunity goals and a strategy by which to achieve them.[40] However, whilst the contract compliance requirements placed strict obligations on contractors they were subject to minimal enforcement and so, over time, their impact lessened. In 2000, for example, the Office of Federal Contract Compliance Programmes ('OFCCP') conducted only 4,162 compliance reviews from amongst the 192,000 contractors that fell under its guidelines.[41] Irrespective of the lacklustre enforcement the action required by US contract compliance programmes is notable within the permitted range of affirmative action because it is wholly at odds with other forms of preference in that it constitutes the country's only mandated form of action. However, by adopting such measures the US executive's use of affirmative action has fuelled its own opposition, which argues that such broad-brush programmes have 'failed properly to consider individual differences' as to the groups benefited and denied.[42] The mandatory nature of this form of affirmative action has made it central to the debate concerning the permissibility of differential treatment and it has therefore had an important formative role in shaping the principles, development and uses of US affirmative action.

#### 2.2.1.2 Government Set-Aside Programmes

A further form of executive affirmative action has been the setting-aside of a proportion of government contracts for minority-run businesses,[43] which arose out of demands for

[38] The 'availability pool' refers to individuals qualified and potentially available for a vacant position in the company, and is used to determine whether underutilization exists and set affirmative action goals, Executive Order 11246, *op. cit.,* s. 203.
[39] Office of Federal Contract Compliance Programmes, US Department of Labor, *EEO and Affirmative Action Guidelines for Federal Contractors Regarding Race, Color, Gender, Religion and National Origin',* http://www.dol.gov/ofccp/regs/compliance/fs11246.htm. Accessed 08.10.2009.
[40] Equal Employment Opportunities Act of 1972, *op. cit.*, s. 4, amending s. 706 of the Civil Rights Act 1964 (78 Stat. 259 42 USC 2000e – 5(a)-(g)) and ss. 10 and 11, amending ss. 715 and 217 Civil Rights Act 1964.
[41] F. Pincus, *Reverse Discrimination. Dismantling the Myth*, (Lynne Rienner Publishers, London, 2003), pp. 24 – 25.
[42] R.A. Lester, *Reasoning about Discrimination. The Analysis of Professional and Executive Work in Federal Antibias Programs*, (Princeton University Press, New Jersey, 1980), p. 287.
[43] See, for example, the Public Works Employment Act 1977 which required that ten per cent of federal grants awarded by the Department of Commerce be given to minority businesses. This requirement was upheld in *Fullilove v Klutznik* 448 US 448 (1980).

equal opportunity emanating from the minority business community.[44] Alongside these measures in 1994 the Federal Communications Commission initiated one of the largest affirmative action set-aside programmes by reserving half of new radio licenses for small businesses, women and minorities.[45] However, whilst observers have argued that set-aside programmes have been a major reason for the expansion of minority-owned businesses,[46] minorities and women have remained significantly underrepresented among government contractors.[47] Despite the arguably limited effect of set-asides in creating equal opportunities they have prompted lawsuits from white business people, which in turn have encouraged the judicial restriction of this form of affirmative action. In *City of Richmond v Croson,* for example, the Supreme Court severely limited the ability of states and local governments to provide minority set-aside programmes by requiring that there must be a history of discrimination for which the set-aside programme was the only possible remedy.[48] In addition to the evidential difficulties inherent in proving discrimination these policies put public authorities in the legally unpalatable position of condemning themselves in order to justify and defend set-aside programmes.[49] Since 1995 further restrictions have been placed on this form of affirmative action contributing to its increasingly marginalised status.[50]

2.2.1.3 Hiring and Promotion Quotas

Arguably the most controversial of all US affirmative action policies are employment-based measures which require a specified minimum or 'quota' of minority appointments. Under the Equal Employment Opportunities Act of 1972 courts were permitted to impose

[44] For an account of some of this disquiet see, J.E. Podair*, The Strike that Changed New York. Blacks, Whites and the Ocean Hill-Brownsville Crisis*, (Yale University Press, New Haven and London, 2002).
[45] Policy upheld in *Metro Broadcasting v Federal Communications Commission* 497 US 547 (1990).
[46] See T. Bates and D.L. Williams, 'Racial Politics: Does it Pay?', *Social Science Quarterly*, Vol 74, No. 3 (1993), pp. 507 – 522; and G. La Noue and J. Sullivan, 'Race Neutral Programs in Public Contracting', *Public Administration Review*, Vol. 55, (1995).
[47] For example, in 2000 women-owned businesses secured only 2.3% of federal procurement contract dollars and in 2006 minority businesses under the '8(a) Program', which helps companies from socially and economically disadvantaged groups obtain federal agency contracts, secured only 2.7% of federal contract dollars. See American Small Business Administration Office of Advocacy, *Women in Business*, (October 2001), p. 21 and American Small Business Administration Office of Advocacy, *Minorities in Business*, (November 2007), table 27, p. 27. For both see http://www.sba.gov/advo. Accessed 11.08.08.
[48] Justice O'Conor's opinion in *City of Richmond v Croson* 488 US (1989), pp. 498 – 506. The requirements of the 'strict scrutiny' approach applied in this case are explained below at section 3.4.1.
[49] See *Franks v Bowman Transport Co*. 424 US 747 (1976) in which the court upheld employer or union use of affirmative action to remedy its own discriminatory acts against identified victims.
[50] See *Adarand Constructors Inc. v Peña* 515 US 200 (1995).

hiring and promotion quotas on employers found guilty of discrimination.[51] Quotas, where imposed by the courts, the executive, in a consent decree or adopted voluntarily, have been accused of requiring the rejection of white males with superior work experience or qualifications in favour of qualified but less-experienced minority and female applicants.[52] Affirmative action quotas have also been criticised for constituting a significant and unlawful burden for white males to bear,[53] and frequently been struck down by the courts for failing to fulfil the strict requirements of permissibility.[54] The reality, therefore, is that court-imposed quotas have remained rare,[55] with Barbara Reskin estimating that there were only 51 throughout the early 1980s,[56] and voluntarily-adopted quotas are largely avoided for fear of legal challenge and judicial condemnation. Consequently, whilst quotas are central within US discussions around affirmative action and represent one of the most radical forms of action their use is confined to a narrow field of operation. The result of this dichotomy is that the impact of affirmative action quotas in the legal debate is disproportionate to their influence on the achievement of equality.[57]

#### 2.2.1.4 Race and Gender-Plus Policies

One form of affirmative action utilised within the employment and educational contexts in the US are programmes in which race or gender may constitute part of a recruitment, promotion or admissions decision, albeit that it may not be the major factor, so-called race-plus and gender-plus policies.[58] This form of action has been widely used in higher education, although the limits to its use were illustrated by the case of *The Regents of the University of California v Bakke* and the subsequent widespread decisions amongst

[51] Equal Opportunities Employment Act 1972, s. 4.
[52] For example in the early 1970s the Women's Equity Action League and the National Organization for Women filed charges with the Department of Labor accusing more than 100 universities and colleges of sex discrimination. As a result affirmative action plans were drawn up requiring the use of specific quotas of women to be hired and promoted, R.A. Lester, *Reasoning about Discrimination*, pp. 146 – 147.
[53] See, F.R. Lynch, *Invisible Victims. White Males and Crisis of Affirmative Action*, (Greenwood Press, New York, 1989).
[54] See 3.4.1 for discussion of the different levels of judicial scrutiny applied to affirmative action.
[55] G. Stephanopoulos and P. Edley, *Affirmative Action Review: Report to the President,* (Government Printing Office, Washington, DC, 1995).
[56] B. Reskin, *The Realities of Affirmative Action in Employment,* (American Sociological Association, Washington D.C., 1998), ch. 3.
[57] Although affirmative action in federal contracting has been linked to some improvements, for example, see J. Donohue and J. Heckman, 'Continuous versus Episodic Change: The Impact of Federal Civil Rights Policy on the Economic Status of Blacks', *Journal of Economic Literature*, 29, (1991), pp. 1603 – 1643.
[58] See *Regents of the University of California v Bakke* 438 US 265 (1987) in which the University employed race as a 'plus factor' in determining the outcome of admissions decisions.

universities to ban any consideration of race in admissions and hiring.[59] The year after the *Bakke* judgment was handed down Californian voters approved Proposition 209 which declared that the State could not 'discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin' thus showing the expansion of opposition to these policies.[60] Race and gender-plus policies were further relegated within affirmative action by the case of *Hopwood v Texas* in which the court upheld the claim of four white students who sued the university on the basis of reverse discrimination.[61] The students alleged that they were unlawfully declined entrance to the school because black and Hispanic students with lower grade point scores were admitted. The court held that this use of affirmative action was unconstitutional.[62] Therefore, while race and gender-plus policies remain part of the broad spectrum of types of affirmative action their legal basis and practical use are increasingly restricted.

#### 2.2.1.5 Targeted Scholarships

Race and gender-based scholarships constitute a further form of affirmative action in the US and, like quotas and race and gender-plus policies, have also been the subject of criticism and judicial opposition. In *Podberesky v Kirwan*, for example, a white student sued the University of Maryland because he could not qualify for the all-black Banneker Scholarship.[63] Despite the university's formal segregation until 1954 the court struck down the scholarship as outside the permitted remit of US affirmative action law. The result of this judgment was that many colleges opened such scholarships to non-minority students.[64] One of the most debated aspects of targeted scholarships is the extent to which the identity of the donor affects the permissibility of the award.[65] This area of debate illustrates the US' difficulty in reconciling the unlawfulness of prejudicial differential treatment with the potential lawfulness, and even possible desirability, of benevolent differential treatment which is a common theme across US affirmative action.

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[59] *ibid* (plurality decision).
[60] Constitution of the State of California, art 1 ss 31, cl. a.
[61] *Hopwood v State of Texas* 861, F. Supp, 551 (1994).
[62] *ibid* at 578.
[63] *Podberesky v Kirwan* 38 F. 3d 147 (4th Cir. 1994).
[64] D. Lederman, 'Justice Department Urges High Court to Uphold Affirmative Action', *The Chronicle of Higher Education*, (1996).
[65] See M. Kinsley, 'Generous Old Lady or Reverse Racist?', *Time*, (28th August 1995).

### 2.2.2 Positive Action in the UK

The current framework for positive action in the UK is governed by domestic law, against a background of European laws, conventions and treaties, as well as policies and initiatives which fall short of having strict legal effect. The broad range of sources of positive action, together with the judicial interpretation of its boundaries, has led to relatively unclear parameters for this area of law.[66] From the outset it is important to distinguish the main forms of positive action from the 'reasonable adjustment' requirements in relation to disability[67] and actions taken to avoid indirect discrimination, such as those relating to maternity.[68] The distinction between positive action and these forms of action are that the latter must be taken to avoid claims of discrimination, whereas failure to take positive action measures will not result in any such cause of action.[69] This thesis will focus on positive action within the narrower sense of purposive measures designed to promote equality, as opposed to the mandatory steps required to avoid claims of discriminatory treatment. However, these alternative forms of action have done much to confuse the parameters and principles operating behind positive action and the effect this has had on UK positive action will be brought out later in this thesis.[70] Apart from these actions a number of forms of positive action may be identified within UK law, as will be demonstrated in the following paragraphs.

#### 2.2.2.1 Enabling and Encouraging Equal Participation

The key form of positive action employed under UK law is the use of measures to enable or encourage persons who share a protected characteristic to overcome disadvantage caused by that characteristic.[71] This protection afforded by the Equality Act 2010 applies where an employer thinks that people who share a particular protected characteristic

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[66] See L. Barmes, 'Equality Law and Experimentation: the Positive Action Challenge', *Cambridge Law Journal* (2009) 68(3), pp. 623 – 654.

[67] This duty imposes obligations to remove or modify many indirectly discriminatory barriers. See Equality Act 2010, s. 189.

[68] Equality Act 2010, s. 18. These provisions can require measures to accommodate women in certain circumstances by allowing them to work part-time or flexibly, because failure of the employer to do so may constitute indirect discrimination against women who act as primary child carers. See *London Underground Limited v Edwards* (No. 2) [1999] ICR 494; [1998] IRLR 364.

[69] The separation of maternity-related provisions from positive action was also made clear in the Equal Treatment Directive 1976 which separately listed them as permitted derogations from the principle of equal treatment. Equal Treatment Directive 76/207 1976 OJ L39/10, art. 2.

[70] L. Barmes, 'Equality Law and Experimentation', *op. cit*, p. 633 – 637. See section and 5.3.2 below.

[71] Equality Act 2010, s. 158.

either suffer disadvantage connected to that characteristic, have needs that are different to those of people without it, or that participation of people with that characteristic in an activity is disproportionately low.[72] In such circumstances employers are permitted to take proportionate action to enable or encourage persons who share the protected characteristic to overcome the disadvantage they face, to meet their particular needs, or to enable or encourage their participation in the relevant activity.[73] This provision builds directly on the previous ability for employers to offer discriminatory access to training and to use targeted recruitment to help and encourage individuals from underrepresented groups to access workplace opportunities.[74] Corresponding action was also permitted to prevent or compensate for disadvantages linked to religion or belief, sexual orientation and age where it reasonably appeared that the measures prevented or compensated for the disadvantages linked to the protected characteristic,[75] and is now also incorporated into the Equality Act 2010.[76]

Once fully commenced the Equality Act 2010 will also require public authorities to have due regard to the need to advance equality of opportunity, which includes them having due regard to the need to encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.[77] This requirement will extend the existing positive obligation on public authorities to promote racial[78] and gender equality.[79] In drafting that is equivalent to the employer's authority to take positive action[80] the Equality Act 2010 permits public authorities to take action to remove or minimise disadvantages suffered because of a shared protected characteristic; meet the different needs of persons with a protected characteristic as a result of that characteristic; and to encourage persons who share a relevant protected characteristic to participate in activities in which there is disproportionately low participation by people with that characteristic.[81] A further effect of the Equality Act 2010 is that it helps to clarify the position of nationality-based

[72] *ibid*, ss. 158(1)(a), (b) and (c).
[73] *ibid,* ss. 158(2)(a), (b), and (c).
[74] See RRA, ss. 37 and 38 and SDA, ss. 47 and 48.
[75] Equal Opportunities (Religious Belief) Regulations SI 2003/1160, reg 25(2) and 25(3); Equal Opportunities (Age) Regulations SI 2006/1031; and Equal Opportunities (Sexual Orientation) Regulations SI 2003/ 1161.
[76] Equality Act 2010, s. 4.
[77] *ibid*, s. 149(3)(c).
[78] Race Relations (Amendment) Act 2000 s. 2, inserting s. 71 into RRA.
[79] Equality Act 2006, s. 84, inserting s. 76A into SDA.
[80] Equality Act 2010, s. 158.
[81] *ibid,* s. 159(2).

positive action which was confused by the UK's incorporation of the *de minimis* requirements of the Race Equality Directive 2000 into the Race Relations Act 1976 (Amendment) Regulations 2003, meaning that the Regulations did not apply to discrimination on the grounds of nationality, whilst the RRA did.[82] However, the scope of the Equality Act 2010 perpetuates the previous limitation affecting employer positive action as a result of the expansive drafting of anti-discrimination law[83] and the continuing lack of clarity over the division between lawful positive action and unlawful direct discrimination.[84]

2.2.2.2 Tie-Break Positive Action

EU law concerning positive action, which determines the permissible parameters of UK measures, expressly allows measures 'intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life'.[85] This provision was interpreted by the ECJ as enabling the fact of an individual's protected characteristic to act as a tie-break consideration in recruitment and promotion decisions.[86] The Court first explored the parameters of the use of 'tie-break' positive action in the case of *Kalanke v Freie Hansestadt Breman* in which an employment-related policy required the appointment of a female job candidate ahead of an equally qualified male candidate, on the basis of her gender.[87] The ECJ held that the appointment was outside the scope of positive action permitted in article 2(4) of the Equal Treatment Directive 1976 because of the absolute priority given to under-represented female applicants.[88] The policy therefore ensured equality of result, as between women and men, as opposed to equality of opportunity. Despite the apparently fatal assessment of the use of a tie-break factor in *Kalanke* the ECJ's position was marginally softened by the subsequent case of *Marschall v Land Nordrhein-Westfalen*.[89] *Marschall* was factually similar to *Kalanke* but the policy under consideration in the later case contained a proviso permitting a male candidate to be

[82] See Race Equality Directive 2000 and Race Relations Act 1976 (Amendment) Regulations 2003. See also Equality Act 2010, s. 9, which 'race' is defined as including nationality.
[83] See Equality Act 2010, s. 13.
[84] Human Rights Joint Committee, Twenty-Sixth Report, *Legislative Scrutiny: Equality Bill*, (October 2009), p. 91, para. 285, http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/169/16902.htm. Accessed 04.08.10.
[85] Equal Treatment Directive (Directive 76/207/OJ 1976 L39/40), art. 2(4).
[86] *Kalanke v Freie Hansestadt Bremen* Case C-450/93 [1995] ECR I-3051.
[87] *ibid*.
[88] *ibid*, para 22.
[89] *Marschall v Land Nordrhein-Westfalen* Case C-490/95 [2001] ECR I- 45; [1998] IRLR 39.

appointed ahead of an equally qualified female if there were specific reasons for doing so. On this ground the ECJ held that the *Marschall* policy constituted lawful positive action because it avoided automatic preferences.[90] These cases show that whilst EU positive action includes the potential for race and gender to be used as 'tie-break' criterion this must not be automatic. However, the theoretical deficiencies in the two judgments, which have been compounded subsequently, mean that the extent of this use of positive action has not been clearly delineated.[91]

In line with the scope of EU law the use of positive action as a tie-break criterion is a key principle of the 2010 Equality Act which expressly acknowledges that compliance with its duties 'may involve treating some persons more favourably than others',[92] although these measures are currently under consideration by the UK Government.[93] Following commencement of these provisions employers will be able to use an individual's membership of an underrepresented social group as a tie-break factor in employment decisions.[94] The tie-break provision provides that where an employer reasonably believes that persons who share a protected characteristic suffer a disadvantage connected with that characteristic, or participation by them in an activity is disproportionately low,[95] the employer can treat a person with that protected characteristic more favourably in a recruitment or promotion decision, with the aim of encouraging persons with that characteristic to overcome or minimise the disadvantage or participate in the activity.[96] In accordance with EU law the new Act will still require that all decisions are based on an assessment of the candidates and that there is no general policy of automatically appointing any individual from a protected group.[97] In addition, all action taken must be a proportionate means of achieving the legislative aim.[98] These caveats correspond with the ECJ's decision in the case of *Abrahamsson and Anderson v Fogelqvist* in which the

[90] See also *Badeck et al v Hessische Ministerprasident* Case C-158/97 [2002] ECR I-1875; [2000] IRLR 432 and *Lommers v Minister van Landbouw Natuurbeheer in Visserij* Case C-476/99 [2002] ECR I – 2891.
[91] See section 3.1.2 below for further discussion of this aspect of the ECJ's jurisprudence.
[92] Equality Act 2010, s. 149(6). The general positive action provisions are contained in Part 11, Chapter 2, ss. 158 and 159.
[93] As a result of the formation of a coalition government, following the General Election in May 2010, these provisions have been subject to additional scrutiny resulting in some uncertainty as to what form, or in fact whether, the provisions will enter into force, particularly as the Coalition Agreement did not commit to their passage. See HM Government, *The Coalition Agreement: our Programme for Government*, (Cabinet Office, London, May 2010), p. 18.
[94] *ibid*, s 159(4).
[95] *ibid*, s. 159(1).
[96] *ibid*, s. 159(2) and 159(3).
[97] *ibid*, s. 159(4).
[98] *ibid,* s. 159(4)(c).

Court stated that a policy permitting the appointment of a less qualified candidate of an underrepresented gender above a more qualified candidate of the opposite sex was disproportionate and unconcerned with an individual assessment of the candidates.[99] Following the commencement of these provisions the UK will use positive action to the full extent envisaged under EU law, despite the ECJ's restrictive interpretation of these parameters.[100]

2.2.2.3 Goals, Timetables and Quotas

UK positive action employs numerical goals and targets in its positive action policies within Northern Ireland to achieve the 'fair participation in employment' by adopting new practices or modifying or abandoning ones that may restrict or discourage representative participation of Protestants and Catholics.[101] The main provisions of the Northern Irish approach were set out in the Fair Employment (Northern Ireland) Act 1989, and subsequently replaced by the Fair Employment and Treatment Northern Ireland) Order 1998 and the Northern Ireland Act 1998.[102] These measures were a response to the situation in Northern Ireland in which Roman Catholics were twice as likely to be unemployed as Protestants with the same educational background,[103] and have yielded results in terms of remedying this unequal representation.[104] On top of monitoring and reporting on the workforce composition[105] the positive action measures permit public authorities to refrain from contracting with employers found to be in default of various provisions under the legislation[106] and also include specific provisions designed to improve the numerical representation of Catholics within the Royal Ulster Constabulary ('RUC').[107] The importance of the Northern Irish affirmative action provisions within the UK is demonstrated by the Government having secured a derogation from the general equality requirement in the Employment Equality Directive 2000 to accommodate these

[99] *Abrahamsson and Anderson v Fogelqvist* [2000] IRLR 732 ECJ.
[100] See further section 3.1.2 below.
[101] Fair Employment and Treatment (Northern Ireland) Order 1998, SI 1998/3162 (N121) 1998 ('FETO'). art. 4.
[102] See the Fair Employment (Northern Ireland) Act 1989 (c. 32); the Northern Ireland Act 1998 (c. 47); and FETO.
[103] See, Fair Employment Commission, 'The Key Facts: Religion and Community Background in Northern Ireland', (1995) which cites figures from 1991. Further consideration of this form of affirmative action is at section 5.3 below.
[104] Equality Commission Monitoring Report No. 19, *A Profile of the Northern Ireland Workforce, Summary of Monitoring Report for 2008*, (2009).
[105] FETO, art. 55.
[106] *ibid,* art 64.
[107] See Police (Northern Ireland) Act 2000 (c. 32).

measures.[108] Accordingly, article 15(1) excluded from the general non-discrimination requirement in article 2(1) recruitment into the police service in Northern Ireland 'in order to protect the quota system introduced to increase Catholic participation'.[109] As well as affirmative action obligations Northern Irish measures also include incentives for employers to engage in positive action,[110] for example, by awarding contracts and grants upon fulfillment of positive action obligations.[111] As will be demonstrated throughout this thesis Northern Ireland represents a distinct forum for positive action within the UK, and as such has utilised some different types of action than those which are generally deployed in the UK.

The range of forms of affirmative action in the US and UK illustrates that the parameters of this area of law contain both similarities and differences between the two countries. Similarities are present in the use of race and gender-based quotas, and the range of contexts in which measures have been used. Wholesale differences exist, however, in the parameters for affirmative action, the judicial treatment of action, and the popular responses to such measures. Substantial differences also exist in which groups the policies are directed at in each country and why each group has been identified for protection. Having assessed the range of forms of affirmative action in the US and UK the following chapters will explore further the fundamentally different undercurrents driving this area of law in both countries, before considering how these different experiences could provide the basis for instructive borrowing of ideas relating to positive action between the two countries.

[108] Employment Equality Directive, 2000/78 EC.
[109] *ibid*, art 15(1).
[110] FETO, arts 53 – 60.
[111] *ibid* arts 62 – 4.

## 3. The Principles behind Positive Action and Affirmative Action

The frameworks for affirmative action in the US and positive action in the UK are each underpinned by a distinct set of legal and social principles. These principles are relied upon to determine what constitutes permissible action in each country and also form the ideological and moral basis upon which the legal movements surrounding affirmative action operate. Substantial differences exist in the content of the core principles upon which each country's equal opportunity efforts are based as well as the various academic and popular arguments regarding these principles. This chapter will explore how the varying interpretations of the principles reveal that the US and UK approach positive action from very disparate doctrinal backgrounds before showing, in chapters four and five, how this has influenced the development and use of affirmative action within each country.

In exploring the different principles upon which affirmative action is based this chapter will look at the country-specific interpretations of the concept of equality within the affirmative action debate. Whilst equality is at the very heart of positive action its interpretation is subject to country-specific influences, and even manipulation, to enable it to fit in with the contrasting arguments of both supporters and opponents of affirmative action. In addition, the pressing social need for the achievement of equality means that in certain areas the legal basis for action has 'moved uneasily to questions of detail and implementation without reaching fundamental decisions on questions of principle'.[112] The debate surrounding the meaning of equality has also expanded into wider arguments in each country including, for example, whether equality within a legal system requires that the law be colour-blind.[113] The varying permutations of this and other such debates have been a primary contributor to the fundamental differences between US and UK affirmative action.[114] This chapter will also consider the arguments surrounding the interpretation of the principle of merit and the country-specific ways in which this has developed. Finally, this chapter will explore how different protected groups are treated

[112] G. Rutherglen and D.R. Ortiz, 'Affirmative Action under the Constitution and Title VII: From Confusion to Convergence', 35 *UCLA Law Review* 467 (1987 – 1988), p. 468.
[113] For examples of the debate surrounding the notion of colour-blind legal provisions see N. Podhoretz, *Breaking Ranks: A Political Memoir*, (Harper and Row, New York, 1979); S. Hook, 'Discrimination, Color Blindness and the Quota System' in B.R. Gross (ed.), *Reverse Discrimination,* (Prometheus Books, Buffalo, New York, 1977) and N. Glazer, *Affirmative Action*, (Basic Books, Inc. Publishers, New York, 1975).
[114] T. Eastland, *Ending of Affirmative Action: the Case for Colorblind Justice*, (Basic Books, Inc., New York, 1997), ch. 2.

under positive action in each country, and in particular the unique position of African Americans within US equality law. Firstly, however, this chapter will consider each country's jurisprudence concerning affirmative action, as it is a key means of identifying the legal principles at work.

## 3.1 Affirmative Action Jurisprudence

Judicially imposed restrictions are a feature of the jurisprudence concerning positive action within both the US and the UK. The jurisprudential regime in the US emphasises the abhorrence of discrimination of any kind and consequently requires that all differentiations on the basis of individual characteristics, especially race, are stringently examined and challenged. This judicial attitude was notably promulgated by Justice Powell following the decision in the case of *Brown v Board of Education*.[115] Despite the dissent to Powell's opinion formal equality has remained stoically central to the US Supreme Court's jurisprudence on positive duties.[116] Negative judicial treatment of positive action is also evident in the jurisprudential guidance offered by the UK judiciary and the ECJ which reveals a halting progression from advocating formal equality to one supportive of a narrow, and largely unprincipled, interpretation of substantive equality that has failed to provide clarity concerning the operation of positive action.[117] Therefore, while the courts' role within both countries has been overwhelmingly to strike down positive action schemes, the specific rationales behind its approach, and the effect that this has had on positive action, differ as will be shown in the following paragraphs.

### 3.1.1 US Affirmative Action Jurisprudence

The evolution of Supreme Court jurisprudence concerning affirmative action has not followed a single, monolithic path but instead has reflected the sensibilities of individual judges and contemporary legal trends and has consequently resulted in successive judicial discontinuities. For example, the Court's ruling in *The Regents of the University of California v Bakke* was based upon the judicial principle that it was unconstitutional to

[115] *Brown v Board of Education* 347 US 483 (1954).
[116] J. Rabe, *Equality, Affirmative Action and Justice*, (Books on Demand, Nordestedt, Germany, 2001), p.292.
[117] See L. Barmes, 'Equality Law and Experimentation: the Positive Action Challenge', *Cambridge Law Journal* (2009), 68(3), pp. 623 – 654.

operate a rigid quota system reserving a certain number of places for minorities.[118] Conversely, judicial support for such affirmative action was illustrated by the judgment in *Fullilove v Klutznick*, in which the court upheld a ten per cent minority set-aside provision for federally funded public works projects,[119] and through the case of *United Steelworkers v Weber*, in which the court held that a short-term voluntary training programme which gave preference to minorities was constitutional.[120] These judgments illustrate that when faced with clear guidelines the US courts have upheld affirmative action, but that they have readily condemned programmes in the absence of an explicit statutory basis.

Judicial support for remedially focused affirmative action, as illustrated by the judgments in *Weber* and *Fullilove,* was subsequently diluted by the Republican court appointments of the 1980s and 1990s which resulted in a 'virtual paralysis' of civil rights development.[121] In *Wygant v Jackson Board of Education*, for example, the court struck down a plan which protected junior minority teachers from dismissal at the expense of white teachers on the grounds of unconstitutionality.[122] Further, in the case of *Richmond v Croson* the court rejected a set-aside programme for minority contractors ruling that local government lacked the power to enact such programmes.[123] Some judicial support for affirmative action did continue during this period, for example, through the upholding of federal laws designed to increase the number of minority-owned radio and television stations,[124] and approval of affirmative action measures that were 'narrowly tailored' and served a 'compelling government interest.'[125] However, whilst supporting affirmative action, these judgments confined it to a very narrow set of circumstances, a strict line that was maintained in the 2003 cases of *Gratz v Bollinger* and *Grutter v Bollinger.*[126] In *Grutter* the Court held that the law school's affirmative action program was constitutional,

[118] *University of California v Bakke, op.cit.* For further consideration of the US attitude towards numerical standards in affirmative action see section 5.2 of this thesis.
[119] *Fullilove v Klutznick, op. cit.*
[120] *United Steelworkers v Weber* 443 US 267 (1986).
[121] T.H. Anderson, *The Pursuit of Fairness: A History of Affirmative Action*, (Oxford University Press, Oxford, 2004), p. 169.
[122] *Wygant v Jackson Board of Education,* 476 US 267 (1986).
[123] *The City of Richmond v J. A. Croson Co., op. cit.*
[124] *Metro Broadcasting v Federal Communications Commission, op. cit*.
[125] *Adarand Constructors v Peña op cit.*
[126] *Gratz v Bollinger* 539 US 244 (2003) and *Grutter v Bollinger* 539 US 306 (2003).

but in *Gratz* the Court rejected the affirmative action programme used because it was too mechanistic and consequently amounted to an unlawful quota system.[127]

The US judiciary has further hampered the achievement of substantive equality through the adoption of a dual evidentiary system, which requires that racial minorities and women face the burden of proving significant disadvantage to justify positive treatment, whilst men and whites only need to point at a slight negative impact for positive action to be declared unlawful.[128] This development has left only a small area for the operation of affirmative action and has effectively 'reversed the social roles that shaped the history of American racism: whites have become the presumed victims and African Americans the presumed racists'.[129] Although the principles of affirmative action implicitly act to the detriment of certain members of the white majority by definition this group is 'adequately represented in the political process and does not, therefore, require Supreme Court intervention to protect its interests'.[130] Despite this, US jurisprudence has had a role in forging the equality principle into a judicial tool for the protection of the majority group against the advancement of the rights of minorities and women. The case law surrounding affirmative action shows the tendency towards judicial conservatism inherent within the country's courts illustrated by their restrictive reading of the constitutional requirement for equal treatment and through the expressed declaration that unlawful discrimination can be directed at both minority and majority groups.[131] Consequently, successive US judiciaries have allowed affirmative action to change from a transformative ideal to being sidelined amid promotion of the discriminatory status quo.[132]

### 3.1.2 UK Positive Action Jurisprudence

The limited legislative provision for positive action in UK law has meant that there has been little judicial consideration of positive action by UK domestic courts. However,

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[127] The role of these cases in shaping US affirmative action are discussed more fully at sections 3.3.1 and 5.2.1.

[128] See *Watson v. Fort Worth Bank and Trust* 487 US 977 (1988). See also *Wards Cove Packing Company. Antonio* 490 US 642 (1989) in which the Court held that a plaintiff must demonstrate that a specific employment practice created the existing disparity, as opposed to simply showing a disparate impact to fulfill a claim of discrimination.

[129] D. Kairys, 'Unexplainable on Grounds other than Race', *American University Law Review*, Vol 45, No. 3, February 1996, http://www.wcl.american.edu/journal/lawrev/45/kairys.cfm. Accessed 21.10.08.

[130] G.A. Spann, *Race against the Court. The Supreme Court and Minorities in Contemporary America*, (New York University Press, New York, 1993), p. 132.

[131] *City of Richmond v J. A. Croson Co*., *op. cit.*

[132] L.A. Jacobs, *Pursuing Equal Opportunities. The Theory and Practice of Egalitarian Justice*, (Cambridge University Press, Cambridge, 2004), p. 103.

where positive actions have been challenged the courts have treated such measures as unlawful discrimination. In the case of *James v Eastleigh Borough Council*, for example, the House of Lords held that the relevant legal test of permissibility was that applied in direct discrimination claims, namely whether the complainant would have received the same treatment as the defendant 'but for' his or her sex, instead of considering whether the measures constituted lawful positive action.[133] Although in his dissent Lord Griffiths argued that acts designed to redress the effect of unlawful discrimination could not themselves be discriminatory, the Court upheld a formal construction of equality.[134] This case does not concern positive action in the general sense referred to in this thesis, namely measures to allow women and minorities to overcome workplace and educational underrepresentation and disadvantage, but it does illustrate the Court's refusal to uphold arguably well-intended differential treatment.[135] The Court's lack of support of positive action is also evident from the case of *Jepson v The Labour Party* in which, again, the test for direct discrimination was applied to a policy of implementing all-women electoral short-lists.[136] These decisions demonstrate that the court has focused on the legal prohibition of differential treatment on the basis of direct discrimination, reflecting the very limited area of operation for positive action allowed for in UK legislation.

A further judicial influence on UK positive action has been the European Court of Justice ('ECJ') because of its importance in interpreting the parameters of action which are available to UK law and because these parameters are given a statutory basis in UK law through the Equality Act 2010.[137] In the ECJ's first case concerning positive action the Court considered the permissibility of a policy which required the appointment of a female job candidate ahead of an equally qualified male candidate, on the basis of her gender.[138] The ECJ held that the policy constituted unlawful discrimination because of the absolute priority it afforded female candidates, thus ensuring equality of result, as opposed to equality of opportunity.[139] The ECJ's decision in *Kalanke* was subject to immediate criticism for the devastatingly narrow interpretation it applied to article 2(4) of the Equal Treatment Directive, which seemed to prevent its use in permitting gender to be

[133] *James v Eastleigh Borough Council* [1990] AC 751 (HL).
[134] *ibid*, para 768.
[135] The case involved the provision of free swimming to individuals 'of pensionable age' which meant that women enjoyed the benefit at 60 years old, whilst men had to wait until 65 years.
[136] *Jepson and Dyas-Elliot v The Labour Party* [1996] IRLR 116 ET.
[137] Equality Act 2010, ss. 149 and 158 – 159.
[138] *Kalanke*, *op. cit.*
[139] i*bid* para 22.

a tie-break factor in recruitment decisions.[140] So troubling was the apparent conclusion reached in *Kalanke*, together with a judgment that was too brief to shed any light on the Court's rationale,[141] that the Commission sought to explain the decision so as to retain the possibility of using gender as a tie-break under article 2(4).[142] According to this explanation it was the automatic nature of the preference in the *Kalanke* policy which constituted the 'special feature of the Breman law' and which was condemned in the decision.[143] This idea was tested in the case of *Marschall*, which was factually similar to *Kalanke*, except that the policy allowed the presumption of female appointment between two equally qualified candidates to be rebutted in the event of specific reasons favouring the male candidate.[144] In contrast to its decision in *Kalanke* the Court held that this policy came within the remit of article 2(4) because the preference for women could be overridden when an objectively assessed individual criterion favoured the male candidate.[145] In the same vein as *Kalanke* the *Marschall* judgment does not contain any in-depth explanation of the ECJ's rationale behind its decision, and despite offering a degree of clarity over the position post-*Kalanke* the judgment left no indication of the necessary content of a policy saving clause or any guidance on policies not premised on the existence of equal qualifications.[146]

The ECJ's approach in *Kalanke* and *Marschall* has subsequently been applied by the Court in the case of *Badeck et al v Hessische Ministerpraesident*.[147] *Badeck* concerned a programme to remedy the under-representation of women in public offices and involved the setting aside of half of the posts for qualified women in sectors in which women were underrepresented, but included five circumstances in which the presumption of the

[140] See, for example, L. Senden, 'Positive Action in the EU Put to the Test. A Negative Score? Case C-450/93 Kalanke v Freie Hansestadt Bremen' [1995] ECR I-3051', *Maastricht Journal of European and Comparative Law* (1996), pp. 146 – 164; D. Schiek, 'Positive Action in Community Law Case C-450/93 Kalanke v Freie Hansestadt Bremen [1995]', *Industrial Law Journal*, No 25 (1996), pp. 239 – 246 and A. Peters, 'The Many Meanings of Equality and Positive Action in Favour of Women under European Community Law - A Conceptual Analysis', 2 *European Law Journal*, 177 (1996), p. 199.
[141] Katherine Cox suggests that the short judgment may reflect the judges' inability to agree on a more substantive document. See K. Cox, 'Positive Action in the European Union: From Kalanke to Marschall' 8 *Colum J. Gender and Law* 101 (1998 – 9), p. 123.
[142] Communication from the Commission to the European Parliament and the Council on the Interpretation of the Judgment of the Court of Justice on 17 October 1995 in Case C-450/93*, Kalanke v Freie Hansestadt Breman*, COM(96) 88 final.
[143] *ibid,* p. 10.
[144] *Marschall*, *op. cit.*
[145] *ibid,* para 35.
[146] E.F. Hinton, 'The Limits of Affirmative Action in the European Union: Eckhard Kalanke v Freie Hansestadt Bremen', 6 *Tex. J. Women and Law,* 215 (1996 – 7).
[147] *Badeck et al v Hessische Ministerpraesident* Case C-158/97 [2002] ECR I-1875; [2000] IRLR 432.

advancement of women could be overridden.[148] Although the case provided an opportunity for the Court to confirm its stance on the relative prioritisation of individual and group interests, as well as the difference between equality of opportunity and equality of results, the Court simply applied the two-limb test arising from *Kalanke* and *Marschall* and found that the *Badeck* scheme was compatible both with article 2(4) of the Equal Treatment Directive and the new article 141(4) EC Treaty.[149] The requirement of proportionality in positive action schemes was confirmed in the case of *Abrahamsson v Fogelqvist*.[150] In *Abrahamsson* the ECJ held that a policy which afforded preference to an underrepresented candidate who, despite having the required skills for the position, was less qualified than the individual who would have been chosen in the absence of a positive action programme was unlawful because it failed to include an objective assessment which took account of specific personal circumstances.[151] The jurisprudence of the ECJ concerning positive action has been subject to a significant amount of criticism, particularly in light of its apparent unwillingness to articulate overriding principles for permissible positive action schemes, instead confining its decisions to the facts at hand and adopting a narrow construction of the principle of equality.[152] In particular the ECJ's insistence on construing positive action as a derogation from the general principle of equality, and not as a means of achieving equality, limited its scope as a result of consequent need for the measure to accord with the principle of proportionality.[153]

A further judicial influence on UK positive action is that of the European Court of Human Rights ('ECtHR') which has held that affirmative action measures are permissible under the non-discrimination provision of the European Convention on Human Rights and Fundamental Freedoms ('ECHR').[154] The ECtHR has, for example, upheld the different treatment of widows and widowers in respect of the provision of a special widow's pension,[155] and has approved of tax advantages specifically aimed at women to encourage their participation in the labour market, provided such measures are

[148] *ibid,* paras 34 – 5.
[149] The test required that there was no automatic prioritisation of women in the event of equally qualified male and female candidates; and the candidates were subjected to an objective, individual assessment. *ibid,* paras 55 and 63.
[150] *Abrahamsson op. cit.*
[151] *ibid,* para 43.
[152] See, for example, D. Caruso, 'The Limits of the Classic Method', *op.cit.*
[153] D. Caruso, 'Limits of Classic Method', *op. cit.*, p. 338.
[154] ECHR, art. 14, Nov. 4, 1050, 213 UNTS 221, which is directly incorporated into UK law through the HRA 1998.
[155] *Runkee and White v United Kingdom*, Application no. 42949/98, (5 October 2007).

proportionate.[156] However, a key weakness of the ECtHR in developing positive action case law, which has contributed to the relatively undeveloped nature of the case law, is that article 14 ECHR only arises in relation to a claim involving breach of another Convention right, and does not give rise to an independent cause of action. This position is in direct contrast to that in the US where the Equal Protection Clause of the Constitution may be applied independent of any other constitutional right. The passage of Protocol 12 ECHR was designed to remedy the limitation to article 14, by providing the Convention with an independent anti-discrimination provision, along the same lines as the Equal Protection Clause, but remains unsigned by the UK.[157] The ECtHR has also frequently avoided considering article 14 and instead chosen to use alternative Convention provisions, including article 8[158] and article 3.[159] A further important factor in limiting the importance of the ECtHR in shaping positive action is the restrictive nature of UK legislation as to what measures may be adopted. The combined results of these factors is that significant '[c]complexities and uncertainties remain' concerning the potential role of article 14 in determining the extent of positive action obligations under the ECHR.[160]

The judicial treatment of positive action within the UK and US shows that throughout the history of preferences the courts have been a generally reactionary, or at least limiting, force. This similarity has led to direct comparisons between specific cases in the US and Europe, including, for example, the accusation that the theoretical deficiencies in the *Marschall* decision are analogous to Justice Powell's opinion in *Bakke* and that *Kalanke* and *Adarand* both had a similarly negative effect on affirmative action.[161] However, whilst judicial limits to positive action are similarly present on both sides of the Atlantic the reasons for this differ between the two countries. One reason for the different judicial treatment of positive action is that the decisions have both influenced, and been influenced by, the varying principles upon which affirmative action in each country is based, as will now be explored.

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[156] *Lindsay v UK* (1987) 9 EHRR CD555. See also *ACB v UK* (1985) EHRR 471, 501. *Schmidt v Germany*, (1994) 18 EHRR 513, 527. *Gaygusuz v Austria*, 23 EHRR (1996) 364, 381.
[157] ECHR, protocol 12, art. 1.
[158] See *Connors* 40 EHRR 101 (2005).
[159] See *East African Asians v United Kingdom* 3 EHRR 76 (173).
[160] C. O'Cinneide, 'Fumbling towards Coherence: The Slow Evolution of Equality and Anti-Discrimination Law in Britain', 57 *Nr. Ireland Legal Quarterly* 57 (2006), p. 86.
[161] See S. Pager, 'Strictness and Subsidiarity', *op. cit.*

## 3.2 The Country-Specific Nature of the Conception of Equality

For both the US and the UK '[e]quality is a fundamental part of a fair society in which everyone can have the best possible chance to succeed in life'[162] and is 'a pivotal concept' linking negative and positive human rights duties.[163] However, whilst equality is both 'fundamental' and 'pivotal' its meaning is not without nuance, even if we confine 'equality' to meaning 'legal equality'.[164] The different interpretations of the meaning of legal equality have been critical in determining the boundaries of positive action in the US and UK. Two key understandings of equality which have shaped affirmative action in each country are 'formal equality', which focuses on prohibiting unlawful discrimination by requiring identical treatment, and 'substantive equality', which recognises that differential treatment may be required to achieve equality. Substantive equality may be usefully sub-divided further between actions seeking 'equality of opportunity' and measures designed to secure 'equality of result', albeit that this division is more pronounced in theory than in practice.[165]

The chronology of legal reform that has taken both the US and UK from permitting distinctions between individuals on the basis of race and gender, firstly to a position of formal equality and latterly to one in which affirmative action has been demanded, if not wholly accepted, suggests an evolutionary similarity in the notion of equality between the two countries.[166] However, the critical distinction between the dominant principles of equality in the US and UK is the extent to which each embraces the notion of substantive equality, because it is this form of equality which is at the heart of positive action. This distinction will be explored over the following paragraphs.

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[162] Communities and Local Government Publications, 'A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain', (Wetherby, June 2007), p. 5.
[163] S. Fredman, *Human Rights Transformed*, *op. cit.*, p. 175.
[164] Thomas Nagel has identified four types of 'equality': legal, political, social and economic and Chris McCrudden has identified five different meanings which may be used to describe the legal concept of equality. See T. Nagel in M. Clayton and A. Williams (eds.), *The Ideal of Equality*, (Palgrave MacMillan, New York, 2002), p. 60 and C. McCrudden, 'Theorising European Equality Law' in C. Costello and E. Barry (eds.), *Equality and Diversity: The New Equality Directives*, (Irish Centre for European Law, 2003), p. 13.
[165] See D.A. Strauss, 'The Illusory Distinction between Equality of Opportunity and Equality of Result' in N. Devins and D. Douglas (eds.), *Redefining Equality* (Oxford University Press, Oxford, 1998), p. 61.
[166] The progression from slavery to racial enlightenment and then to the use of affirmative action is also found in many other jurisdictions. See T. Sowell, *Affirmative Action around the World: An Empirical Study,* (Yale University Press, New Haven, 2004); and E. Appelt and M. Jarosch (eds.), *Combating Racial Discrimination: Affirmative Action as a Model for Europe*, (Berg Publishers, Oxford, 2000).

### 3.2.1 The US Conception of Equality

The US principle of equality has its foundations in the Fifth and Fourteenth Constitutional Amendments which enshrine the guarantee of equal protection of the law,[167] and are violated by intentional, purposeful and deliberate actions that harm persons because of their race, national origin or sex.[168] In order to achieve equality the Constitution and specific civil rights legislation state that racial minorities must be treated equally with majority individuals. To this end affirmative action in the US has been shaped by a very narrow interpretation of the principle of equality as an 'anti-caste principle', requiring the rejection of all law whose purpose or effect is to subject people to any differential treatment, whether minority or majority.[169] Any deviation from the formal equality inherent in this parity of treatment, for example in the form of preferences, has been criticised for 'violating the rights of whites and men in the same way that first order, prejudicial discrimination, violates the rights of black minorities and women',[170] thus popularising the notion that 'in the distribution of benefits under the laws all racial [and gender-based] classifications are invidious'.[171]

The importance of the Constitution in establishing the principles behind the affirmative action debate reflects the centrality of these founding documents within the US legal framework. However, arguments which focus on the strict wording of the constitutional documents ignore contrary declarations within international law and conventions that the adoption of 'temporary special measures aimed at the acceleration of de facto equality between men and women [and different races] shall not be considered discriminatory' thereby excluding affirmative action from the principle of identical treatment.[172] Opponents of modern-day affirmative action have seized upon the limited expressed aims of early equality promises to insist that the best overall social outcome would result from

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[167] First articulated in the Civil Rights Act 1866.
[168] US Constitution, Amendment V, 'Trial and Punishment, Compensation for Undertakings' (Ratified 15th December 1791) and Amendment XIV, 'Citizenship Rights' (Ratified 9th July 1868).
[169] An early example of the anti-caste principle may be found in O. Fiss, 'Groups and the Equal Protection Clause', *Philosophy & Public Affairs*, 5 (Winter 1976), pp. 107 – 177.
[170] A. Koppelman, *Anti discrimination Law and Social Equality,* (Yale University Press, New Haven, 1996), p. 31.
[171] C. Cohen, *Naked Racial Preference*, (Madison Books, Maryland, 1995), p. 52.
[172] UN Convention of the Elimination of All Forms of Discrimination against Women, 1979, art. 4 and UN Convention on the Elimination of All Forms of Racial Discrimination, 1969, art. 1(4). Although, it has only been in the 1990s that the US has ratified many of the treaties containing guarantees relating to race-based equality. For example, the UN Convention of the Elimination of All Forms of Racial Discrimination, was not ratified in the US until 21st October 1994, whilst the UK ratified the Convention on 11th October 1966.

a regime that does not tolerate any form of discrimination and in which all considerations of race are a negative, and therefore unlawful, factor in decision-making.[173] Concentration on the literal wording of the law also ignores the inherent flexibility in the prohibition of racial discrimination[174] and that the 'literal application of what is believed to be the plain language of the statute … would lead to results in direct conflict with Congress' unequivocally expressed legislative purpose'.[175] In addition, James Jones has suggested that because the Constitution does not expressly enforce colour-blindness, whilst recognising the existence of slavery, 'it is irrefutable constitutional history' that the Constitution was *not* colour-blind.[176]

The strength of the idea that the US principle of equality calls for identical treatment, and therefore necessitates formal equality, is further reinforced by the argument that differential treatment of any kind should be regarded with suspicion, so that 'when whites do things that benefit themselves, then we should be suspicious of that; but equally, when people of color do the same thing, then we should be suspicious of that'[177] to avoid causing 'society serious harm'.[178] Supporters of identical treatment also utilise the calls for formal equality from early civil rights campaigners as a powerful weapon to defend their arguments and protect their social position.[179] Consequently, early proponents' criticism of all racial classifications and all differential treatment, in their efforts to eradicate prejudicial behaviour, afford supporters of identical treatment a potent source of rhetoric which is now utilised to resist measures designed to achieve substantive equality.[180] The Supreme Court bolstered the arguments for identical treatment in its decision that Title VII of the Civil Rights Act 1964 did not require that minorities and women receive preferential treatment, only that they not be victimized by illegal

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[173] See, for example, R.A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws*, (Harvard University Press, Cambridge, Mass., 1992) and R.A. Epstein, 'Standing Firm, on Forbidden Grounds', *San Diego Law Review*, Vol. 31, (1994), p. 1.
[174] J. Raskin, in the discussion 'Beyond Black and White: Race Conscious Policies and the 'Other Minorities' at American University, Washington College of Law, 21st Sept. 1995. Viewed on http://www.c-spanvideo.org/program.67266-iI. Accessed 13.06.09.
[175] *Regents of the University of California v Bakke* 438 US 265 (1978) at 341.
[176] J.E. Jones, Jr., 'The Rise and Fall of Affirmative Action', pp 347 in H. Hill and J.E. Jones (eds), *Race in America: the Struggle for Equality*, (University of Wisconsin Press, Maddison, 1993), pp. 345 – 359.
[177] J.H. Ely, 'The Constitutionality of Reverse Discrimination', 41 *University of Chicago Law Review* 723, 731 – 733, 739 (1974).
[178] Justice Kennedy in *Miller v Johnson* 515 US 900 (1995) at 2486.
[179] P. Gottfried and T. Flemming, *The Conservative Movement. Social Movements Past and Present*, (Twayne Publishers, Boston, 1992), p. 41.
[180] E. Schnapper, 'Affirmative Action and the Legislative History of the Fourteenth Amendment', *Virginia Law Review*, LXXX1, (1985), pp. 753 – 98.

discrimination.[181] The court's role in forming the conception of equality is also apparent in the cases of *Shaw v Reno* and *City of Richmond v Croson* in which it acted on the assumption that affirmative action is either explicitly racist or is able to mask racism.[182] The Court's arguments however ignored that 'since the [14th] Amendment grew out of the Civil War and the freeing of the Slaves, the core prohibition was early held to be aimed at the protection of blacks'.[183] In addition, the affirmative action cases of the mid-1990s, *Miller v Johnson*, *Adarand v Peña* and *Missouri v Jenkins*, which are synonymous with the conservative resurgence of the Supreme Court, also demonstrate the significant judicial promotion of a formal, colour-blind construction of equality.[184]

One of the US' most explicit proponents of the colour-blind principle is Richard Sander who has used empirical evidence to argue that colour-based preferences have resulted in fewer students belonging to racial minorities in American law schools.[185] Sander states that minority students who benefit from affirmative action are disproportionately clustered at the bottom of their classes, leading to a higher attrition rate and lower rate of bar passage amongst them than there would have been in the absence of any preference.[186] The combined effect of these factors, Sander claims, is that there are fewer black lawyers than there would be under a race-blind system.[187] Sander's conclusions have, however, been directly challenged by the contrary hypothesis that any differentials between minority and majority law students are attributable to embedded discrimination within the educational system and other external factors as opposed to any deficiency in the minority students themselves or the negative impact of affirmative action.[188] Critics of Sander have also reworked his data to show that the proportion of minority students admitted to the most elite schools would fall dramatically in the absence of affirmative

[181] *Texas Department of Community Affairs v Burdine* 450 US 248 (1981) pp. 258 – 9.
[182] See *Shaw v Reno* 113 S. Ct. 2816 (1993), at 2833 and *City of Richmond v Croson,* 488 US 469 (1989).
[183] J. Rehnquist, dissenting, *Trimble v Gorden* 430 US 762 (1977) at 780.
[184] See *Missouri v Jenkins* 515 US 70 (1995) in which the court limited the remedial use of affirmative action by striking down district court efforts to increase minority educational achievement and attract white students to public schools; *Adarand v Peña op. cit.* which held that congressionally mandated affirmative action plans must pass the test of strict scrutiny; and *Miller v Johnson* 515 US 900 (1995) in which the Court applied strict scrutiny to a minority-majority district in which race was a predominant factor in creating the district.
[185] R.H.A. Sander, 'A Systematic Analysis of Affirmative Action in American Law Schools', 57 *Stanford Law Review*, No. 4 (November 2004), p. 367.
[186] *ibid*, pp. 449, 460, 478, 479.
[187] *ibid*, p. 372.
[188] R. Lempert et al, 'Affirmative Action in US Law Schools: A Critical Response to Richard Sander's 'A Reply to Critics', *University of Michigan Law School: The John M. Olin Center for Law and Economics Working Paper Series,* Paper 60 (2006), pp. 21 – 22.

action, resulting in virtually no African American students.[189] While critics of Sander have sought to negate his theories and criticise his methodology[190] in so-doing they have highlighted the extent to which US affirmative action is affected by conflicting arguments, which result in a developmental paralysis in this area of the law and confusion as to the interpretation of the legal principles upon which it is based.

For US supporters of affirmative action the principle that equality requires colour-blindness is 'structurally insupportable'.[191] The impact of the colour-blind approach to US affirmative action has also been criticised as being ignorant of the positive value of black culture and assuming that white culture represents neutrality.[192] However, race is so deeply ingrained in the historical background of the US that neutrality of treatment will not yield neutral results[193] and in this context the Supreme Court's insistence on colour-blindness 'ceases to resemble an admirable social panacea, but rather metastasizes into a virulent social malignancy'.[194] As Andrew Koppelman has argued the notion of a colour-blind constitution takes a legal approach to equal treatment which 'derives its appeal by seizing on one valid instance of the process theory's requirement that the legislator be impartial, fetishizing it, and forgetting its basis'.[195] Despite such arguments, opponents of affirmative action have popularised the notion that the on-going treatment of individuals according to their colour delays the achievement of *de facto* equality, underlining the natural inferiority of minority groups, and forestalling the evolution of affirmative action.[196]

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[189] J. Rothstein and A.H. Yoon, 'Affirmative Action in Law School Admissions: What Do Racial Preferences Do?', *University of Chicago Law Review*, 75 (Spring 2008) 649, p. 712.
[190] In particular see I. Ayres and R. Brooks, 'Does Affirmative Action Reduce the Number of Black Lawyers?', 57 *Stanford Law Review* 1087 (2005); D.L. Chambers et al, 'The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study', *Stanford Law Review*, 57 (May), pp. 1855 – 1898; D. Wilkins, 'A Systematic Response to Systematic Disadvantage? A Response to Sander', *Stanford Law Review* 57 (May), pp. 1915 – 1961; D.E. Ho, 'Why Affirmative Action Does Not Cause Black Student to Fail the Bar: A Reply to Sander', *Yale Law Journal*, 114 (June), pp. 1997 – 2004; and K. Barnes, 'Is Affirmative Action Responsible for the Achievement Gap between Black and White Students?', *Northwestern University Law Review*, 101 (Fall 2007), pp. 1759 – 1808.
[191] A. Natapoff, 'Trouble in Paradise: Equal Protection and the Dilemma of the Inter-Minority Group Conflict', 47 *Stanford Law Review*, 1059 (1995), p. 1095.
[192] L. Friedman, 'Brown in Context', p. 64 in A. Sarat (ed.), *Race, Law and Culture. Reflections on Brown v Board of Education,* (Oxford University Press, Oxford, 1997), pp. 49 – 73. See also S.A. Law, 'White Privilege and Affirmative Action', 32 *Akron Law Review* 603, (1999).
[193] USCCR, *Statement on Affirmative Action*, (Clearinghouse Publication 54, October 1977), p. 12.
[194] G.A. Spann, *Race against the Court*, *op. cit.,* p. 139.
[195] A. Koppelman, *Anti Discrimination Law op. cit.,* p. 33.
[196] M.J. Perry, *We the People: The Fourteenth Amendment and the Supreme Court*, (Oxford University Press, Oxford, 1999), p. 105.

### 3.2.2 The UK Principle of Equality

UK anti-discrimination legislation is founded on a formal understanding of equality, through the definition of direct discrimination, which states that an action is discriminatory if 'but for' the protected characteristic the two individuals, comprising of the person with the protected characteristic and the comparator who does not have the protected characteristic, would have been treated the same.[197] The implication in this test is that identical treatment is lawful treatment whilst any differential treatment, even if benevolently motivated, may constitute unlawful discrimination.

The articulation of equality in UK law is closely related to the principle of formal equality found in European law, which was founded firstly upon economic aspirations, and in particular the ideal of equal pay.[198] This required equal pay between men and women undertaking the same work, or work of an equal value, and that job categorisation be carried out without discrimination.[199] The failure of article 119 to expressly refer to equal treatment in terms other than pay, however, led to its narrow application.[200] The Council of the European Union therefore passed the Equal Treatment Directive 1976 which, as well as concerning equal treatment in matters other than pay, also permitted 'measures to promote equal opportunity.'[201] This small concession to a substantive equality approach was drafted as an exception to the general, formal equal treatment requirement,[202] thus echoing the positive action measures in UK domestic law.[203] The European derogation for positive action was listed among two other permitted exceptions which could be enacted within Member States until 'the concern for protection which originally inspired them is no longer well founded'. [204] Alongside exceptions for occupational qualifications[205] and maternity-related protection[206] were the positive duty provisions

[197] See Equality Act 2010, s. 13(1), which replaces RRA, s. 1(1)(a) and SDA, s. 1(2)(a). See also the Equal Pay Act 1970, s. 1.
[198] Treaty of Rome 1957, art. 119 (now art. 141).
[199] Equal Pay Directive 75/117 1975 O.J (L30) 19.
[200] See, for example, *Defrenne v Sabena (No. 3)* Case C-149/77 [1978] ECR 1365.
[201] Equal Treatment Directive 76/207 1976 OJ L39/10, article 2(4).
[202] *ibid*, art 2(1).
[203] SDA, ss. 47 and 48 and RRA, ss. 37 and 38.
[204] *ibid,* arts 3(2)(c) and 5(2)(c).
[205] *ibid*, art 2(2).
[206] *ibid*, art 2(3).

which permitted the promotion of gender equality by 'removing existing inequalities' which affect the opportunities of women and minorities.[207]

A significant development in the EU/UK notion of equality from one of formal equality to one of substantive equality arose out of the provisions of the Treaty of Amsterdam 1997 which stated that equality required 'full equality in practice'.[208] The achievement of 'full equality *in practice*' has been interpreted as permitting the adoption of specific measures to prevent or compensate for disadvantages experienced by the underrepresented group and therefore moves on from the requirement that equal treatment necessitates identical treatment.[209] On top of the requirements of article 141(4) the directives implemented in response to the new non-discrimination provision in article 13 EC Treaty also reflect the 'commitment to substantive not merely formal equality'.[210] Article 5 of the Racial Equality Directive 2000, for example, states that 'the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin'.[211] Comparable provisions also exist in other Directives, including the Framework Equality Directive 2000, the Gender Equality in the Provision of Goods and Services Directive 2004 and the Equal Treatment Directive 2006.[212]

The key factor which demonstrates that both article 141(4) and the article 13 directives move towards the principle of substantive equality is that they do not frame positive action as a derogation from equality, but as an integral part of achieving it. Pursuant to this the provisions put a heightened emphasis on the possible need for specific measures to achieve equality, with the implication that these will not be uniformly relevant to all individuals. Implementation of this requirement into UK domestic legislation has brought with it a more substantively focused notion of equality.[213] The approach will be solidified by uncommenced sections of the Equality Act 2010 which explicitly

[207] *ibid*, art 2(4).
[208] EC Treaty, art. 141(4).
[209] E.F. Dedeis, 'The Treaty of Amsterdam: The Next Step towards Gender Equality', 23 *B.C. Intl & Comp Law Rev* 1(1999), pp. 30 – 33.
[210] C. McHugh, 'The Equality Principle in EU Law: Taking a Human Rights Approach?' 14 *ISLR* 31 (2006).
[211] Council Directive 2000/43/EC, art. 5.
[212] Council Directive, 2000/78/EC, art. 7(1) and Council Directive, 2004/113/EC, art. 6 and Council Directive 2006/54/EC. art. 2(8).
[213] See, Employment Equality (Sexual Orientation) Regulations 2003, esp. reg. 26; Employment Equality (Religion of Belief) Regulations 2003, esp. reg. 25; Sex Discrimination (Amendment of Legislation) Regulations 2008 SI 2008/963; Race Relations Act 1976 (Amendment) Regulations 2003 SI 2003/1626; and Employment Equality (Sex Discrimination) Regulations 2005 SI 2005/2467.

acknowledge that '[c]ompliance with the [Act's equality] duties … may involve treating some persons more favourably than others'.[214] The Equality Act 2010 also affirms the mandatory need for public authorities to exercise their functions with due regard to the need to advance equality of opportunity.[215]

The ECJ has also been instrumental in the developing principle of equality and in particular shaping the form of substantive equality that is permitted under European law, and which will now, as a result of the Equality Act 2010, be incorporated into UK law. In the *Kalanke* decision the Court demonstrated the clear distinction between equality of opportunity and equality of outcome, holding the former to be permissible, and the latter not.[216] By contrast, however, *Marschall* arguably allowed equality of result, subject to the inclusion of a savings clause,[217] marking a degree of movement towards this form of substantive equality.[218] Although the savings clause altered the outcome of the choice between two candidates on some occasions, when it did not come into effect the outcome of the decision was effectively pre-determined in favour of the equally qualified female candidate.[219] The Court confirmed its acceptance of substantive equality encompassing measures which effectively achieve equality of results in *Badeck.*[220] In *Badeck* the ECJ approved of plans which included binding targets for increasing the proportion of women in sectors in which they were underrepresented so that more than half of the positions arising during the two year duration of each plan were designated for women, except where a 'genuine occupational qualification' existed, or it was 'convincingly demonstrated that not enough women with the necessary qualifications are available' in which case a smaller proportion of posts could be designated.[221] In applying the test it had set down in *Marschall* the ECJ required only that there was no automatic and unconditional priority given to women when there were two equally qualified individuals

[214] Equality Act 2010, s. 149(6). See also s. 159(3).
[215] RRA, s. 71 and SDA, s. 76A. See Equality Act 2010 ss, 149(1)(a) and (b) once in force.
[216] *Kalanke, op. cit.,* para 23*,*
[217] *Marschall, op. cit.,* paras 24 – 31.
[218] See C. Barnard and B. Hepple, 'Substantive Equality', *The Cambridge University Law Journal* (2000) Vol 59, Iss. 3, pp.562 – 585. See also C. Barnard, 'The Principles of Equality in the Community Context: P, Grant, Kalanke and Marschall: Four Uneasy Bedfellows', *The Cambridge University Law Journal* (1998) Vol 57, Iss. 2, pp. 353 – 373.
[219] This led to the criticism of the scheme by Advocate General Jacobs who argued that if an absolute rule granting women priority is unlawful then a conditional clause merely displaces the rule, without altering its discriminatory nature. See Opinion of Advocate General F.G. Jacobs, Case C-409/95 [1997] All ER (EC) 865 (1997), [1998] CEC, (CCH) 152 (1997), at 161.
[220] *Badeck, op. cit.*
[221] *ibid*, para 3.

and that there was an individual and objective assessment of the candidates.[222] Subject to these caveats, therefore, the ECJ approved a construction of equality which assured an equal outcome for both genders. A further indication of the ECJ's movement towards a substantive equality approach is its holding that an employer's scheme which provided subsidised nursery places to female employees was lawful positive action, on the reasoning that 'an insufficiency of suitable and affordable nursery facilities is likely to induce more particularly female employees to give up their jobs'.[223] A substantive understanding of equality is incorporated into the Equality Act 2010, albeit that the relevant sections have yet to commence.[224]

The European equality provisions illustrate how EU law, in contrast to the US, has gradually relinquished its unfettered search for identical treatment and instead has focused on the aim of equality of opportunity, with some indication that this is now moving towards a principle of equality of outcome, both of which represent a much more 'positive and value-laden concept than non-discrimination' or *de facto* equality.[225] In line with this approach UK positive action has been increasingly designed to achieve substantive equality between majority and minority groups, under which equality of outcome is prioritised over equality of treatment, although this prioritisation is arguably more tenuous where market forces are threatened.[226] This difference illustrates the contrast between the current EU and UK substantively focused principle of equality, as compared to the continuing strength of US arguments for formal equality.[227] Consequently, despite similar periods of hesitancy and some opposition, as well as some similarities in the criticism directed at each country's legislature and judiciary, the UK is now developing a general framework for equality built on substantive equality,[228] whilst the US continues to grapple with conceptual confusion in the construction of this principle.

[222] *ibid,* paras 55 and 63.
[223] *Lommers, op. cit.,* para 370.
[224] Equality Act 2010, s. 159.
[225] E. Ellis, *EU Anti-Discrimination Law*, (Oxford University Press, Oxford, 2005), p. 3.
[226] See H. Fenwick and T. Hervey, 'Sex Equality in the Single Market: New Directions for the European Court of Justice' (1995) 32 *Common Market Law Rev* 443.
[227] As illustrated, for example, by *Gilbert v General Electric Co*. 1997 S Ct. 401 (1977).
[228] C. O'Cinneide, 'Fumbling towards Coherence', *op. cit*.

## 3.3 The Definition of Merit Utilised in Affirmative Action

The relative degree to which protected characteristics have been used as part of the definition of 'merit' in US and UK positive action has compounded the differences between US and UK affirmative action principles. Whilst the US legal framework permits race to count towards an individual's merit in narrowly constructed circumstances affirmative action critics have maintained that all decisions should be made on the basis of objectively assessed merit and determined that any process that takes race into account is equally bad whether whites, blacks, men or women are favoured because 'it departs from the norm of a career open to talents'.[229] However, such arguments are starkly contrasted by those of critical race theorists who consider merit to be socially constructed by the dominant group and used to maintain its social hegemony.[230] The tension between the legal framework and vociferous popular opinions has left these two highly divergent positions to be reconciled by the courts, which has generally sought to restrain the use of membership of a protected group in the construction of merit. The UK by contrast has determinedly excluded an individual's race or gender from constituting any part of their perceived 'merit' so that even where a protected characteristic is relevant to a decision, this is only after an individual's merit has been assessed. This was firstly achieved by separating the operation of positive action from situations requiring the assessment of merit, and latterly by only considering positive action after merit has been determined, and even then only in certain circumstances. The following paragraphs will further consider the country-specific influences on the principle of merit in the context of affirmative action.

### 3.3.1 US Interpretations of the Principle of Merit

US affirmative action allows the existence of a minority characteristic to form part of the assessment of an individual's qualifications, or merit, under narrowly defined circumstances.[231] However, such use has been controversial and fiercely resisted with the claims of malcontent litigants frequently being upheld by the courts on the basis that the

[229] A. Koppelman, *Anti-discrimination Law and Social Equality*, (Yale University Press, New Haven, 1996), p. 35.
[230] R. Delgado, *Critical Race Theory,* (New York University Press, New York and London, 2000), pp. 105 – 107.
[231] See *Grutter v Bollinger*, *op. cit*. and *Gratz v Bollinger*, *op. cit*.

policies constitute a departure from the appropriate construction of merit.[232] The extent to which departures from objectively assessed merit, in terms of academic achievement and work experience, are readily accepted within the US is however evident across the employment and educational environment. Outside affirmative action standards of merit rely heavily on personal connections, legacies, family contacts and standardized tests, for example, all of which are highly discriminatory.[233] In addition, many elite schools have long used non-academic preferences to encourage a diverse student population, whether this is in terms of geographical origin, social background or specific talents, and have commended the benefit of these attributes within the learning environment.[234] At Harvard University, for example, John Lamb concludes that routinely more white students gain entry as 'legacy admissions'[235] than do the total number of Black, Hispanic and American Indian students through affirmative action.[236] What distinguishes these preferences from those made on the basis of race and gender is that they predominantly benefit white males and it is therefore in the majority's social interest that individuals benefiting from race and gender-based preferences are more opposed and stigmatised than those benefiting through the operation of other group-based programmes.[237] Arguments supporting an objective assessment of merit also suggest that individuals benefitting from affirmative action will be 'mismatched', in terms of skills and qualifications, to the position they are awarded.[238] The argument that affirmative action admittances are not based on individual accomplishment, however, disregards the obstacles that are routinely in the way of individuals from previously excluded groups entering higher education and certain professional jobs.[239]

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[232] See, for example, the comments of Justice Clarence Thomas in cases including *Gratz v Bollinger, Grutter v Bollinger, Adarand v Pena,* and *Parents Involved in Community Schools v Seattle School District, No. I* Nos 05-908, 426 F.3d 1162, and 05-915, 426 F.3d 513 (2007).

[233] S.A. Law, 'White Privilege and Affirmative Action', p. 618 and R.B. Ginsburg and D.M. Jones, 'Affirmative Action: An International Human Rights Dialogue', 1 *Rutgers Race and Law Review,* 193, (1998 – 1999), p. 618.

[234] R. Post, 'Introduction: After Bakke', in R. Post and M. Rogin (eds.), *Race and Representation: Affirmative Action*, (Zone Books, New York, 1998), pp. 13 – 27.

[235] It is common practice in private US universities to give preference in admissions to family of alumni. These are called 'legacy admissions'.

[236] J.D. Lamb, 'The Real Affirmative Action Babies: Legacy Preferences at Harvard and Yale', 26 *Columbia Journal of Law and Social Problems* 491, 504 (1993).

[237] N. Strossen, 'Blaming the Victim: A Critique of Attack on Affirmative Action', 77 *Cornell Law Review*, 974, (1991 – 2), p. 978.

[238] R. Sander, 'A Systematic Analysis of Affirmative Action', *op. cit*., pp. 449 – 453.

[239] See R. Zweigenhoft and W.G. Domhoff, *Blacks in the White Establishment? A Study of Race and Class in America*, (Yale University Press, New Haven, 1991), especially pp. 145 – 158 concerning the barriers of stigmatisation faced by minorities.

Merit in the US incorporates a wide range of characteristics and although opponents of affirmative action argue for a narrow, objective construction of merit in relation to affirmative action measures this does not generally exist across assessments of merit. In the case of *Mitchell v Cohen*, for example, the Supreme Court justified amending the definition of merit to include consideration of an individual's status as a military veteran as a means of helping soldiers readjust to civilian life.[240] Whilst race or gender-based preferences have been attacked veterans' preferences have been largely immune from criticism and widely protected by the courts. In fact, veterans' preferences have been considered so important that they have been maintained despite the court labelling them as 'unwise and costly'.[241] Veterans' preferences, unlike affirmative action preferences, primarily benefit white males and so illustrate how the white male hegemony in the US continues to limit the growth of minority advancement whilst protecting white-benefitting programmes, although both forms of action continue to exist within US law. The US' insistence on sameness for minority treatment while 'American society is replete with preferences and categorical separations of various sorts' shows the degree to which the principles upon which US affirmative action is based are a product of the society and historical context in which it exists and that these factors are very significant in determining the scope of the legal provisions.[242] As these examples show the concept of merit gets manipulated by opponents of affirmative action to serve their own interests.

The court's impact in limiting the use of race as a component in determining an individual's merit is evident in the case of *Bakke*, in which the university put in place qualitative selection criteria under which Alan Bakke expected to be admitted, but then departed from this by taking other factors, including race, into account.[243] The court's decision did not therefore condemn the consideration of race per se but effectively condemned its use on the grounds of what was the appropriate test of merit. US arguments about the role of merit in university-based affirmative action also extend to the provision of race and gender-specific scholarships. The attitude towards these endowments can be seen in the case of *Proberesky v Kirwan* in which the court struck

[240] *Mitchell v Cohen* 33 U.S. 411 (1948) at 418. See also the Vietnam Era Veterans Act 1974, ss. 4211 - 4215 which required any employer with a federal contract of $10,000 or more to take affirmative action to employ and advance in employment qualified veterans with disabilities and veterans of the Vietnam era. 38 US Code Chapter 42.
[241] *White v Gate* 253 F2d 868 (1958) at 869.
[242] J. Skrentny, *The Ironies of Affirmative Action, op. cit.,* p. 36.
[243] P. Green, *The Pursuit of Inequality*, (Martin Robertson, Oxford, 1981), p. 174.

down a racially exclusive scholarship at the University of Maryland because the programme failed to meet the required level of judicial scrutiny.[244] Again this decision does not prohibit the consideration of race in assessing merit, but illustrates how the court has been instrumental in limiting its use. The most recent approach of the Supreme Court to the use of race as a factor in an individual's merit maintains the strict level of scrutiny, whilst accepting that an individual's race can add value to the assessment of their merit.[245] This decision may suggest that the Court is increasingly willing to uphold the minority benefitting intentions of affirmative action provisions, against popular opposition, or simply that affirmative action schemes are more cautious in their drafting and limited in their aspirations.

### 3.3.2 UK Interpretations of the Principle of Merit

The confinement of UK positive action to specially targeted advertisements and training programmes under the RRA and SDA has previously meant that when the decision to promote, appoint or dismiss is made, and with it an individual's merit is being assessed, no positive action considerations are simultaneously being taken into account.[246] This separation between merit and membership of a protected group is continued in the Equality Act 2010 provisions enabling employers to help individuals to overcome disadvantage caused by a protected characteristic.[247] Consequently the debate surrounding the appropriate definition of merit in UK positive action is relatively undeveloped compared to the US with official tests of merit not incorporating positive action considerations. This leaves the popular perception of merit as constituting 'a universal concept … generally confined to criteria such as formal qualifications and experience', albeit that in reality the factors taken into account in determining a person's merit may include a wide array of additional considerations.[248] The separation of positive action from the point of decision-making has also enabled UK positive action to avoid some of the most damaging charges directed at US affirmative action including the accusation that it results in the recruitment of unqualified and undeserving individuals.[249]

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[244] *Prodberesky v Kirwan*, *op. cit.*
[245] See *Grutter v Bollinger, op. cit*.
[246] SDA, s. 48 and RRA, s. 38.
[247] Equality Act 2010, s. 158.
[248] N. Jones, 'Positive Action and the Problem of Merit: Employment policies in the National Health Service', *Critical Social Policy* (2005) Vol 25: 139, p. 153.
[249] See, for example, A. G. Mosley and N. Capaldi, *Affirmative Action: Social Justice or Unfair Preference?,* (Rowman and Littlefield Publishers, Inc, Maryland, 1996), p. 32.

Even within Northern Ireland adherence to selection on the basis of merit still requires objective and systematic recruitment of the most qualified individual for the position.[250] This means that an individual's membership of a protected group is considered separately from their 'merit'. [251]

In uncommenced changes to UK positive action that are included in the Equality Act 2010 the UK construction of merit will continue to be unaffected by affirmative action considerations.[252] In its latest developments UK law has adopted the background parameters for positive action as set out in European case law, which espouse a definition of merit which is explicitly race and gender-neutral, despite recognition that this definition can in fact have a biased impact in practice. In *Marschall*, for example, the ECJ acknowledged that merit cannot be objectively measured and that 'where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudice and stereotypes concerning the role and capabilities of women in working life'.[253] Despite this the ECJ has refused to sanction the use of an individual's race, gender, or other protected characteristic in the assessment of their merit, and instead, such characteristics have only been flexibly applied to determine a tie-break decision.[254] The principle of merit, therefore, is shaped without refer to protected characteristics, albeit that the outcome of a decision choosing between two equally meritorious candidates may be determined on the basis of the presence of such a characteristic. The Court's judgment in the case of *Abrahamsson* clarified the separation between the permitted consideration of an individual's minority characteristic and the appropriate definition of merit by holding that an individuals' lack of qualifications could not be bolstered by their membership of an underrepresented, protected class.[255] In other words, the Court held that an individual's membership of a protected group did not count towards their qualification for the position, relative to any other candidate. Because the Equality Act 2010 will insert the judicial findings of the ECJ into UK law the principle of merit employed in making appointment

[250] Equality Commission for Northern Ireland, Code of Practice Fair Employment In Northern Ireland, (2003), para 5.1.1. See also paras 5.3.2 – 5.3.5.
[251] B. Hepple, 'Discrimination and Equality of Opportunity – Northern Irish Lesson', *Oxford Journal of Legal Studies* 10 [1990] 408, p. 413.
[252] This does not mean that the assessment of merit will be more or less objectively assessed, only that positive action will continue not to have a role in its determination.
[253] *Marschall, op. cit.* para 29.
[254] As discussed in section 3.1.2 in relation to the ECJ's decisions in *Kalanke* and *Badeck*.
[255] *Abrahamsson, op. cit.,* para 56.

and promotion decisions will continue to avoid consideration of an individual's race, gender or other protected characteristic, and only add this factor into the decision-making process in the event of a tie-break situation and subject to strict legislative criteria.[256]

Despite the UK's failure to incorporate positive action considerations into an individual's assessment of merit commentators have argued that such a development would not deprive the assessment of merit of its legitimacy. For example, Albert Weale has suggested that an individual's gender and race could reasonably constitute part of their 'merit' because there is no definite agreement as to what factors may form part of this assessment.[257] Therefore, departing from the typical criteria, albeit that they themselves are frequently and systematically ignored, need not invalidate a decision.[258] Building on support for the implementation of an explicitly flexible construction of merit Bhikhu Parekh has suggested that what forms merit at any one time is a 'social decision and a matter of social policy'.[259] It should therefore not be promulgated as a fixed and inviolable factor in decision-making, but recognised as historically contingent.[260] This debate displays similarities with US views about the inappropriateness of considering minority status as part of merit, although the legal provisions in the two countries remain distinct.

Both the US and UK have rejected the use of a minority characteristic as an inflexible or decisive factor in assessing an individual's merit.[261] Beyond this, however, the role of merit in affirmative action differs between the two countries. The US has permitted the use of a range of minority characteristics, including race and gender, to bolster an individual's merit and has also departed from what are perceived as merit-based decisions to benefit underrepresented groups. Despite this use opponents of affirmative action have heavily criticised these measures, whilst ignoring their similarity to other forms of majority-benefiting action. By contrast UK law has excluded positive action considerations from the assessment of merit, with the only possible role for a minority

[256] See Government Equalities Office. 'A Fairer Future. The Equality Bill and Other Action to Make Equality a Reality', (April 2009), part 2, pp. 29 – 37.
[257] A. Weale, *Political Theory and Social Policy*, (MacMillan, London, 1983), p. 165.
[258] *ibid.*
[259] B. Parekh, 'The Case for Positive Discrimination' in B. Hepple and E.M. Szyszczak (eds.) *Discrimination: The Limits of the Law,* (Mansell Publishing Limited, London, 1992), pp. 261 – 280.
[260] *ibid*, pp. 272 – 5.
[261] See, for example, *Kalanke, op. cit.,* para *22*, *Badeck*, paras 28 – 29 and *Bakke, op. cit.*

characteristic being to distinguish between equally qualified individuals in the event of a tie-break.

## 3.4 Affirmative Action across Different Protected Groups

Underlying positive action is the ideal of creating a 'level playing field' in which all individuals can enjoy equal access to education, employment and general societal opportunities. Supporters of a range of political creeds predominantly accept these arguments and acknowledge that while slavery and female disenfranchisement overtly prohibited equal access continuing discrimination prejudice and stereotyping has meant that the achievement of equality has remained elusive.[262] However, the legal and social consensus evaporates when the question turns to the principle behind how to combat the different forms of societal inequality variously experienced by women and minorities, with the US and UK adopting different approaches which will be explored below.

### 3.4.1 US Affirmative Action across Different Groups

In US affirmative action the categorisation of individuals on the basis of race is treated as more inherently pernicious than classifications based on gender.[263] Consequently, the treatment of racial minorities and women under affirmative action have developed along different paths meaning that '[i]t is not right to observe without qualification that men and women and "black" and "white" people, are "opposite sides of the same coin"'.[264] The most striking difference between the histories of the emancipation of US women and African Americans is the role of slavery and the decades of uneasy race relations that followed its abolition. The presence of slavery has conditioned the development of minority-based positive action and resulted in the differing permutations and distinct judicial treatment of each form of affirmative action.[265]

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[262] See, N. MacLean, *Freedom is Not Enough. The Opening of the American Workplace*, (Harvard University Press, London, 2006).
[263] S. Mayeri, 'A Common Fate of Discrimination: Race-Gender Analogies in Legal and Historical Perspective', in *The Yale Law Journal*, (2000 – 1), 110.2, p. 1050.
[264] K. Monaghan, *Equality Law*, (Oxford University Press, Oxford, 2007), p. 15.
[265] See M.E. Levin, 'Is Racial Discrimination Special?', 15 *Journal of Value Inquiry* 225, (1981), pp. 227 – 8.

One indication of the different principles affecting race and gender-based affirmative action in the US is the application of varying levels of judicial scrutiny. From early in the history of affirmative action the US court has made it clear that all governmental action that rests solely on distinctions drawn according to race has to be subjected to 'the most rigid scrutiny'[266] and that racial classifications must be 'necessary, and not merely rationally related, to the accomplishment of a permissible state policy'.[267] The strict scrutiny test also specifies that there must be a 'compelling state interest' to justify the deployment of race-based quotas, which is usually interpreted as meaning that it must be intended to combat intentional discrimination when no other form of action is likely to work. Finally the quota itself must be 'narrowly tailored' and finite in duration so that once the number of minorities in the workforce has reached a representative level the policy should be terminated.[268] By contrast, preferences based on an individual's gender only need to satisfy an intermediate level of scrutiny, which requires that they are fairly and substantially related to the achievement of an important government interest.[269] The application of 'strict scrutiny' to all race classifications and 'intermediate scrutiny' to gender classification cemented the legitimacy of differential treatment between race and gender-based affirmative action in the US and has resulted in a greater propensity for the courts to uphold gender-based affirmative action, as explicitly stated in the case of *Danskine v Miami Dade Fire Department*.[270] US gender-based preferences are therefore less vulnerable to constitutional condemnation than preferences based on an individual's race.[271]

A further example of the more lenient US judicial treatment afforded to gender-based affirmative action cases, as compared to race-based preferences, is the case of *Califano v Webster* in which the court rejected a male worker's challenge to a social security provision which treated women more favourably than men by allowing women to exclude more low-earning years for the purposes of calculating benefit.[272] In *Califano* the policy was subjected to an intermediate level of scrutiny under which it was justified on the basis

[266] *Korematsu v United States* 323 US 214, 216 (1944) quoted in *Loving v Virginia* 388 US 1 (1967) at 11.
[267] *McLaughlin v Florida* 379 US 184, 196 (1964) at 197 (J. Harlan, concurring).
[268] Justice O'Conor in *Adarand v Peña* , *op. cit.,* paras 212 – 239.
[269] *Craig v Boren* 429 US 190 (1976), para 197.
[270] *Danskine et al. v Miami Dade Fire Department et al*., 1999, (6/12/2001, No. 99-14493), part III.
[271] R.B. Ginsburg and D.J. Merritt, 'Affirmative Action: An International Human Rights Dialogue', 1 *Rutgers Race and Law Review*, 193 (1998 – 1999), p. 213. See also R.B. Levinson, 'Gender Based Affirmative Action and Reverse Gender Bias: Beyond Gratz, Parents Involved, and Ricci', 34 *Harv J.L. and Gender* (2010).
[272] *Califano v Webster* 430 US 313 (1977).

of the general need to 'remedy discrimination against women in the job market', without the need to identify a particular instance of discriminatory treatment of the individual involved.[273] By contrast, the stringency of the court's scrutiny of race-based programmes was illustrated in the *Seattle Schools* case where the plaintiff's attempt to negate the lack of a finding of past discrimination by relying on complaints made against the school district was rejected as an inadequate basis upon which to justify the particular race-based affirmative action plan.[274]

Some US commentators have argued that instead of requiring racial preferences to pass a test of strict scrutiny the US should have adopted the policy rejected in the *Bakke* whereby the court would allow consideration of generalised societal racial discrimination to justify affirmative action programmes.[275] The rejection of this approach signified the end of a range of affirmative action programmes unable to meet this higher standard.[276] Further arguments against the different principles supporting race and gender-based action suggest that the application of strict scrutiny 'confuses benefit, equal opportunity, and inclusion with burden, discrimination, and exclusion'.[277] The Court's natural conservatism and suspicion of race-based measures has meant rejection of the lesser standard of scrutiny for race-based preferences, allowing the differential treatment of race and gender to exemplify the divisive and divided nature of the affirmative action movement in the US.[278]

### 3.4.2 UK Positive Action across Different Groups

Whilst US affirmative action is forced to deal with the residual influences of slavery, societal racism and the consequently cautious approach to dealing with racial classifications, the UK has adopted a more uniform approach to the implementation of positive action across different protected groups. Under the Equality Act 2010 the level

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[273] *ibid,* at 319.
[274] *Parents Involved in Community Schools v Seattle School District, op. cit*. on writ of Certiorari to the United States Court of Appeal for the Ninth Circuit.
[275] *Bakke*, *op. cit*.
[276] S. Douglas-Scott, 'Affirmative Action in the US Supreme Court: the Adarand Case – the Final Chapter', *Public Law* 43 (1977).
[277] Angela Davis, Key note address at Race, Law and Justice Conference, 'The Rehnquist Court and the American Dilemma', *American University Law Review*, (February 1996), http://www.wcl.american.edu/journal/lawrev/45/kahlen.cfm. Accessed 10.08.10.
[278] C. Cunningham and N.R. Madhava Menon, 'Race, Class, Caste…? Rethinking Affirmative Action', 97 *Michigan Law Review* 1296 (1999).

of scrutiny to be applied to tie-break positive action, once commenced, is comparable across all cases and requires that the positive action programme must be proportionate.[279]

In determining whether a positive action policy fulfils the proportionality principle European law has established three requirements for permissibility: the suitability of the measure for attainment of the desired objective; the necessity of the disputed measure; and the proportionality of the measures to the restrictions involved.[280] The proportionality test was first applied in relation to positive action by the ECJ in *Abrahamsson* in which the Court held that the scheme under consideration was not proportionate because it failed to consider the candidates individually.[281] The application of the proportionality requirement was confirmed and developed in *Lommers* in which the ECJ considered the provision of subsidised nursery places to women employees, which had been provided in an attempt to remedy the under-representation of women where there were insufficient and inadequate childcare facilities.[282] The ECJ held that the scheme was in principle acceptable, provided that male employees with childcare responsibilities were also given access to the benefits.[283] Importantly, the Court held that the fact that the policy did not guarantee access to nursery places to employees on an equal-footing was not contrary to the principle of proportionality.[284] This was based on the limit of places in the nursery, together with the waiting list for female employees to gain a place for their child, as well as the fact that the scheme did not entirely deprive male employees from access to nursery places.[285] In the case of *Serge Briheche* the ECJ confirmed that proportionality was the test against which the lawfulness of any positive action was to be assessed stating that 'derogations [from anti-discrimination law] must remain within the limits of what is appropriate and necessary in order to achieve the aim in view' and requiring that 'the principle of equal treatment be reconciled as far as

[279] Parallel treatment for all subjugated groups was first proposed by the White Paper, *Racial Discrimination*, Cmnd. 6234 (HMSO, London, 1975) and is incorporated into positive action in the Equality Act 2010, s. 159(4)(c).
[280] A version of the proportionality principle is now enshrined in Article 5 EC Treaty, which provides that action by the European Community may not go beyond what is necessary to achieve the objectives of the Treaty.
[281] *Abrahamsson, op. cit.,* para 53.
[282] *Lommers, op. cit.*
[283] *ibid,* paras 44 – 5.
[284] *ibid,* para 43.
[285] *ibid*, paras 37 and 43.

possible with the requirements of the aim thus pursued.'[286] The ECJ has therefore continued to reaffirm the proportionality requirement confirming that contemporary developments in positive action programmes maintain the use of this single test of permissibility, offering equivalent protection across protected groups.

However, despite the existence of a single test of proportionality the principle may be applied with different levels of stringency 'ranging from a very deferential approach, to quite a rigorous and searching examination' of the reasons given for the measure under consideration.[287] In this respect both the US and the UK employ different levels of judicial examination in relation to varying affirmative action targets, and therefore afford varying levels of protection. However, whilst the US has formalised the principle of unequal scrutiny for gender and race-based programmes UK positive action retains a single test that may be applied by the judiciary in accordance with the specific factors involved in the case under consideration. This affords the UK a greater degree of flexibility in dealing with positive action challenges while the US, by contrast, is bound by its own strict, inflexible precedent.

As well as being one of the markers of the fundamental differences between US affirmative action and UK positive action the different principles upon which the laws are based and their various interpretations have also influenced the development of positive action law in both countries. Following the same pattern that has been set out in this chapter the development of affirmative action laws in each country can be characterised as consisting of superficial similarities which give way to fundamental differences on closer inspection. The range of influences affecting the development of affirmative action in the US and UK will be explored in the next chapter.

[286] *Serge Briheche v Ministre de l'Interieu, Ministre de l'Education Naitonale et Ministre de la Justice* Case C-319/2003 [2004] ECR I-8807, para 24. See also *R (Wilkinson) v Inland Revenue Commissioners* [2005] 1 WLR 1718; and *Stec v UK* (2006) (App Nos. 6573/01 and 65900/01) for recent applications of the test.
[287] P. Craig and G. De Burca, *EU Law. Text, Cases and Material* (3rd edn. Oxford University Press, Oxford, 2003), pp. 371 – 379.

## 4. The Differing Development of Affirmative Action and Positive Action

One important factor in creating the fundamental distinctions between positive action in the UK and affirmative action in the US are the different developmental courses of each country's equal opportunity laws. These differences reflect the fact that the nature of any socio-legal campaign is affected by its protagonists and their own social, economic and political priorities.[288] These priorities in turn are specific to the background within which the campaigns exist, making 'context critical' to the formulation of affirmative action laws.[289] This chapter will consider how political forces have had a palpable impact on the development of affirmative action and meant that it has at times found itself as much subject to the priorities and ambitions of individual politicians as to any holistic legal ideology.[290] The judiciary's role in the development of each country's legal provisions will also be considered, especially the way in which the nature, power and personnel of the judiciary has affected affirmative action. This chapter will go on to show that the development of affirmative action matches each country's contemporary social needs and objectives as well as the priorities of different social movements and that even where there are apparently similar social aims behind affirmative action policies these are pursued in country-specific ways. This chapter will end by considering the role of the executive in shaping the development of affirmative action law. Firstly, however, this chapter will explore how the different routes of legal development have contributed to the fundamental differences between the affirmative action in the US and UK.

### 4.1 Similar, but Diverging Roads of Legal Development

The unique developmental routes of US and UK positive action, which incorporate legal, administrative, popular and academic influences, have had a significant impact on how the relevant laws have been used, interpreted and changed, although this does not mean that there has been no transatlantic cross-referencing in the development of anti-

[288] For example, Charles Ogletree cites the different, but complementary, paths of affirmative action forged by Justice Thurgood Marshall and Martin Luther King Jr., C.J. Ogletree Jr., *All Deliberate Speed*, (W.W. Norton & Company, New York, 2005), p. 135.
[289] J. Skrentny, *The Ironies of Affirmative Action*, *op. cit.,* p. 232.
[290] J. Solomos, 'The Politics of Anti-Discrimination Legislation; Planned Social Reform or Symbolic Politic', p. 30, in R. Jenkins and J. Solomos (eds.), *Racism and Equal Opportunity Policies in the 1980s,* (Cambridge University Press, Cambridge, 1987).

discrimination law.[291] Indeed, the direct political and executive interaction between the US and UK regarding race relations law meant that US law had an important influence on the 1976 Race Relations Act.[292] Some cross-referencing between the US and European sources is also evident including, for example, in Advocate General Tesuaro's opinion in *Kalanke,* in which he mentioned a number of US cases.[293] Despite this the legal development of positive action has taken a different course in each country.

The original basis for the development of affirmative action within Europe was the notion of equal treatment for men and women and in line with this the Treaty of Rome provided that both genders should enjoy equal pay for work of equal value.[294] Europe's early commitment to equal wages did not, however, stem from a 'lofty desire' to promote gender equality.[295] Instead, the Treaty provision reflected the more practical fear that cheap, mobile, female labour in some countries would undercut the price of goods in other nations.[296] On the UK's accession to the European Union in 1973 it amended existing legislation to fulfil the Treaty's goals,[297] although even before this the UK had similarly espoused the benefit of opening up access to the labour market to all individuals, particularly women.[298] In addition, the UK legal development of positive action had already moved on from wholly economic motivations to more social considerations,[299] which were later enshrined in the SDA and RRA and now the Equality Act 2010.[300] This is a course of development which Europe has subsequently followed, and arguably

[291] See, for example, H. Street, G. Howe and G. Bindman, *Street Report on Anti-Discrimination Legislation*, (PEP, London, 1967) which recommended basing the UK's anti-discrimination system on US experiences.
[292] C. McCrudden, 'Racial Discrimination' in C. McCrudden and G. Chambers (eds.), *Individual Rights and the Law in Britain*, (Clarendon Press, Oxford, 1994), p. 427.
[293] Opinion of Advocate General Giuseppe Tesauro, Case C-450/93, 1995 ECR I-3051, [1996] 1 C.M.L.R. 175 (1995) at 183.
[294] Treaty of Rome 1957, art. 141 (previously art. 119).
[295] R.B. Ginsberg, 'The Benjamin N. Cardozo Lecture: Affirmative Action an International Human Rights Dialogue', *The Record* (May/ June 1999), vol 54, No. 3, pp. 275 – 309, p. 305.
[296] *ibid*. See also A. Heritier, *Policy-Making and Diversity in Europe. Escape from Deadlock*, (Cambridge University Press, Cambridge, 1999), p. 70.
[297] The requirements of article 141 EC Treaty and Directive 76/207 were incorporated into UK law through amendment to the Equal Pay Act 1970 (c. 41).
[298] Mr Boyd-Carpenter, Official Report Hansard HC 13 March 1952 Vol 497 ccl 1786 – 1794, 1791.
[299] This was clear through the passage of the Race Relations Act 1968 (c. 71), which extended the provisions of the Race Relations Act 1965 (c. 73) and made employment-based discrimination unlawful, even before the UK joined Europe.
[300] SDA, ss. 37 and 38, RRA, ss. 47 and 48 and Equality Act 2010, ss. 149, 158 and 159.

overtaken the UK in pursuing, most recently through the European Charter of Fundamental Rights.[301]

From the foundation of positive action in Europe, in terms of equal pay, however, its legal development has been marked by a cycle of implementation of outline provisions, judicial consideration, and subsequent enactment of further legal clarification of the judicial decisions.[302] This pattern is evident in the replacement of article 2(4) of the Equal Treatment Directive[303] with article 2(8) of the Equal Treatment (Amendment) Directive after a number of ECJ judgments which clarified the parameters of acceptable positive action.[304] The measures referred to under article 2(8) are interpreted in conjunction with article 141(4) which was inserted into the EC Treaty by the Treaty of Amsterdam and which was the first primary European legislation to refer to positive action.[305] Article 141(4) upholds the permissibility of positive action countenancing that 'with a view to ensuring full equality in practice between men and women in working life the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers'.[306] The importance of the Treaty of Amsterdam in advancing positive action is underlined by article 13 which enabled the Council to 'take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, age disability and sexual orientation'.[307] On the basis of this article the Council has subsequently adopted a range of directives, including the Racial Equality Directive,[308] the Framework Equality Directive,[309] the Gender Equal Treatment Directive[310] and the

[301] See C. O'Cinneide, *op. cit*., p. 57. See also C. McGlynn, 'Families and the European Charter of Fundamental Rights: Progressive Change or Entrenching the Status Quo?', *European Law Review* 26(6), (2001), pp. 582 – 598.
[302] The impact of this pattern of development on the UK is important because of the role of European positive action parameters in setting the parameters for permissible action that may be incorporated into UK legislation.
[303] Equal Treatment Directive, art 2(4).
[304] Equal Treatment (Amendment) Directive 2002/73/EC OJ L268/15.
[305] EC Treaty, art. 141(4).
[306] *ibid.*
[307] *ibid*, art. 13.
[308] Council Directive 2000/43/EC, art. 5, requiring the equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L180/22, incorporated into UK law by the Race Relations Act 1976 (Amendment) Regulations 2003.
[309] Council Directive 2000/78/EC, art. 3, establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16, incorporated into UK law by the Employment Equality (Sexual Orientation) Regulations 2003.

Equal Treatment Directive,[311] which contain positive action provisions. To bring the cycle of EU/UK positive action development round again the most recent legal developments are incorporated into UK legislation through the Equality Act 2010.[312] The Equality Act is designed to streamline existing equality law and 'replace th[e] thicket of legislation with a single Act, which will form the basis of straightforward practical guidance for employers, service providers and public bodies'.[313] This pattern of legal development demonstrates how, with the EC Treaty in the background, legal measures have gradually increased the coverage of UK positive action, and as a result of the Equality Act 2010 UK law will include the full range of positive action measures permitted by the Treaty, once the Act is fully in force.

In contrast to the UK development of positive action law the US legal foundations for anti-discrimination law, and consequently for affirmative action, are enshrined in the decree that 'all men are created equal'[314] and as such are guaranteed the equal protection of the law.[315] From this basis of formal equality the move towards legalised affirmative action has always sat uncomfortably between the legislative documents and the demands of the related popular social movement and throughout its development the US has struggled to apply constitutional documents drafted for one purpose to achieve another resulting in a 'constitutional analysis [that] is not based on reason, logic, facts or even history'.[316] US affirmative action therefore embodies a conflict between the aspirational notion of equality and the reality of its development which has led to an apparent mismatch between the Constitution and the various Executive Orders requiring differential treatment between people on the basis of their membership of a protected group. Aside from Executive Orders the specific legal basis for affirmative action is vague and this has afforded an important role in determining the shape of the legal development of affirmative action to the courts. In this way the courts have had an

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[310] Council Directive 2004/113/EC, art. 6, requiring equal treatment between men and women in the access to and supply of goods and services, [2004] OJ L373/37, incorporated into UK law by the Sex Discrimination (Amendment of Legislation) Regulations 2008.
[311] Equal Treatment Directive 2006/54/EC, art. 2(8) incorporated into UK law by the Employment Equality (Sex Discrimination) Regulations 2005.
[312] Equality Act 2010, ss. 148 and 158 – 159.
[313] Government Equalities Office, *A Fairer Future. The Equality Bill and Other Action to Make Equality a Reality*, (April 2009), p. 7. See also: Government Equalities Office, *Equality Bill: Making it Work. Policy Proposals for Specific Duties. A Consultation*, (June 2009), p. 4.
[314] Declaration of Independence written by Thomas Jefferson in 1776.
[315] U.S. Constitution, Amendment 14 (1). See also Civil Right Act 1866.
[316] S. Reinhardt, 'Remarks at UCLA Law School Forum on Affirmative Action: Where have you gone, Jackie Robinson?', 43 *UCLA Law Review*, (1995 – 6), p. 1731.

important role in setting and interpreting the limits of affirmative action each time a particular policy is subjected to judicial review. This has allowed it, at various times to fashion affirmative action to fit strictly determined, even predominantly majority-benefitting parameters,[317] as well as rare instances of enlightened creativity in developing the scope of permissible action.[318]

A further influence on the legal development of affirmative and positive action is the divergent constitutional traditions within each country.[319] Unlike the US the UK is unhindered by the need to reconcile contemporary legal developments with a static constitutional document written for very different purposes to those of affirmative action legislators. The potential for a written constitution to influence the evolution of a legal system is illustrated by US claims and counter-claims regarding constitutional interpretations which have pervaded much of the modern discourse concerning affirmative action.[320] In contrast the UK's lack of a written constitution and system of conventions means that the law can be adapted to fit in with parliamentary preferences and priorities.[321] One of the risks inherent in reliance on an unwritten constitution is that the flexibility of Parliamentary conventions makes them susceptible to the changing agendas of successive governments. Consequently 'any new House of Commons can despotically and finally resolve a policy matter,' including that of positive action.[322] However, the absence of either the political or popular will for such decisive action, together with the influence of European legislative development, has prevented this from becoming the fate of UK positive action. To the extent that UK positive action law is governed by written constitutional documents, through the applicability of European legislation and directives, these ordinances constitute less of a barrier to the progress of positive action than the US Constitution because they have been informed by the more

[317] See, for example, the cases of *Missouri v Jenkins* 115 S. Ct. 2038 (1995), *Board of Education of Oklahoma v Dowell et al.* 498 US 237 (1991), *Milliken v Bradely* 418 US 717 (1974), *Knight v Nassau County Civil Services Commission* 454 US 818 (1981) and *Wittmer v Peters* 515 US 1111 (1997).
[318] See, for example, the cases of *Grutter v Bollinger, op. cit*., *Fullilove v Klutznik* 448 US 448 (1980) and *Metro Broadcasting v Federal Communications Commission, op. cit*.
[319] Christopher McCrudden suggests that the UK and US exemplify the two main approaches which dominate constitution building, with Britain utilizing the pragmatic empiricist approach, whilst the US follows a constitutional idealist approach. See C. McCrudden, 'Northern Ireland and the British Constitution' in J. Jowell and D. Oliver, *The Changing Constitution, op. cit.,* pp. 323 – 375.
[320] See A. Kelly, 'The School Desegregation Case', in J. Garraty (ed), *Quarrels that have Shaped the Constitution*, (Harper and Row, New York, 1987), pp. 307 – 334.
[321] There is significant discourse which argues that the UK is moving towards a written constitution, though this debate is outside the scope of this thesis. For further consideration see, for example, V. Bogdanor, *The New British Constitution*, (Hart Publishing, London, 2009).
[322] W. Bagehot, *The English Constitution,* (1st edn. 1873), (rev. edn. Cosimo Books, New York, 2007), pp. 130 – 175.

enlightened modern-day views on the achievement and meaning of equality. In addition, the widespread understanding and approval of the positive action requirements of the European Treaty has removed significant scope for arguments, of the type that clutter the US affirmative action debate, concerning its legality and which solidify the different impact of each country's legislative framework on the development of affirmative action.

## 4.2 The Development of Affirmative Action as a Political Tool

As well as the differing impact of US and UK legal structures on the development of positive action it has also been affected by political forces in each country. Indeed, positive action has at times more easily fitted within matters of politics than within the set of fundamental human rights.[323] Affirmative action has been used as a political tool in two key ways: firstly as a campaigning tool, by which affirmative action policies are promoted as a means of attracting voters; and secondly as a policy tool, by which the electorate's choice of candidate or voting district is changed to fulfil positive action aspirations. For example, the US has explicitly used affirmative action to amend voting districts and as a means of rallying popular political support so that while '[i]n the mid-1950s overt racial discrimination was widespread and often unapologetic by the mid-1970s anyone who would not publicly condemn racial discrimination was outside the boundary of acceptable political debate'.[324] In the UK, the use of positive action as a policy tool has predominantly been limited to the selection of candidates for parliamentary positions,[325] whilst the 'scant support' traditionally afforded to positive action has limited its significance as a campaigning tool.[326] Therefore, both countries have used positive action as a political tool, but there have been significant differences in the nature and outcome of these uses, which will be explored in below.

### 4.2.1 The Role of Political Personnel

Part of the overarching influence of politics on the development of affirmative action, both in the US and UK, has been through the role of the changing characters and priorities of individual political protagonists, which have served to differentiate affirmative action

[323] S. Fredman, *Human Rights Transformed*, *op. cit.,* p. 66.
[324] D. Strauss, 'The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards', *Georgetown Law Journal*, Vol. 79 (1991) pp. 1619 – 1657, p. 1619.
[325] For example through legislation intended to achieve more gender-representative electoral shortlists, Sex Discrimination (Election Candidates) Act 2002 (c. 2).
[326] A. McColgan, *Discrimination Law: Text, Cases, Law*, (2nd ed. Hart Publishing, Oxford, 2005), p. 131.

in the two countries. US politicians have gained political capital from variously defending and rejecting affirmative action and this use of affirmative action as an overtly political tool has meant that it has been promoted when the political consensus supports this but sidelined, and even actively criticised, when popular sentiment changes.[327] The approach of UK politicians has been more muted so that positive action has largely remained at the margins of British political thinking, although this has changed where economic developments have converged with the demands of equality campaigners.[328] These differences will be explored further in the following paragraphs.

#### 4.2.1.1 Political Personalities within US Affirmative Action

It is arguably one of the greatest ironies within US affirmative action that it owes much of its liberal and explicitly race-based character to a Republican President who otherwise focused his political campaigning on appealing to the socially conservative South.[329] Although it was not anticipated that Richard Nixon's election would mark any substantive development of affirmative action he helped to popularise affirmative action and also defended it in Congress. In addition, through Executive Order 11478, Nixon created the mechanisms that enabled its widespread implementation and enforcement, including the establishment of the Equal Opportunities Commission.[330] Nixon's actions bolstered the efforts of the Department of Labor to address workplace underrepresentation of minority workers,[331] following the publication of statistical evidence showing the extent of such under-representation in six key trades.[332] It is easy to argue that Nixon's efforts failed to make significant inroads into the white hegemony within the skilled construction trades but his actions gave affirmative action a heightened sense of direction and political prioritisation as well as making strategic political sense in light of threatened racial violence and Nixon's own narrow presidential victories.[333] Kevin Yuill has similarly argued that Nixon used affirmative action to attract the support of minorities hoping to

[327] N. MacLean, *Freedom is Not Enough*, *op. cit.*, pp. 300 – 332.
[328] C. McCrudden, *Racial Discrimination*, *op. cit.,* p. 439.
[329] J. Skrentny, *The Ironies of Affirmative Action, op. cit.*, p. 177.
[330] Executive Order 11478, s. 4, as amended in 1987 by the Executive Order 12106, in 1998 by Executive Order 13087, and in 2000 by Executive Order 13152.
[331] Through the implementation of the Philadelphia Plan.
[332] The trades surveyed were: ironworkers, pipe fitters, steam fitters, sheet-metal workers and electrical workers. Code of Federal Regulations, Title 41, chapters 1–100, 'Public Contracts and Property Management.' July 1, 2000. Chapter 60, Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor. (U.S. Government Printing Office, Washington D.C., 2000).
[333] J. Skrentny, *The Ironies of Affirmative Action, op. cit.*, pp. 175 – 182.

benefit from the preferences before utilising it to divide black communities and capitalise upon the feeling of injustice amongst poor white voters once the effects of the economic downturn began to be felt.[334] By appealing to "you, the great silent majority of my fellow Americans" Nixon explicitly sought renewed support from non-protesting white Americans.[335] These calculated actions echoed President Roosevelt's earlier use of affirmative action, for example through Executive Order 8802, to quell public unrest including a threatened march on Washington, during the Second World War.[336]

Political use of affirmative action has been repeated by a succession of US presidents and politicians, Republican and Democrat alike.[337] It is therefore clear that the development of US affirmative action has been influenced by the political need to gain support from minorities and other marginalised social groups whilst ensuring that this is not at the expense of majority commitment. Consequently, majority economic interests and concerns have consistently usurped those of minorities.[338] For example, although Bill Clinton openly supported affirmative action principles and measures, stating that '[t]he purpose of affirmative action is to give our nation a way to finally address the systematic exclusion of individuals of talent on the basis of their gender or race from opportunities to develop, perform, achieve, and contribute',[339] he decreased active promotion of minority interests during the economic downturn of the early 1990s.[340] The ease with which affirmative action is demoted in the political agenda illustrates the extent to which within ordinary politics it has been normalised as a subject of constant presence but of varying importance, which might derive from either support for, or criticism of, affirmative action policies, within the US.[341]

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[334] K. Yuill, *Richard Nixon and the Rise of Affirmative Action. The Pursuit of Racial Equality in an Era of Limits***,** (Rowman and Littlefield, Maryland, 2007), pp. 224 – 229.
[335] Richard Nixon, 'Address to the Nation on the War in Vietnam, 3rd November 1969', (Public Papers of the Presidents of the United States: Richard Nixon, 1969), pp. 901 – 909.
[336] See Executive Order 8802 and N. Glazer, *Affirmative Discrimination. Ethnic Inequality and Public Policy*, (Basic Books, Inc., New York, 1975), p. 169.
[337] For example see the description of Ronald Regan's use of affirmative action as a political tool in B.K. Landsberg, *Enforcing Civil Rights. Race Discrimination and the Department of Justice,* (University Press of Kansas, Kansas, 1997), p. 147.
[338] See J.E. Podair, *The Strike that Changed New York*, (Yale University Press, New Haven and London, 2002), p. 193 and more generally see pp. 192 – 200 and pp. 206 – 214.
[339] Bill Clinton, Remarks by the President on Affirmative Action, (Office of the Press Secretary, The White House, The Rotunda National Archives, 19th July 1995).
[340] See W.L. Taylor, and S.M. Liss, 'Affirmative Action in the 1990s: Staying the Course', *The Annals of the American Academy of Political and Social Science*, (1992), 523, pp. 30 – 37.
[341] However, the election of President Obama has been cited as an event that could lead to progress in the attainment of racial equality, although it being too early to draw such a concrete conclusion. See. A.M.

4.2.1.2 Political Personalities within UK Positive Action

The fundamental difference in the role of US and UK political personalities in shaping affirmative action is the extent and nature of their involvement, as opposed to the simple fact of their involvement, with much more explicit political wrangling over affirmative action in the US than in the UK. In support of this analysis it has been suggested that the UK political interest in fostering a 'general rights consciousness' has long been limited,[342] and that matters concerning positive action and non-discrimination have consistently been of a low political priority. However, although the long-term explicit party-political use of affirmative action is not so evident in the UK as in the US the pattern of its use does show variation between different governments, while overall its prominence has been increasing with the importance of equality and positive action measures being given a more visible role within government policy and rhetoric.

The question of measures to achieve racial equality emerged during a period of political consensus concerning anti-discrimination law, from 1965 until the mid-1970s, and was adopted as a policy of all the main political parties.[343] However, between 1979 and 1997 the Conservative government was openly hostile to a number of positive action-type policies, in particular the use of contract compliance policies under which government contractors were required to institute fair wages and promote freedom of association as a condition of their contracts. In 1983, for example, the Conservative government repealed the Fair Wages Resolutions and incorporated provisions into the Local Government Act 1988 to 'prevent abuse of the contractual process'.[344] The political disinclination to use positive action in connection with government contracts was continued by the Labour government through the requirement that employment practices of potential contractors could only to be taken into account in awarding contracts if their actions directly related to the provision of the relevant services and if they could form part of the 'best value'

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Kupenda, 'The Obama Election and a Blacker America: Lawfully Creating Tension for Change' 1 Faulkner Law Review 187 (2009-10).

[342] C. McCrudden and G. Chambers (eds.), *Individual Rights and the Law in Britain*, *op. cit.,* p. 8.

[343] I. Katznelson, *Black Men, White Cities: Race, Politics and Migration in the United States, 1900 – 1930 and Britain, 1948 - 68*, (Oxford University Press for the Institute of Race Relations, London, 1973), pp. 125 – 126.

[344] Nicholas Ridley, Secretary of State for the Environment, Official Report Hansard HC Debs, vol 119, col 86 (6 July 1987).

drive.[345] These developments reveal that whilst positive action has been subject to varying prioritisation by different political parties it has been subject and subordinate to the consistent prioritisation of economic concerns, which have trumped aspirations relating to social justice. Arguing along these lines Joni Lovenduski has suggested that the succession of 'Conservative governments…succeeded in replacing a political discourse which could accommodate social justice with one which emphasized market forces and therefore could not'.[346] Bringing this argument up to date Colm O'Cinneide has concluded more generally that 'successive governments have…set their face against the use of preferential treatment'.[347] The lack of governmental interest in positive action is also suggested by the fact that the major legislative provisions have remained in place since the 1970s and remained largely unchanged, until the changes instigated by the Equality Acts of 2006 and 2010.

The relative lack of political interest in UK positive action, as compared to the significant political mileage that has been gained out of US affirmative action both by its critics and supporters, has however been slowly changing as a result of development of the increased 'mainstreaming'[348] of equality issues and rights-based legislative developments such as the Human Rights Act 1998.[349] Mainstreaming, in relation to gender-based policies, has been defined as 'the systematic integration of the respective priorities and needs of women and men in all policies … with a view to promoting equality between women and men and mobilising all general policies and measures specifically for the purpose of achieving equality by actively and openly taking into account, at the planning stage, their effects on the respective situation of women and men in implementation, monitoring and evaluation'[350] and has emerged in response to political demands for more measures to achieve substantive equality from across Europe.[351] In particular mainstreaming has been associated with the relative openness of the EU equality regime to the involvement of

[345] Local Government Best Value (Exclusion of Non-Commercial Considerations) Order 2001 SI 2001/99.
[346] J. Lovenduski, 'Implementing Equal Opportunities in the 1980s: An Overview', *Public Administration* 1, (1989), 67.
[347] C. O'Cinneide, 'Fumbling towards Coherence', *op. cit.*, p. 98.
[348] The principle of gender mainstreaming was launched at the UN Conference on women in Beijing in 1995and was adopted as part of the UK's gender policy in 1998. See Cabinet Office, *Policy Appraisal for Equal Treatment Guidelines,* (1998).
[349] See J. Shaw, *Mainstreaming Equality in European Union Law and Policymaking,* (European Network Against Racism, Brussels, 2004).
[350] Communication from the Commission, *Incorporating Equal Opportunities for Women and Men into all Community Policies and Activities*, COM(96)67, p. 2
[351] See M.A. Pollack and E. Hafner-Burton, 'Mainstreaming Gender in the European Union', 7 *Journal of European Public Policy* (2000) 432.

campaigners and non-governmental organisations, both from the UK and elsewhere within Europe.[352] In the UK the New Labour Government made a number of policy initiatives mainstreaming equality,[353] and thereby raised it up the political agenda.[354] In particular, in Northern Ireland the political search for an end to dispute between Catholics and Protestants has been attributed with centralizing the importance of equality and human rights.[355] Even amid these developments, however, the nature of the political response to positive action in the UK is in stark contrast to the emotive and oscillating attitude of US political forces to affirmative action. The UK's political commitment to positive action has also been brought into renewed question by the possibility that following the formation of a Liberal Democrat/ Conservative coalition government some of the provisions of the Equality Act 2010 will be 'watered down' to the extent that they are rendered 'toothless'.[356] The different use of affirmative action by political personalities in the US and UK therefore largely remains.

### 4.2.2 The Role of Affirmative Action in the Development of Political Structures

In both the US and the UK the elimination of racial and gender barriers to voting and voter registration has allowed minorities and women to achieve *de jure* political equality. Despite this, both groups have continued to be numerically underrepresented in national and local legislative bodies[357] and both the US and the UK have looked to affirmative action to provide a way to remedy this situation. However, as will be shown below, the two countries' use of affirmative action to reform political structures differ with the US concentrating on altering voting districts in pursuance of its affirmative action goals and the UK using gender-based electoral short-lists.

#### 4.2.2.1 The Role of Affirmative Action in the Development of US Political Structures

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[352] See C. Hoskyns, *Integrating Gender; Women, Law and Politics in the EU,* (Verso, London, 1996).
[353] See J. Squires and M. Wickham-Jones, 'New Labour, Gender Mainstreaming and the Women and Equality Unit', *British Journal of Politics and International Relations,* Vol 6 (2004), pp. 81 – 98 who considered the work of the Women and Equality Unit as having exemplified New Labour's approach to gender mainstreaming.
[354] E. Breitenbach et al (eds.), *The Changing Politics of Gender Equality in Britain* (Palgrave, Basingstoke, 2002).
[355] C. McCrudden, 'Mainstreaming Equality in the Governance of Northern Ireland' 22 *Fordham International Law Journal* 1696 (1998 – 9), p. 1698.
[356] A. Hill, 'Equality Law Rendered "toothless" by Coalition Review', *The Guardian*, 30 September 2010, http://www.guardian.co.uk/society/2010/sep/30/equality-law-gender-pay-gap. Accessed 30.09.10.
[357] See appendix 1 and appendix 5.

In the US the implementation of structural changes to the voting system has been promoted as 'the most precisely tailored and least drastic means of implementing the political inclusion principle'.[358] In addition the historic impact of discrimination on electoral districts has meant that these can perpetuate continuing *de facto* discrimination, the presence of which may be suggested by the continuing underrepresentation of women and minorities in both Congress and the House of Representatives.[359] Despite this use of affirmative action to create fair representation by engineering voting districts US courts have delivered inconsistent judicial conclusions regarding its legality and these have prevented significant development of affirmative action in this area.[360] In the case of *Shaw v Reno*, for example, the Court found that the creation of a majority-black congressional district was 'bizarre' and 'unexplainable on grounds other than race'.[361] The Court consequently held that this was unlawful stating also that the practice of district manipulation bore an 'uncomfortable resemblance to political apartheid' irrespective of its positive aims.[362] This case supported an earlier court decision which held that the Constitution 'does not entail the right to have a Negro candidate elected', even though the existing electoral scheme meant that despite one third of the population being African American they were consistently represented by an all-white commission and white mayor.[363] The judgments in *Shaw* and *Bolden* do not, however, reveal the full judicial picture of the US' use of affirmative action to promote minority political representation because the courts have not uniformly disapproved of the revision of voter districts to increase minority representation. However, even amid judicial approval of schemes, they have been subject to stringent conditions.

The case of *Thornburg v Gingles* is an example of how judicial support for affirmative action has in reality not allowed the use of such measures, because the court has imposed restrictive conditions on the permissibility of affirmative action to alter political structure.[364] In this case, African American voters successfully challenged one single-member district and six multi-member districts claiming that they violated the Voting

[358] 'Note on Affirmative Action and Electoral Reform', Vol. 90 *Yale Law Journal* 1811 (1980 – 1981), pp. 1811 – 1812.
[359] See appendix 5, tables 3 and 4.
[360] See R. Sander, 'Reconsidering Shaw: The Miranda of Race-Conscious Districting', *The Yale Law Journal* (2000), 109.3, pp. 1603 – 1637.
[361] *Shaw v Reno* 113 S Ct. 2816, 2833 (1993) at 2825.
[362] *ibid* at 2827.
[363] *City of Mobile v Bolden* 446 US 55 (1980) at 65.
[364] *Thornburg v Gingles* 478 US 30 (1986).

Rights Act by effectively impairing their ability to elect candidates of their choice.[365] However, in the judgment Justice Brennan articulated three demanding preconditions for establishing a minority vote dilution claim, that: the minority group needs to be sufficiently large and geographically compact to constitute a majority in a single member district; the minority group must politically cohesive; and whites must vote as a bloc often enough that the minority's candidate usually loses.[366] While the answer to these questions inevitably varies according to the particular context, like all judicial decisions, they represent a high level to fulfil, and have increased the level of 'racial reification and rigidity' within district restructuring cases.[367] Such cases have discouraged minorities from challenging apparently unfair practices, for fear that even if the court accepts that affirmative action could in theory be applied to remedy the situation, the circumstances allowing for its operation would be so unattainable that the judgment would be deleterious for future affirmative action use.[368]

#### 4.2.2.2 The Use of Positive Action in the Development of UK Political Structures

In contrast to the US' use of affirmative action to alter electoral areas the UK has used positive action to restrict voters' choice of candidates through the use of all-women electoral shortlists,[369] a development which marked the recognition amongst many feminist groups that institutional representation was important in securing equality.[370] The UK has adopted this form of action relatively recently, compared to other European countries, with the Labour party first using all-women shortlists in 1993.[371] However, despite an unprecedented number of female Members of Parliament having been returned after the 1997 election this form of action was challenged and declared to be unlawful discrimination, contrary to the SDA.[372] This judgment is interesting because the court

[365] *ibid*, at 34 citing the Voting Rights Act 1965, s. 2.
[366] *ibid*, at 49 – 51.
[367] R.F. Moran, 'Rethinking Race, Equality and Liberty: The Unfulfilled Promise of *Parents Involved'* 69 *Ohio State L.J*. 1321 (2008), p. 1477. Most recently the court has only upheld unlawful redistricting claims in relation to intentional minority-vote dilution, as opposed to supporting redistricting for affirmative action purposes. See *League of Latin American Citizens v Perry* 548 US 399 (2006).
[368] Even where minorities have challenged discriminatory practices the risk of an unfavorable judgment, even if supportive of affirmative action, has been attributed to the likelihood of claims settling out of court. See for example *Taxman v. Piscataway Township Bd. of Educ.*, 91 F.3d 1547 (3d. Cir. 1996).
[369] See SDA, s. 49(1), as superseded by Equality Act 2010, ss. 104 – 106.
[370] J. Lovenduski, *Feminizing Politics*, (Polity Press, Cambridge, 2005).
[371] M. Russell and C. O'Cinneide, 'Positive Action to Promote Women in politics: Some European Comparisons'*, The International and Comparative Law Quarterly*, Vol. 52, No. 3 (July 2003), pp. 587 – 614, p. 590.
[372] *Jepson and Dyas-Elliot v The Labour Party* [1996] IRLR 116 ET.

failed to consider any significant arguments concerning the legitimacy or importance of positive action and simply applied the test for direct discrimination, which was, unsurprisingly, found.[373] The controversy surrounding this form of positive action has continued to fuel political opposition to its use amidst arguments of tokenism and unlawful quotas. For example, the former Conservative Member of Parliament Anne Widdicombe stated whilst in office that the suffragettes themselves 'would have thrown themselves under the King's horse to protest against positive discrimination and all-women shortlists'.[374] Despite the controversial nature of all-women shortlists within the UK the European Commission has itself adopted a Council recommendation which aims to promote a more balanced participation of women in decision-making bodies of all kinds, demonstrating the perceived importance of this form of positive action within the Community.[375] Such measures may have been a factor in all-women shortlists being reinstated as lawful positive action, and under the Equality Act 2010 being made permissible until 2030.[376]

Regardless of this reversal in attitude, however, the underrepresentation of women and ethnic minorities in politics is a persistent trend within the UK.[377] Examples of this underrepresentation include that following the 2010 election the number of women in the Commons increased to the record level of 143, but despite this improvement women only make-up 22 per cent of the House.[378] According to the 2001 census figures women make up 51.3 per cent of the UK population[379] meaning that a representative number of female MPs would have been 338, a number more than double that of the present female contingent. A similar pattern of underrepresentation of ethnic minorities amongst UK MPs is also clear. Even after the most recent elections only 27 non-white politicians were returned, representing 4.2 per cent of House of Commons members,[380] whilst a representative figure would have required 52 non-white members.[381]

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[373] *ibid,* at 117.
[374] Anne Widdicombe, House of Commons Debate, 7 May 2008, para 895, http://www.publications.parliament.uk. Accessed 14.07.08.
[375] Council Recommendation 694/96 EC on the balanced participation of women and men in the decision-making process (OJ L319, 10 December 1996, P. 0011-0015).
[376] Equality Act 2010 ss. 104(1), 104(2) and 105(2).
[377] See appendix 5, table 1.
[378] *ibid.*
[379] See appendix 1, table 1.
[380] See appendix 5, table 2.
[381] B. Smith, *Ethnic Minorities in Politics, Government and Public Life*, (House of Commons Library, November 2008).

Both the US and UK have used politically-based affirmative action to tackle the under representation of women and minorities in politics but have done so in different ways. This reemphasises once again that there are both similarities and differences between US and UK affirmative action law. It is interesting to consider, however, why the use of positive action to manipulate political structures has met with political opposition in both countries, and maybe hints at the existence of a similar conservatism marking US and UK political use of affirmative action. However, the impact of this similar reluctance to support the political use of affirmative action has differed in each country because of other distinguishing factors in the use and nature of positive action measures, including the differing level to which the judiciary has influenced positive action development, as will be considered below.

### 4.3 The Impact of the Judiciary on the Development of Affirmative Action

The role of the judiciary in the development of affirmative action in the US and UK has served to compound the differences between this area of law in the two countries. The extremely emotive and socially important nature of the subject in the US has afforded the courts a key formative role in the development of the law. This role has been mainly characterised by US judicial reluctance to rule on issues surrounding positive duties resulting from a sense of a lack of judicial legitimacy for making such rulings[382] and judicial hostility where such issues do come before the courts because the 'judges, who are mostly white, reflect many of the attitudes of other whites' including a cynicism towards colour-conscious laws.[383] In the UK, by contrast, positive action has attracted relatively little domestic judicial consideration because of the extremely limited parameters for positive action within UK law. Therefore, the judicial influence on UK positive action has been predominantly that of the ECJ which has interpreted the European parameters of positive action within which UK action exists. The nature of each country's judicial influence, together with their changing personnel and political biases, has also differentiated the development of affirmative action in the US and UK. These differences and their impact on affirmative action will be considered below.

[382] *San Antonio Independent School District v Rodriguez* 411 US 959, 93 S Ct 1302.
[383] K. Holt and B.W.H. George (eds), *Race, Culture, Psychology and Law*, (Sage Publications, Inc, London, 2005), p. 82.

### 4.3.1 The Role of the Judiciary in US Affirmative Action

Whilst the US courts have fleetingly styled themselves as a protective force for affirmative action, nurturing and promoting it in its more liberal deliberations,[384] such examples are most notable as exceptions to the general trend of judicial opinion which has increasingly insisted that affirmative action must find social and political acceptance without its paternalism.[385] The judicial inclination towards conservatism has consequently contributed to the erratic manner in which US affirmative action has developed with liberal progress frequently followed by a rapid retreat amid a conservative backlash. The impact of the judiciary on the development of US affirmative action and its attempts to reconcile its conservative nature with its early protectionist instinct is exemplified by three Supreme Court rulings between 1978 and 1980: *Regents of the University of California v Bakke*, *United Steelworkers of America v Weber* and *Fullilove v Klutznik*.[386] These cases enabled the court to uphold affirmative action plans in a number of different contexts and to explore the question of whether the Equal Protection Clause of the 14th Amendment could be used to advance the welfare of one class of individuals for compelling social reasons, even when that advancement may infringe the life or liberty of another.[387] However, the cases attracted significant popular criticism, particularly from some members of the white majority who claimed that the 'reverse discrimination' under consideration was directly contradictory to the 14th Amendment right that 'no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the US; nor deny any person within its jurisdiction the equal protection of law'.[388] The opposition shows that even rare instances of judicial liberalism have been impeded by popular hostility towards positive measures. The judicial hesitancy in supporting affirmative action that has been a feature of such policies

[384] For example in *Brown v Board of Education* 347 US 483 (1954).
[385] See J.H. Wilkinson III, *From Brown to Bakke: The Supreme Court and School Integration 1954 – 1978*, (Oxford University Press, Oxford, 1979). See also G. Spann, 'Pure Politics' 88 *Michigan Law Review* 1971 (1990).
[386] *Bakke, op. cit., United Steelworkers of America v Weber, op. cit.,* and *Fullilove v Klutznik, op. cit.*
[387] *Bakke op. cit.*, at 307 – 316. See also D. Bishop, 'The Affirmative Action Cases: Bakke, Weber and Fullilove', *The Journal of Negro History*, vol 67, no 3, (Autumn 1982), pp. 229 – 244 for early consideration of the implications of these decisions on affirmative action.
[388] U.S. Constitution, Fourteenth Amendment, *op.cit*, s. 1.

since their inception also reflects the competing personalities making up the bench and their willingness to acquiesce to personal and popular conservatism.

By the 1990s the personnel of the Supreme Court demonstrated the increasingly polarised popular views towards affirmative action, as the liberal bloc, composed of Justices Blackmun, Brennan and Thurgood Marshall, gave way to a more unanimously conservative outlook within the Court. This neo-conservatism was most singularly personified by Justice Antonin Scalia whose appointment in 1985 signalled the start of the move away from the 'liberal Constitutional interpretation of the 'Warren era' to a stricter concern with the letter of the law'.[389] Such was the staunch nature of this judicial conservatism that Justice Blackmun, in a dissenting judgment, opined that '[o]ne wonders whether the majority still believes that race discrimination, more accurately, race discrimination against non-whites is a problem in our society, or even remembers that it ever was'.[390] The importance of the views of individual members of the judiciary is most clearly shown in the adjoining cases of *Gratz* and *Grutter.*[391] In these cases the court's wavering decision swung on the opinion of a single judge – Justice O'Connor – who supported the affirmative action policy in *Grutter* but ruled that the policy in *Gratz* was unlawful.[392] It can therefore be seen that the nature of the US judiciary has had an enduring role in controlling the development of affirmative action and its tendency towards conservatism has been a consistent and increasing presence. Consequently, 'to ask them [the judiciary] to produce significant social reform is to forget their history and ignore their constraints'.[393]

### 4.3.2 The Role of the Judiciary in UK Positive Action

In contrast to the position in the US the UK judiciary has remained relatively uninvolved in the development of positive action because it has been confined to such a limited scope

[389] P.I. Weizer, *The Opinions of Justice Antonin Scalia: The Caustic Conservative,* Teaching Texts in Law and Politics, Vol 13, (Peter Lang Publishing, New York, 2004).
[390] *Ward's Cove Packing v Antonio* 490 U.S. 642 (1989) at 662, Blackmun dissenting.
[391] *Gratz v Bollinger, op. cit* and *Grutter v Bollinger, op. cit.*
[392] For further consideration of O'Connor's rationale behind the two judgments see C. Estland, 'Putting Grutter to Work: Diversity', 26 *Berkeley, U.J. Employment and Labor Law*, 3, (2005), p.18.
[393] G.N. Rosenburg, 'African American Rights after Brown'*, Journal of Supreme Court History*, 24, pp. 201 – 225, (1999), p. 221. See also G.N. Rosenburg, *The Hollow Hope: Can Court Bring About Social Change?*, (University of Chicago Press, Chicago, 1991) and for comment which reaches the converse conclusion see E. Chemerinsky, 'Can Courts Make a Difference?' in N. Devin and D.M. Douglas, *Redefining Equality*, (Oxford University Press, Oxford, 1998), pp. 191 – 204.

of operation,[394] and in particular has not operated in relation to recruitment or promotion decisions.[395] Instead, its involvement in positive action law has been secondary to that of the ECJ.[396] The ECJ's case law concerning positive action has, however, been the subject of a significant amount of criticism as a result of its cautious approach to allowing positive action programmes and failure to explicitly set out the parameters of permissible action,[397] coupled with its insistence in ruling on questions deemed to be highly context-dependent. The case of *Griesmar v Ministere de l'Economie, des finances et de l'Industrie*, for example, demonstrates the ECJ's inability, or unwillingness, to assess Member State rationales behind positive action measures.[398] In the case, as well as simply applying a straightforward, formal understanding of equality, the Court refused to approve Member State discretion in framing policies to fulfil social policy aims,[399] according to which female civil servants were awarded special pensions credit to compensate for time they may have taken off to care for children.[400] The case of *Abrahamsson* also demonstrates the tension between ECJ and Member State views as to the parameters of positive action because, while the Swedish authorities considered the use of gender as a tie-break criteria inadequate to address female underrepresentation, and consequently used it as a 'value adding' factor in a person's qualifications, the ECJ rejected this reasoning.[401]

Criticisms of the role of the ECJ in positive action have concluded that its judgments should be restricted to the protection of minorities from negative discrimination.[402] Daniela Caruso, for example, has argued that in assessing the permissibility of positive action national courts are far better equipped than the ECJ particularly in terms of balancing equal rights with redistributive policies, as they are able to take into account local context, culture and national welfare policies.[403] Caruso goes on to argue that 'the

[394] SDA, ss. 47 and 48 and RRA, ss. 37 and 38.
[395] Although this will change following the commencement of Equality Act 2010, s. 159, in April 2011.
[396] The role of the ECJ in the development of UK positive action has been in establishing the parameters within which UK law may operate. However, its role is now even more important because the Equality Act 2010 incorporates positive action to the full extent permitted by the ECJ, and so gives the ECJ's decisions a role in shaping UK positive action.
[397] As was considered at sections 3.1.2 and 3.2.2 of this thesis.
[398] *Griesmar v Ministere de l'Economie des Finances et de l'Industrie*, Case C-366/99 [2001] ECR I-9383.
[399] *ibid,* paras 39 – 46.
[400] *ibid*, paras 51 – 56.
[401] *Abrahamsson, op. cit*, para 56.
[402] S. Pager, 'Strictness and Subsidiarity: An Institutional Perspective on Affirmative action at the European Court of Justice', 26 *BC Int'l 7 Comp L. Rev*. 35 (2003).
[403] D. Caruso, 'The Limits of the Classic Method: Positive Action in the European Union after the New Equality Directives', 44 *Harvard Int'l Law Journal* 331 (2003), p. 343 – 4.

variables at stake in local positive action schemes are too complex and too far-reaching, to fit comfortably within the scope of the ECJ's jurisprudence'.[404] Such arguments conclude that whilst the ECJ may be well-placed to assess the proportionality of some national measures affecting, for example, free movement of goods, its competence to assess the proportionality of social policy measures, and in particular positive action, is more questionable.[405] Limiting the ECJ's role in developing the parameters of positive action, and assessing individual schemes, would allow for greater State autonomy in the formulation of positive action schemes which would then be assessed by national courts, able to closely assess individual needs in light of the background context experienced within the Member State.

One cause for possible optimism concerning the ECJ's impact on the development of positive action is that much of its case law has been based on its interpretation of the Equal Treatment Directive.[406] Now that this has been replaced the ECJ may consider that there is a broader scope of admissibility for positive action measures and consequently for Member State autonomy in defining positive action schemes.[407] However, this will not occur if the ECJ continues to monopolise authority to rule on positive action, despite it being intrinsically linked to the domestic situation within Member States. The ECJ's approach contrasts with that of the ECtHR which has stated that the role of the ECHR in protecting human rights is subordinate to the role of the national legal system,[408] and that because Member States are better placed than the international judge to balance individual rights and state interests the Court will operate a limited review of the balance struck.[409]

Affirmative action in both the US and UK has, therefore, been significantly influenced by its judicial treatment, and in each case the judiciary's role has been seen to limit the parameters of positive action. However, the reasons behind this similar influence are different. In the US the reactionary stance of the courts towards affirmative action seems to be a result of the conservative inclinations of the judiciary and their willingness to

[404] *ibid,* pp. 336 – 7.
[405] G. De Burca, 'The Principle of Proportionality and its application in EC Law', 13 *Y.B. Eur. L.* 111 - 2 (1993).
[406] Equal Treatment Directive, art. 2(4).
[407] Equal Treatment (Amendment) Directive, art. 2(8).
[408] *Handyside v UK*, A24 para 48 (1976).
[409] See D.J. Harris, M. O'Boyle, and C. Warbrick, *Law of the European Convention of Human Rights*, (Butterworths, London, 1995), at 12 – 15.

respond to popular opposition to minority-benefiting policies. By contrast the UK courts have had an extremely limited role in forming UK positive action. At the same time the ECJ's limiting influence on positive action is arguably attributable to the Court adjudicating on matters outside its main area of competence and knowledge and rigid adherence to its own limiting precedents. A further difference between the two countries lies in their present ability to move towards a more favourable treatment of positive action because while the US continues to oscillate between progressive and regressive decisions, and has consequently failed to make any steady progress in mainstreaming affirmative action, the ECJ may be more able to accommodate a wider range of positive action programmes, as a result of its gradually broadening understanding of equality which has now been incorporated into UK law.[410]

## 4.4 The Role of Society in the Development of Affirmative Action

In both the US and UK the development of affirmative action policies has been heavily affected by the shifting political power of different social groups and the changing historical concepts of minorities.[411] Consequently in each country there is a clear interaction between affirmative action and social change, with the particular impact that social developments have on each country's equal opportunities programmes reflecting the different minority interest groups lobbying government whose support is considered to be sufficiently politically important to merit action. In the US, for example, calls for new forms of affirmative action have been increasingly raised by the growing Hispanic community on the grounds of social prejudice suffered due to the prevalence of 'a defective culture of broken families, lack of motivation, welfare abuse, and criminal subcultures'.[412] Conversely, other minority groups have claimed that affirmative action measures which include Hispanics are 'an historical accident for which there is no possible justification' because this group has not faced the historical discrimination experienced by African Americans.[413] Similarly, the UK has sought to promote the interests of newly-protected social groups. Whilst the growing prominence of new social

[410] As discussed previously at section 3.2.2 of this thesis.
[411] A.K. Appiah, 'Race, Culture, Identity: Misunderstood Connections', in A.K. Appiah and A. Guttman (eds.), *Color Conscious: the Political Morality of Race*, (Princeton University Press, Princeton, 1996).
[412] F.L. Pincus, *Reverse Discrimination. Dismantling the Myth*, (Lynne Rienner Publishers, London, 2003), p. 83 and p. 141. See also appendices 3 and 4 which illustrate the poor relative academic and occupational attainment of the US Hispanic population compared to the general population.
[413] L.H. Fuchs, 'What Do Immigrants Deserve?' *Washington Post*, (29th Jan 1995).

groups through positive action is similarly evident in both the US and the UK the resultant impact on the development of affirmative action is different and affected by the distinct social backgrounds in each country, as will be shown in the following paragraphs.

### 4.4.1 The Social Influences on the Development of US Affirmative Action

US society and race-relations are intrinsically linked, so much so that increasingly race and racism are characterised as social constructs.[414] The result of this is that social history has been a potent influence on the development of anti-discrimination law and in particular the development of affirmative action, which is inextricably linked with slavery and the Civil Rights Movement. Slavery has been influential both in creating a society that is highly stratified along racial lines and in the societal attitudes that grew out of the slave trade and the wealth it generated.[415] These two factors have meant that long after slavery was made illegal society's vested interest, as represented by that of the white majority, has been in retaining the social structure through which it had economically, socially and politically flourished. Consequently the US is still dealing with 'the problem of the color-line'.[416]

Against the unique and pervasive background of slavery and racial segregation the importance of US society in the development of affirmative action may be characterised as consisting of two key periods of formative influence: the first beginning around 1972, and centring on the controversy surrounding gender and racial preferences that arose out of the deployment of affirmative action in employment, government contracting and education; and the second beginning in the 1990s and continuing to grow until the Supreme Court's decisions in the summer of 2003.[417] The first period of direct interaction between equal opportunities, including affirmative action, laws and society witnessed the development of a powerful social movement fuelled by legislation and case law which acknowledged the need for 'conscious efforts … to balance any conscious or

[414] Although consideration of this is outside the remit of this thesis see, for example, R. Delgado and Stefancic, J., *Critical Race Theory: The Cutting Edge,* (2nd ed. Temple University Press, Philadelphia, 2001).
[415] As illustrated by the development and continued relevance of the 'New Negro', A. Locke (ed.), *The New Negro: An Interpretation* (1925) (rev. edn. Atheneum, New York, 1992).
[416] W.E.B. Du Bois (auth), N. Huggins (ed.), *The Souls of Black Folk: Essays and Sketches*, (Library of America Publishers, New York, 1986), p. 425.
[417] See, T. Anderson, *The Pursuit of Fairness: A History of Affirmative Action*, (Oxford University Press, Oxford, 2004), esp chs 4 and 5.

unconscious prejudice on the part of employers'.[418] This period of the Civil Rights Movement and the events such as the Vietnam War inspired minorities to argue collectively for increased equality and opportunity under the 14th Amendment, in particular by seeking equal access to education and employment.[419] The success of the popular movement in developing affirmative action in the US was, however, limited by its need for widespread social support. The impasse caused by the polarity of US societal views towards affirmative action is illustrated by the opposition to social change from people who felt 'strongly that they are being asked to bear the burden for old wrongs in which they have played no part at all; and in that they see rank injustice'.[420] The impact of the diverging nature of popular opinion on the development of affirmative action is exemplified by the split in attitudes during this period towards the policy of 'busing'.

From the late 1960s busing was a widely-used response to the right of the Department of Justice to withhold funding from school districts maintaining segregation,[421] and was used to overcome school segregation caused by residential patterns which allowed a neighbourhood schooling policy to transform one type of discrimination into another.[422] Critics of busing argued that it contravened both the rights sought by the anti-slavery movements and those enshrined in the US Constitution[423] and that instead of ensuring the rapid desegregation of schools it simply encouraged a rapid 'white flight' from public to private schools.[424] Conversely, supporters of busing advocated it as a means of avoiding the negative racial stereotypes perpetuated by segregated schools[425] and assuring all

[418] J.A. Baer, *Women in US Law: The Struggle toward Equality from the New Deal to the Present* (2nd ed. Holmes and Meier, New York, 1996), p. 101.
[419] See, for example, S. Curry, *Silver Rights,* (Algonquin Books of Chapel Hill, North Carolina, 1995), which recounts the attempts of black parents to place their children in white schools in Mississippi.
[420] A. Williams, 'Color-Coded Scholarships', *Washington Times*, 25th May 1995, at A27. In this article Williams equates minority-only scholarships to 'reverse Jim Crow laws'. See also D. D'Souza, *Illiberal Education: The Politics of Race and Sex on Campus*, (MacMillan Inc, New York, 1999), pp. 27 – 28 who attributes white opposition to affirmative action to the extent that the white majority felt 'victimised by the machinations of social planners'.
[421] Civil Rights Act 1964, *op. cit.,* title IV.
[422] D.J. Armor, *Forced Justice, School Desegregation and the Law*, (Oxford University Press, Oxford, 1995), pp.117 – 153.
[423] N. Glazer, *Affirmative Discrimination: Ethnic Inequality and Public Policy*, (Basic Books, Inc., New York, 1975), p. 119.
[424] J. Coleman, S. Kelly and J. Moore, *Trends in School Segregation 1968 – 1973*, (The Urban Institute Press, Washington, D.C., 1975). 'White flight' refers to the practice of white students withdrawing from public schools following the implementation of a policy of busing and moving to private sector education.
[425] Kimberlé Crenshaw, for example, has considered the existence of polarized images of black and white individual that perpetuate negative stereotypes regarding racial minorities in which they are viewed as lazy, unintelligent, immoral and criminal whilst their white counterparts are seen as industrious, intelligent, moral and law-abiding. K. Crenshaw, 'Race, Reform and Retrenchment: Transformation and Legitimization in Antidiscrimination Law' 101 *Harvard Law Review* 1331 (1988).

children the benefits inherent in mixed educational environments.[426] The court's early support of busing is illustrated by the cases of *Thompson v School Board of Newport News* in which it upheld a busing policy which required a travelling time of between forty minutes and one hour each way[427] and in *Northcross v Board of Education of Memphis City Schools* in which the Supreme Court approved a plan for the transportation of 14,000 children every day.[428] The impact of busing on the racial composition of desegregated schools has been explored by Welch and Light who drew mixed conclusions as to the benefits of such policies but found overwhelming evidence of white flight.[429] The conflicting views towards busing typify the divergent societal attitudes to, and influences on, affirmative action that have resulted in many discontinuities in its development within the US.[430] The schism between the beneficiaries and 'victims' of affirmative action has for some people re-emphasized the dangers inherent in differential treatment which have been so apparent in the country's history, and has consequently split old societal alliances.[431] Supporters of affirmative action dismiss these arguments as protectionism of the status quo which, by virtue of past injustices, enables white males to enjoy a privileged social pre-eminence routinely unavailable to minorities and women.

The second period of heightened social influence on affirmative action was dominated by arguments concerning the use of race in higher education and the extent to which preferences should be the exclusive preserve of African American students. Stephen Thernstron, for example, has pointed out that whilst African American and Latino enrolment at Boalt Hall dropped considerably in 1997 for a full view of the growth of equal opportunities for minorities this should be seen in the context of a marked increase in Asian American enrolment.[432] Consequently the nature of the US debate has in part become more closely aligned with the UK, which espouses equal action for all protected groups, but US legal measures fail to reflect this. Therefore, fundamental differences

[426] See for example K.B. Clark, 'The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement', presented to the court in Brown, reprinted *Minnesota Law Review* 37 (1953) 427. The stated benefits included improved self-esteem, academic achievement and long-term educational, occupational and psychological outcomes, as well as improving race relations.
[427] *Thompson v School Board of City of Newport News* 498 F. 2d 195 (1974).
[428] *Northcross v Board of Education of Memphis City Schools* 412 US 427 (1973).
[429] F. Welch and A. Light, *New Evidence on School Desegregation*, (USCCR, Clearinghouse Publications 92, Washington D.C, 1987). The survey covered 125 school districts with enrolments of over 15,000 students and a racial composition of 10 – 15% African American students.
[430] This split in attitudes, however, is almost entirely consistent across race divisions. See, for example, C. Rossell, 'Black and White Attitudes on School Desegregation Issues' in N. Devins and D.M. Douglas, *Equality, op. cit.*, pp. 120 – 138.
[431] P. Green, *The Pursuit of Inequality*, (Martin Robertson, Oxford, 1981), p. 166.
[432] S. Thernstron, 'Farewell to Preferences?', *The Public Interest*, (Winter 1998), p. 42.

continue to exist between the two countries because the US is unable to escape the historical baggage surrounding slavery and systemic discrimination of black Americans and its impact on affirmative action developments.

A further illustration of the predominantly hostile popular views of US society towards affirmative action is the passage of referenda requiring that affirmative action policies are abandoned. The passage of California's Proposition 209,[433] for example, shows that there are significant sections of the US population which are not just apathetic to affirmative action but are actively opposed to such preferences, often as a result of prejudice based on inaccurate, but widely propounded, stereotypes of minorities.[434] Even where individuals are not opposed to affirmative action on directly prejudicial grounds the white majority seeks to protect its position within society, both at individual and group level, and in so doing creates social, political, economic and legal barriers to the advancement of positive action.[435] Against this background the perceived detrimental impact of affirmative action on the white public is both a result of the white resistance to the promotion of equal rights and factors in its continuation.[436]

### 4.4.2 The Social Influence on the Development of UK Positive Action

The social influences shaping the initial development of positive action in the UK can be characterised as progressing along two separate lines, one in relation to racially targeted positive action and one relating to gender-focused measures. However, one important characteristic of the social influence on UK positive action is the disparity of emphasis between race and gender-based measures, which in part reflects the uneven nature of EU action.[437] In relation to race-based measures, whilst the UK has had an involvement in the slave trade it would be erroneous to see any degree of historical continuity between

[433] Proposition 209, *op. cit*., sought the prohibition of racial preferences in public employment, public contracting and in admissions to public education. It also banned gender preferences, and so may be seen as more symptomatic of opposition to preferences per se than continuing racial discrimination, although it still illustrates the unwillingness of the white, male hegemony to alter the status quo.
[434] L.M. Baynes, 'Paradoxes of Racial Stereotypes, Diversity and Past Discrimination in Establishing Affirmative Action in FCC Broadcasting Licensing', 52 *Administrative Law Review* 979, (2000), p. 985. Baynes argues that the disproportionate increase in news coverage of homicides either extends the prevailing stereotype to those viewers who are unaware of it, or reinforces the stereotype to those viewers who already hold it.
[435] For an example of white protectionist view in academic discourse surrounding affirmative action see B.R. Gross, *Discrimination in Reverse. Is Turnabout Fair Play?*, (New York University Press, New York, 1978).
[436] L.A. Graglia, *Disaster by Decree. The Supreme Court decisions on Race and the Schools*, (Cornell University Press, London, 1976), pp. 277 – 278.
[437] C. Hoskyns, *Integrating Gender, op. cit*, p. 181.

legalized slavery in the country and the contemporary development of positive action. Instead, racial diversity within the UK is largely a post Second World War development.[438] This disjunction has contributed to existence of 'the profoundly different contexts of racial disadvantage in the two continents'.[439] In the UK the initial motivation for race-based anti-discrimination legislation was as a response to immigration so that legislation limiting the right to enter the UK was enacted firstly alongside legislation prohibiting discrimination against minorities,[440] and then legislation which contained the UK's first positive action provisions.[441] At a similar time the growth of social interest in equality directly influenced the executive's use of positive action and the British government's use of public contracting to counter race-based discrimination.[442] In contrast to the specific motivations for race-based action gender-based positive action was a legislative achievement of the convergence of popular calls for greater gender equality with European concern about the impact of cheap female labour.[443] Consequently, the first wave of social debate surrounding the progression from anti-discrimination to gender-based positive action in the UK followed its entry into Europe and implementation of Europe's largely economically motivated requirements for equal treatment of both genders.[444]

The second resurgence of the positive action debate in the UK began in the late 1990s and marked the culmination of 'a cultural shift which has taken decades to begin to take hold'.[445] This more recent surge of interest in equality and positive action links anti-discrimination law, human rights and social policy goals which target a wide range of underrepresented groups, and is exemplified by the scope of the Human Rights Act 1998 which incorporates the provisions of the ECHR into UK domestic law.[446] Such developments illustrate the increased importance being placed on social inclusion, in addition to the need to remedy particular types of inequality, arising from particular

[438] C. McCrudden, 'Racial Discrimination' in C. McCrudden and G. Chambers (eds.), *Individual Rights and the Law in Britain, op. cit.*, p. 410.
[439] B. Hepple, 'The European Legacy of Brown v Board of Education', 2006 *U. Ill. Rev*. 605, p. 620.
[440] See Race Relations Act 1965, *op. cit*. and Race Relations Act 1968, *op. cit.*
[441] RRA, ss. 37 and 38.
[442] B. Hepple, *Race, Jobs and the Law in Britain*, (2nd ed. Penguin Books, London, 1970), p. 276. See also section 4.5 below.
[443] See C. Hoskyns, *Integrating Gender, op. cit,* ch. 2.
[444] EC Treaty, art 141 (previously art. 119).
[445] F. Klug, *Value for a Godless Age. The Story of the United Kingdom's New Bill of Rights,* (Penguin Books, London, 2000), p. 48.
[446] One of the implications of this is that domestic legislation is interpreted as far as possible as compatible with the ECHR, which means that the Convention requirement of non-discrimination is centralised within all domestic legislation. See ECHR, art. 14 and Human Rights Act 1998 (c. 42), s. 3 and sch. 1, art. 14.

instances of past discrimination.[447] This trend can be seen in the development policy, interest groups and activists seeking to promote equality and diversity by advocating the benefits of 'community cohesion' and 'strength in diversity'.[448] Whilst these initiatives did not constitute legally enforceable duties they did seek to create a supportive social context which, in turn, helped to create the political good-will upon which the success of positive action and other equality-based policies depends.[449]

Although the social influence on UK positive action arguably demonstrates a greater acceptance of the social utility of *de facto* equality than is present in the US some of the wider societal responses to developments in positive action hint at some similarities in the context between the US and UK. Katherine Cox, for example, cites newspaper headlines following the handing down of the *Marschall* decision by the ECJ as revealing a social context receptive of criticism of positive action as an unfair and negative development.[450] Cox argues that headlines such as 'Court allows Jobs for the Girls'[451] and 'Court Strikes Blow for Career Women'[452] demonstrate the readiness with which relative successes for positive action progress are decried as representing a negative development. The problem of an unsupportive social context to the development of positive action is also recognised by the UK government in their decision to use the label 'positive action' instead of 'affirmative action' because of the hostility these measures had aroused in the US.[453] The desire to avoid such a response seems to confirm the potential impact of an unsupportive social context on the development of affirmative action, and also explains why the UK has sought to avoid the divisive measures which have provoked the hostile context within which US affirmative action exists.

Where the UK has used more severe forms of positive action, such as in Northern Ireland and in tackling institutional racism, it has sought to maintain the largely supportive social context by initially targeting such measures at circumstances demonstrating a particular and significant need. The positive action used to tackle racism within the UK police

[447] See H. Collins, 'Discrimination, Equality and Social Inclusion' 66(1) *MLR* (2003), pp. 16 – 43.
[448] See, for example, the diversity-focused aims of publications such as Home Office, 'Improving Opportunity, Strengthening Society', (2005) and Home Office, 'Strength in Diversity' (2004).
[449] G. Mills, 'Combating Institutional Racism in the Public Sector' 31 *ILJ* (2002), pp. 96 – 8.
[450] K. Cox, 'Positive Action in the European Union: From Kalanke to Marschall', *op. cit.*
[451] Financial Times (25 November 1997), quoted in *ibid.*
[452] Independent (12 November 1997), quoted in *ibid.*
[453] As stated at section 2.1 of this thesis.

force, for example, was a direct response to the findings of the MacPherson Report.[454] The finding of institutional racism was used to implement a stronger positive race equality duty on public authorities under the Race Relations (Amendment) Act 2000.[455] This duty was later expanded to gender under the Equality Act 2006[456] and demonstrates how the UK has used specific instances of particular public support for positive action as a basis from which to expand the remit of legislative provision. Similarly, whilst the UK has used the situation in Northern Ireland as the context for enacting its most sweeping positive action provisions, it has subsequently extended these to the Welsh Assembly, albeit without the same systematic process for target setting and monitoring, along with more limited enforcement.[457] Consequently, the UK's use of less intrusive forms of positive action, except where there is a particular acknowledged need, has encouraged a more supportive social setting than has existed in the US. In addition, the absence of a painful and recent history of invidious racial discrimination and the need for compensatory discrimination to remedy this reinforces the differing nature of social influences on the development of US and UK affirmative action and their role in maintaining the distinctions between the two sets of legal measures.[458]

### 4.5 The Development of Executive-Based Affirmative Action

Differences between the development of US and UK positive active are also present in the development of the executive's use of these policies. Here, the US has adopted an uncharacteristically hard core position regarding this form of action, requiring mandatory action to be taken by all public authorities and some private companies involved in government contracting.[459] By contrast, the UK has primarily taken a less severe approach by encouraging voluntary action within public authorities and withholding contracts from person engaging in discrimination in employment.[460] Along the same lines as this analysis Christopher McCrudden has identified two models of procurement

[454] Home Office, 'Report of the MacPherson Inquiry', Cm 4262 (24th February 1999).
[455] Race Relations (Amendment) Act 2000, s. 2.
[456] Equality Act 2006, s. 84. Once commenced, in April 2011, this duty will be contained in Equality Act 2010, s. 149.
[457] P. Chaney, *A Report Commissioned by the Equality and Human Rights Commission Equal Opportunities and Human Rights: The First Decade of Devolution in Wales*, (April 2009). The same accusation is made of the expansion of the measures to the Welsh and Greater London Assemblies, in C. O'Cinneide, 'Fumbling towards Coherence', *op. cit.*, p. 90, fn. 163.
[458] See E. Phillips, 'A Comparative Study of Compensatory Discrimination - Cautionary Tales for the United Kingdom' in B. Hepple and E.M. Szyszcak (eds), *Discrimination: The Limits of Law*, *op. cit.*
[459] Executive Order 11246, of 24th September 1965 (30 Fed. Reg. 12319) reprinted in 42 USC 2000e (1982).
[460] A. Lester and G. Bindman, *Race and Law*, (Longman, London, 1972), p. 207.

regulation used in affirmative action, namely the market access model and the efficient procurement model.[461] McCrudden observes that the US has primarily used the market access model whilst Europe has prioritised the alternative model and the respective adoption of each model has had important consequential effects on the operation of this area of affirmative action in each country.[462] This section will consider how these models have characterised the evolution of executive-based affirmative action in the US and UK and driven one tranche of the country-specific manifestations of the law.

### 4.5.1 US Development of Executive-Based Affirmative Action

The convergence, during the Second World War, of the social aspiration of ending employment-based discrimination with the economic imperative of achieving this aim prompted the executive's use of government contracting as a key forum for affirmative action.[463] Consequently, through executive action, as exemplified by Executive Orders 8802 and 9326, non-discrimination became a mainstream policy and greater social reality.[464] Even after the Second World War the approach of the Roosevelt government to contracting was maintained by successive Presidents and the existence of permanent committees, with broad legislative powers, continued to follow Roosevelt's model of the Fair Employment Practices Committees.[465] The executive's role in promoting non-discrimination and latterly positive action efforts to increase minority representation in government contracting can therefore be seen as an important developmental building-block within US affirmative action. Executive-based action is also unique among US affirmative action measures because it represents a means of implementing non-discrimination requirements without the need for statutory authority. It was, for example, the affirmative action requirement within President Johnson's Executive Order 11246 that took it beyond the remit of Title VII.[466] Consequently, a key rationale for the development of affirmative action within the executive has been to enable political forces

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[461] C. McCrudden, *Buying Social Justice, op. cit.*, p. 301.
[462] *ibid*, see generally chs 6 – 8.
[463] See M.E. Reed, *Seedtime for the Modern Civil Rights Movement: the President's Committee on Fair Employment Practice, 1941 – 1946*, (Louisiana State University, Louisiana, 1991).
[464] Executive Order 8802 (1941) prohibited discrimination in the employment of workers in the defense industries or government because of race, creed, colour, or national origin. Executive Order No. 9346 (1943) increased the budget of the Committee to half a million dollars and replaced its part-time staff with full-time employees.
[465] By 1965 at least 20 large cities had adopted Fair Employment Practices Committees ordinances. See J.P. Witherspoon, *Administrative Implementation of Civil Rights*, (University of Texas Press, Texas, 1968).
[466] 30 Fed Reg 12319 (24th September 1965).

to fulfil economic and social priorities without legislative approval, thereby circumventing the influence of judicial conservatism and uncertain constitutional provisions. US executive-based affirmative action is highly intertwined with the influence of political priorities in driving the development of affirmative action and so this section has been kept intentionally short so as not to unnecessarily restate the influences already cited concerning the importance of politically inspired affirmative action programmes. Nevertheless it is important to appreciate that executive-based action has been a consistently important formative basis for the development of US affirmative action.

### 4.5.2 UK Development of Executive-Based Positive Action

The executive's use of positive action in the UK can be directly linked to the popular demands for equal opportunities in late 1960s Britain and the demographic changes resulting from post-colonial immigration.[467] This use was supported by influential reports such as the Street Report which recommended that a non-discrimination clause should be included in all government contracts.[468] The hesitant legislative attempts to enact this requirement,[469] and its outright rejection in relation to gender,[470] illustrate that the UK executive's use of contract compliance to implement meaningful positive action provisions has remained limited, weakly enforced and of only peripheral significance.[471] The key exception to this is the role of the executive in promoting and implementing affirmative action in Northern Ireland and in recent developments in UK positive action.

The executive's use of positive action within Northern Ireland has yielded significant results in increasing religious diversity within the employment context.[472] The Fair Employment Act 1989, for example, imposed executive-based positive duties on employers to take measures to achieve fair and representative economic participation of Roman Catholic and Protestant employees so that 'anything lawfully done in pursuance

[467] See B. Hepple, *Race, Jobs and the Law in Britain*, (2nd ed., Penguin Books, London, 1970), p. 276.
[468] H Street et al, *Street Report on Anti-Discrimination Legislation*, (Political and Economic Planning, London, 1967), paras 192 – 194.
[469] Official Report, Hansard HC Vol 788, 22nd October 1969, cols. 296 – 297.
[470] Official Report, Hansard HC Vol. 893, 18th June 1975, cols. 1478 – 1482.
[471] C. McCrudden, *Buying Social Justice*, *op. cit.,* pp. 301 – 360.
[472] R. Cormack, and R. Osborne, 'Disadvantage and Discrimination in Northern Ireland', in R.J. Cormack and R.S. Osborne (eds.), *Discrimination and Public Policy in Northern Ireland*, (Clarendon Press, Oxford, 1991).

of affirmative action' was within anti-discrimination law.[473] To ensure the implementation of these legislative requirements the Equality Commission was permitted to make recommendations of affirmative action measures and impose sanctions on employers who failed to fulfil their positive duty obligations[474] as well as prohibiting executive public authorities from entering into contracts with employers who did not comply with the positive action provisions.[475] Christopher McCrudden, Robert Ford and Anthony Heath have explored the link between the development of positive action within the executive and the religio-political composition of the employers' workforces.[476] Their analysis found that firms reaching agreements with the Commission as to the implementation of positive action programmes demonstrated significant evidence of improvement in the proportion of minority workers and that the positive action requirements were likely to have been integral to the processes driving change in the Northern Ireland labour market in the 1990s.[477] Having established positive action as an acceptable and accepted means of executive action within Northern Ireland the UK government has recently sought to broaden its use.

The use of positive action by the UK executive may be set to expand as a result of the provisions of the Equality Act 2010 which builds on the public positive action duty in the Equality Act 2006.[478] Uncommenced sections of the 2010 Act permit the implementation of duties on public authorities in relation to their public procurement functions.[479] Although there is as yet no current experience of the potential scope of these provisions, the fact that the government retained the use of executive-led positive action in the Act, despite some on-going opposition to these proposals,[480] suggests its desire to increase the use of measures in this area.[481] Such a development could, in turn lead to a greater

[473] FETO, art 5(3).
[474] *ibid*, arts 62 – 66.
[475] *ibid*, art 64.
[476] C. McCrudden, R. Ford and A. Heath, **'**Legal Regulation of Affirmative Action in Northern Ireland: An Empirical Assessment', *Oxford Journal of Legal Studies* (2004) 24(3), pp. 363 – 415.
[477] The findings, however, were caveated by the need for further evidence regarding non-monitored firms, *ibid*, p.414.
[478] Equality Act 2006, s. 84.
[479] Equality Act 2010, ss. 153 – 4, and s. 155(3).
[480] For example from David Frost, the Director General of the British Chamber of Commerce and Petra Wilton, of the Chartered Management Institute, see R. Prince, 'Positive Action for Recruitment to be Enshrined in Law', *The Telegraph*, 3rd December 2008 http://www.telegraph.co.uk/news/newstopics/politics/labour/3546305/Positive-action-for-job-recruitment-to-be-enshrined-in-law.html. Accessed 23.10.09.
[481] However, some warnings have been stated that such duties may simply be used as a 'technocratic tool in policymaking' to retain the discriminatory status quo. See, C. O'Cinneide, 'Fumbling towards Coherence', *op. cit.*, p. 92.

alignment between US and UK policies in this area. Despite this potential for greater coordination fundamental differences between each country's provisions are likely to remain because of the different contexts and legal frameworks within which the measures are enacted.

The developmental influences on positive action in the UK and on affirmative action in the US have been broad-ranging, and have varied according to legal, political, economic and societal context. The specific nature of the background influences in each country has, therefore, led to fundamentally different forms of positive action law developing, despite them showing superficial similarities. The different developmental factors in each country have also had an impact upon the uses to which affirmative action has been put, as will be explored in the next chapter.

## 5. The Different Uses of Affirmative Action in the US and UK

This chapter will consider the different uses of positive action and explore how these relate to the legal systems and societies out of which they have developed and to the principles upon which they are based. The uses of positive action will be considered in conjunction with the various models for action present in the two countries including: the relative use of voluntary and mandatory action, exclusionary and opportunity-creating measures, and the use of explicitly numerically-focused positive action. These different uses of positive action extend to the permissibility of policies that seek numerical outcomes, as well as to the different use of affirmative action either as a means of determining a tie-break situation between two equally qualified candidates or as a value-adding factor for minority applicants, as will be shown in this chapter. This chapter will, however, begin by exploring the different degrees to which affirmative action has been used to encourage and train underrepresented individuals as compared to actions to the exclusion of non-minority and male individuals, for example through recruitment and promotion.

### 5.1 Exclusionary Uses of Affirmative and Positive Action

The remedial principle behind affirmative action has been important within both the US and UK, whether it has been in the context of remedying particular instances of discriminatory treatment or overturning general societal prejudice. Despite this similarity country-specific differences mark the uses of affirmative action to compensate victims of discrimination as well as the relative ease with which such programmes have been implemented and upheld in each country. One key difference in the compensatory use of positive action is the extent to which each country has adopted affirmative action methods that result in the exclusion of non-benefited individuals. US affirmative action has included measures which exclude non-minority males, although the impact of this burden on affected individuals has meant that these forms of affirmative action have been controversial and thus confined to a narrow field of use.[482] By contrast, exclusionary forms of action have been generally avoided by UK legislation in favour of efforts

[482] For example *EEOC v US Tel & Tel Co*. 556 F. 2d 167 (3rd Cir.) 1977 and *United Steelworkers of America v Weber*, *op. cit.*

intended to increase opportunities for previously excluded groups of society, for example, by offering training and using minority-targeted advertising, without directly favouring minorities over majority individuals, but this approach may be changing. These different uses of exclusionary affirmative action will be considered below.

### 5.1.1 US Use of Exclusionary Affirmative Action

Alongside narrow operational justifications for affirmative action in the form of 'bona fide occupational qualification[s]',[483] which are only applicable to essential gender-based preferences[484] where no less-restrictive or reasonable alternative is available,[485] US use of exclusionary affirmative action can be identified in the Supreme Court's judgment in *United Steelworkers v Weber.*[486] *Weber* transformed the Civil Rights Act from 'what was publicly heralded as a statute that prohibits the use of sexual or racial categories into one that mandates the use of racial and sexual quotas in hiring, firing and promotion decisions'[487] and consequently secured the role of exclusionary affirmative action in US case law. Alongside *Weber* there has been some further judicial support for exclusionary affirmative action, for example from Justice Powell, who has argued that such measures place only a small burden on the excluded groups and that 'their [the excluded group's] burden is not so great that the set aside must be disapproved'.[488] However, the US Court has not consistently supported the use of exclusionary action, particularly when the burden placed on the excluded group relates to employment-based recruitment or dismissal.[489] In such circumstances exclusionary programmes have been accused of effectively 'impos[ing] the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives'.[490] In assessing the US use of exclusionary affirmative action it is immediately clear that such programmes have only been promoted in judicially tailored circumstances designed to prevent ongoing and

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[483] Title VII of the Civil Rights Act 1964, codified as Subchapter of Chapter 21 of 42 USC ss 2000e.
[484] *Dothard v Rawlinson* 433 US 321 (1977) 97 S.Ct. 2720.
[485] *Automobile Workers v Johnson Controls Inc*. 499 US 187 (1991) 111 S.Ct. 1196.
[486] *United Steelworkers v Weber*, *op. cit.*
[487] D.F.B. Tucker, *The Rehnquist Court and Civil Rights*, (Dartmouth Publishing Company Limited, Aldershot, 1995), pp. 191 – 2.
[488] *Fullilove v Klutznik op. cit.* at 514 – 5.
[489] USCCR, 'Affirmative Action in the 1980s: Dismantling the Process of Discrimination', (Clearing House Publication 70, Nov 1980) declared that balancing 'the national interest in eliminating discrimination against minorities and women and the interests of individual white men is especially difficult when employers lay off worker', p. 36.
[490] *Wygant v Jackson Board of Education op. cit.*, at 283.

future discrimination.[491] Through its decisions the US courts have reflected the perceived need to balance the national interest in eliminating discrimination against minorities and women with the interests of non-minority individuals[492] thereby upholding the notion that affirmative action programmes are 'extrinsically morally wrong if their social costs are large, relative to the costs of eliminating or frustrating' the discriminatory treatment.[493] This schism in judicial approach shows how US use of affirmative action is affected by conflicting priorities and principles which may be contrasted to the UK's cautious approach to positive action that has enjoyed more consistent judicial and societal approval.

A further characteristic of the US' use of exclusionary affirmative action is that where such decisions are unavoidable, for example in the case of economically required redundancies, affirmative measures have been more readily deployed to protect minorities who would otherwise disproportionately suffer.[494] Thus through its use of exclusionary affirmative action the US Court has again expressly balanced the need to 'break down old patterns of … segregation and hierarchy'[495] whilst ensuring that the positive action does not 'unnecessarily trammel the interests' of non-benefited workers in avoidable circumstances.[496] Despite the controversy around exclusionary affirmative action the support shown by the court also illustrates instances of severely punishing past discrimination through the awarding of exclusionary remedies in favour of persons who are not themselves identifiable victims of discrimination.[497] On such occasions the Supreme Court has ruled that 'a sharing of the burden of the past discrimination is presumptively necessary'[498] and that the apparent expectations of 'arguably innocent' white male employees cannot act as a barrier to measures eliminating the present effects of past discrimination.[499]

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[491] For a list of Circuit Court decisions embracing this theory, see R.K. Fullinwider, 'Achieving Equal Opportunity', pp. 106 – 108 in R.K. Fullinwider and L. Mills (eds.), *The Moral Foundations of Civil Rights*, (Rowman and Littlefield, Totowa, 1986), pp. 99 – 114.
[492] *Wygant v Jackson Board of Education, op. cit.*, at 292.
[493] L. Alexander, 'What makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes and Proxies', *University of Pennsylvania Law Rev*, Vol 141: 149 (1992), p.219.
[494] See *Tangren v Wackenhut Services, Inc*. 480 F. Supp 539 (D. Nev), (aff'd No. 79 – 3796) (9th Cir. Oct. 5, 1981) which approved the manipulation of redundancy procedures to protect minority workers.
[495] *United Steelworkers v Weber op. cit,* at 208, quoted in *Johnson v Transport Agency, op. cit.*, at 628.
[496] *ibid* at 208.
[497] For example the case of *EEOC v US Tel. & Tel. Co*. *op. cit.*
[498] *Franks v Bowman Transportation Co. Inc*. *op. cit.* at 777.
[499] *ibid* at 774.

Whilst some judicial support has been shown for unavoidable exclusionary policies the US court has been generally more willing to uphold non-exclusionary programmes and remedies. For example, the court has sought to circumvent the displacement of majority males by awarding remedial action which provides financial compensation for the victims of discrimination, without displacing the present majority incumbent.[500] The use of such 'front pay' remedies has been a means of 'shifting to the employer the burden of the past discrimination' as opposed to it being wholly borne by employees.[501] An additional difficulty encountered in the US' use of exclusionary positive action arises where standards that impartially measure skills disqualify more minorities and women than white men.[502] The pervasive and cumulative effects of discriminatory processes, for example, frequently mean that few minorities and women possess the experience, skills or aspirations that certain positions demand.[503] US arguments surrounding exclusionary affirmative action have also been influenced by the fact that such policies are necessarily both under-inclusive and over-inclusive and employers are consequently 'trapped between the competing hazards of liability to minorities if affirmative action is not taken to remedy discrimination and liability to non-minorities' if it is, together with the sense of injustice of the rejected white applicants.[504] The controversial nature of exclusionary affirmative action has been described by the Courts as 'precisely the sort of government action that pits the races against one another, exacerbates racial tension, and provoke[s] resentment among those who believe that they have been wronged by the government's use of race'.[505] Such views have encouraged the use of non-exclusionary affirmative action within the US and confined exclusionary measures to circumstances of unavoidable action and uncharacteristic judicial liberalism.

### 5.1.2 The UK's Use of Exclusionary Positive Action

Whilst the US' attempts to use exclusionary affirmative action in a broad range of circumstances have been curtailed by popular opposition, UK use of this form of positive

[500] For example, in 1980 Ford Motor Company had to pay back pay of $13 million to women and minorities, lost as a result of the company's discriminatory practices, W. McElroy, 'Affirmative Action: What does it Affirm?, *op. cit.*, pp. 181 – 188.
[501] *Franks v Bowman op. cit.,* at 38.
[502] *Griggs v Duke Power Co*. 401 US 424 (1971).
[503] *International Brotherhood of Teamsters v The United States of America* 431 US 329 (1977).
[504] Justice O'Connor in *Wygant v Jackson Board of Education, op. cit.,* at 291. See also P.G. Polyviou, *The Equal Protection of the Law, op. cit.*, p. 361 concerning the impact of exclusionary affirmative action policies on white males.
[505] Justice Thomas, *Adarand v Peña*, *op. cit.* at 241.

action has been confined at the outset by the limited scope for positive action within non-discrimination legislation. In fact, prior to the Equality Act 2010, UK legislation had not countenanced the use of positive action to make a decision which resulted in the exclusion of one individual in favour of another, such as in a recruitment or promotion choice, instead restricting action to the provision of training and encouragement.[506] The narrowness of these clauses meant that even the training that could be offered was limited because it was not permitted to lead straight into a job, so that 'on the job' training and apprenticeships were excluded because they were seen as closing the gap between training and appointment too much to constitute permissible positive action.[507] The limited scope of these provisions was upheld by the employment tribunal in the case of *Hughes and others v London Borough of Hackney* in which the reservation of three local authority employment positions for ethnic minorities was found to constitute unlawful discrimination.[508]

It is from the European framework for positive action, as interpreted by the ECJ, that the first use of exclusionary positive action that has been influential in the UK has derived. Despite illustrating a narrow construction of permitted exclusionary action the ECJ has approved of the use of positive action as a tie-break factor in determining a recruitment or promotion decision.[509] The position of exclusionary positive action within UK law is brought into line with ECJ jurisprudence by the Equality Act 2010 which permits positive action at the point of recruitment subject to the preconditions established by European case law, namely that both candidates are equally qualified, that there is no blanket policy of preferring the underrepresented individual, and that the measures are a proportionate means of enabling individuals from the underrepresented group to overcome or minimise disadvantage or participate in the relevant activity.[510] Although the relevant provision in the Equality Act has not yet commenced it reflects the full extent of the permitted use of exclusionary positive action advocated by the ECJ, whilst continuing to maintain the distinction between the UK's use of exclusionary positive action, in the event of a tie-break, and the wider use of exclusionary affirmative action in the US, where it can be a

[506] RRA, ss. 37 and 38 and SDA, ss 47 and 48 as amended.
[507] See Commission for Racial Equality, Code of Practice on Racial Equality in Employment (November 2005), p. 40, para 3.44.
[508] *Hughes and others v London Borough of Hackney* (unreported) [1986] EAT/1288/99. See also *Tottenham Green Under-Fives' Centre v Marshall (No. 2)* [1991] IRLR 162 (EAT).
[509] See, for example, *Kalanke, op. cit* and *Marschall, op. cit.*
[510] Equality Act 2010, s. 158.

factor in a decision, regardless of the existence of a tie-break situation, subject to the fulfilment of specific conditions.[511] The different uses of exclusionary positive action in the US and UK are demonstrated by the judicial decisions in *Johnson* and *Marschall*.[512] In *Marschall* the ECJ only permitted gender to be used to justify exclusionary positive action in the event of a tie-break situation. By contrast the court in *Johnson* allowed a protected characteristic to be one of a number of factors in making a recruitment or promotion decision, irrespective of whether two individuals were considered to be equally qualified before the protected characteristic was considered. The Supreme Court's decision illustrates its apparent unwillingness for a decision to turn decisively upon the existence of a protected characteristic, whilst permitting its potential relevance in all decisions. The ECJ by contrast has limited when the protected characteristic can play a role in decision-making, but allows it to be decisive, although not automatically so, when it is considered. This distinction in use of exclusionary affirmative action has led to commentators holding up *Marschall* as more beneficial to protected groups than the decision in *Johnson*.[513]

Where the US and UK in positive action are similar in their use of exclusionary positive action is in their rejection of automatic preferences. This is demonstrated by the decision in *Marschall* which utilised the same line of reasoning as Justice Powell in *Bakke* in which he stressed the need for individual consideration of positive action policies on a case by case basis, and the unlawfulness of automatic preferences.[514] In addition, two areas in which the UK has used exclusionary positive action in ways that is particularly similar to the US is in relation to police recruitment, where it has been seen as a potential means of meeting government targets for the recruitment and retention of minority and female employees, and in Northern Irish measures to achieve the religious integration of Protestants and Catholics.[515] It is clear, therefore, that the limited use of exclusionary action in US and UK has some similar aspects to it, particularly in Northern Ireland,

[511] See, for example, Harriet Harman, House of Commons Daily Debates, 11 May 2009, Hansard HC, col 548 who confirmed that the positive action provisions of the Equality Bill 2009, now the Equality Act 2010, did not constitute positive discrimination. http://www.publications.parliament.uk/pa/pahansard. Accessed 21.08.10.
[512] Although the *Marschall* decision is an ECJ judgment this articulates the position under UK law following the implementation of the Equality Act 2010, and can therefore be used to compare the US and UK position.
[513] See Needham, 'Leveling the Playing Field – Affirmative action in the European Union: A Comparison of Marschall v Land Nordrhein-Westfalen and Johnson v Transportation Agency of County Santa Clara', 19 *N.Y.L Sch. J. Int'l & Comp L*. 479 (1999 – 2000).
[514] *Bakke, op. cit*., pp. 287 – 320 and *Marschall, op. cit*., para 33.
[515] See FETO as amended.

although this use is treated in terms of exceptionalism as compared to positive action elsewhere in the UK. The fundamental differences however arise in the precise forms of use that are made of exclusionary actions, which in turn are attributable to the different influences affecting US and UK provisions. In the US, for example, limitations to the use of exclusionary action are promoted by judicial conservatism and popular opposition to such measures; whereas, in the UK the restrictive legal framework for positive action holds a tighter rein on the use of exclusionary positive action. The different impacts of these influences on the operation of exclusionary action can be seen particularly clearly in relation to measures aimed at achieving a pre-determined numerical outcome, which will now be considered.

## 5.2 The Different Approaches to Numerical Affirmative Action

Affirmative action programmes based on numerical considerations can be seen as a natural extension of exclusionary affirmative action because both uses require one individual to be excluded in favour of another who fulfils the particular statistically-desired outcome. Both the US and the UK have employed some form of numerically-framed positive action measures, but the extent to which each country prioritises the achievement of a particular numerical outcome[516] over that of individually assessed equality of opportunity differs, as will be shown below.

### 5.2.1 US Numerical Affirmative Action

The legal basis for US numerical preferences for minority students first came under judicial attack in the case of *Bakke v The Regents of the University of California*[517] where the Supreme Court held that a policy which set aside a specific number of places for minority students contravened the 14th Amendment's commitment to equal protection of

[516] Such measures are often considered to be seeking the creation of 'diversity', the benefits of which have been widely accepted in both the US and UK. See USCCR, *The Benefits of Racial and Ethnic Diversity in Elementary and Secondary Education,* (November 2006), R. Hero, *Face of Inequality: Social Benefits of Workforce Diversity,* (Oxford University Press, Oxford, 2000), EHRC, *Talent not Tokenism. The Benefits of Workforce Diversity,* (2008) and Office for Official Publications for the European Commission, *Continuing the Diversity Journey: Business Practices, Perspectives and Benefits* (2008). However, the use of affirmative action to achieve diversity through the deployment of numerical targets has attracted country-specific responses.

[517] *Bakke op. cit.* The Court had previously accepted for decision a similar case at the University of Washington but it was later dismissed as the plaintiff who had been admitted to the Law School was about to graduate. See *DeFunis v Odegaard* 416 US 312 (1974).

the laws for all citizens. The judgment was responding to a policy under which the university reserved a set quota of places for minority students so that majority students, including the plaintiffs, were refused admission whilst minority students with lower marks were able to enrol. The decision of the Supreme Court served to limit the use of affirmative action based on numerical goals holding that whilst race could be used as a flexible factor in university admissions strict quotas were illegal.[518] Although this judgment 'sharply divided opinions'[519] within the US affirmative action debate for the US judiciary it defined the acceptable limits to exclusionary quotas in affirmative action as requiring that each policy be applied with reference to the relative qualities of individual applicants.

The controversial nature of numerically-couched policies within US affirmative action was further illustrated by the case of *Hopwood v Texas* in which the plaintiff argued that the admissions policy judged African Americans and Hispanics against more lenient criteria than other applicants.[520] Under the scheme the court found that a score at which minorities were categorized as 'presumptive admits' would result in a white applicant being categorized as a 'presumptive denial'.[521] The policy was criticised by the court on the basis that 'the use of race to achieve a diverse student body … simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny'.[522] The quotas used in affirmative action programmes concerning admissions reveal how judicial attitudes as to what constitutes a lawful and unlawful program have influenced the use of exclusionary affirmative action, and how numerical targets have been marginalised within permitted action. US treatment of numerical considerations, and the line between their permissibility and impermissibility, is also clearly shown by the contrary judgments in the cases of *Gratz v Bollinger*[523] and *Grutter v Bollinger*.[524] Both cases concerned the admissions policy of the University of Michigan which was managed for undergraduates and members of the law school so that between six and seven per cent of successful

[518] *Bakke, op. cit.*, part III
[519] C.E. Anderson, 'A Current Perspective: The Erosion of Affirmative Action in University Admissions', 32 *Akron Law Review* 181, (1994), p. 183.
[520] *Hopwood v Texas*, *op. cit.*
[521] *ibid*, at 561 – 2, 563, 575.
[522] *ibid*, at 948. For more recent application of the *Hopwood* judgment see *Messer v Meno* 130 F.3d 130 (5th Cir. 1997).
[523] *Gratz v Bollinger* 539 US 244 (2003).
[524] *Grutter v Bollinger* 539 US 306 (2003).

applicants were African American.[525] In *Gratz* the Supreme Court struck down the undergraduate admissions practices, holding that the points system used, which operated on the basis of factors including race, was too rigidly applied.[526] The system in place made a total of 150 points available for each candidate, out of which 40 points could be awarded for non-academic factors that the university felt would add to the experience of the university campus.[527] The court found that the effect of this system was to make race a potentially decisive factor in determining the admission decision, as opposed to it being one of several factors.[528]

Public interest in *Gratz* is illustrated by the remarks made by President Bush who, whilst expressly supporting 'diversity of all kinds, including racial diversity in higher education', condemned the university's method of seeking this goal as 'fundamentally flawed' and amounting to an illegal system of quotas.[529] By contrast to the decision in *Gratz*, in *Grutter* the court narrowly upheld the use of race in determining admissions to the university's law school, finding that it was employed with sufficient flexibility to satisfy the state's compelling interest in increasing the proportion of minority students admitted.[530] In its decision the court supported the preference afforded to disadvantaged minorities, holding that it did not automatically violate the Equal Protection Clause and the importance of the programme in enabling the cultivation of 'a set of leaders with legitimacy in the eyes of the citizenry'.[531] In addition the law school employed race as a 'plus factor' ensuring that the policy had a degree of flexibility and evaluated each applicant on their individual merits, as well as being operative for a finite period.[532] The cases of *Gratz* and *Grutter* exemplify the trend of the 1990s and early 2000s towards

[525] *ibid*, at 367 – 369 (Rehnquist, dissenting) and 374 (Kennedy, dissenting).
[526] *Gratz v Bollinger, op. cit.*, at 269.
[527] The non-academic factors included up to 20 points for: socioeconomic disadvantage, membership of an underrepresented minority group, attendance at a predominantly minority or socially disadvantaged high school, recruitment for athletics, or at the Provost's discretion *ibid*, at 9.
[528] *ibid*, at 272.
[529] Office of the Press Secretary, 'President Bush Discusses Michigan Affirmative Action Case. Remarks by President George W. Bush on the Michigan Affirmative Action Case', (The Roosevelt Room on 15th January 2003). See http://www.whitehouse.gov/news/releases/2003/01/2003115-7.html. Accessed 21.05.08. Further criticism of the use of numerical targets to create diverse educational and employment environments includes See A. Kronman, 'Is Diversity a Value in American Higher Education?', 52 *FLA Rev*. 861 (2000), D. D'Souza, *Illiberal Education: The Politics of Race and Sex on Campus*, (MacMillan, Inc., New York, 1999), J. Wrench, 'Diversity Management Can be Bad for You', 46(3) *Race and Class* (2005), 73 – 84 and K. Daniel, D. Black, and J. Smith, 'Racial Differences in the Effects of College Quality and Student Body Diversity on Wages', pp. 221 – 232 in G. Orfield (ed)., *Diversity Challenged*, (Harvard Education Publishing Group, Cambridge, Mass, 2000).
[530] *Grutter v Bollinger, op. cit.,* at 327 – 333.
[531] *ibid*, at 332.
[532] *ibid*, at 337 – 339 and 343.

affirmative action in the context of university admissions founded on past discrimination and whilst *Gratz* seems to have marked the demise of *Bakke's* diversity rationale, arguably first signified by *Hopwood*, *Grutter* shows an important shift from a 'backward-looking and inward-looking perspective on voluntary affirmative action to forward-looking and outward-looking perspectives' subsequently characteristic of the US' use of numerical standards for affirmative action.[533]

As well as its use in an educational context numerically-based affirmative action obligations have also been imposed on firms engaged in federal contracts,[534] and such use has resulted in increased representation of minority workers.[535] These measures have, therefore, had an important role in increasing workplace diversity where passive non-discrimination was ineffective.[536] However, this form of affirmative action has been subject to shifting political priorities which have seen a significant decrease of funding for the OFCCP where the political climate has required.[537] Despite this one example of numerically-based measures being successful the US affirmative action has been unable to widely embrace numerically-based action because it represents an unpopular progression from *de facto* equal treatment to engineering the representation of minorities within the workplace and educational environment. In addition, it is argued that 'once affirmative-action plans are loosed from their remedial moorings…an operational-needs defense can benefit the historically favoured as well as the historically disfavoured' and should therefore be avoided.[538] Consequently, the US' early use of numerical goals for affirmative action within federal contracting has been demoted and criticised among the

[533] C. Estland, 'Putting Grutter to Work: Diversity, Integration and Affirmative Action in the Workplace', 26 *Berkeley UJ, Employment and Labor Law*, 3, 2005. See also A.L. Antonio, et al., 'Effects of Racial Diversity on Complex Thinking in College Students', *Psychological Science*, Vol. 15, (2004), pp. 507 – 510.
[534] See F.L. Pincus, *Understanding Diversity. An Introduction to Class, Race, Gender and Sexual Orientation* (Lynne Rienner, London, 2006), pp. 75 – 6 which gives examples of companies who have used diversity training and positive action policies to settle discrimination claims.
[535] J. Leonard, 'The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment', *Journal of Economic Perspectives*, 4 (1984), pp. 47 – 64 cites a study conducted in the early 1980s which showed that the proportion of black males employed in contractor companies increased from 5.8 per cent in 1974 to 6.7 per cent in 1980 whilst in non-contractor companies the increase was only from 5.3 per cent to 5.9 per cent.
[536] Potomac Institute, *Affirmative Action: The Unrealized Goal. A Decade of Opportunity*, (The Potomac Institute, Inc., 1973), pp. 6 – 7.
[537] For example, the Energy Department, the Federal Highway Administration and the Commerce Department, amongst others, all cut back their set-aside programmes during the 1990s. See C. McCrudden, *Buying Social Justice, op. cit.,* pp. 172 – 175.
[538] K.R. Browne, 'Nonremedial Justifications for Affirmative Action in Employment: A Critique of the Justice Department's Position', 12 *Labour Law* 451, (1996 – 7), p. 452.

range of affirmative action programmes which in turn this has encouraged the limitation of its operation.

### 5.2.2 UK Numerical Positive Action

Whilst the US' commitment to numerically-framed goals and timetables in affirmative action has been broad-based but controversial, and with mixed success, the UK's approach may be characterised as allowing for such programmes in response to a particular, acute need. The two key forms of numerically based positive action which have developed within the UK are those implemented as narrow exceptions to the general avoidance of numerical goals within positive action, such as the measures used within Northern Ireland,[539] and the non-legally enforceable initiatives, such as those intended to diversify public authority workforces.[540]

Northern Irish measures, particularly under the FETO, are clearly aimed at achieving numerically measured results. The explicit nature of the numerical aims of the Northern Irish measures are clear from the Patten Report which set targets for 50 per cent recruitment of Catholic RUC officers over a 10 year period, in an attempt to redress an imbalance in the religious composition of the force which meant that whilst 40 per cent of the population of Northern Ireland was Catholic only 8 per cent of RUC Officers were Catholic.[541] Instead of provoking criticism for being unlawful discrimination these measures were promoted as 'essential to gaining widespread acceptability' of the force's legitimacy.[542] A further example of the narrow use of numerical forms of positive action are the measures implemented following the conclusion of the McPherson Report,[543] which indicated that the UK was in breach of the International Convention on the Elimination of all Forms of Racism,[544] because public institutions were engaging in acts and practices of racial discrimination.[545] Consequently, the police were charged with achieving targets to increase the numbers of ethnic minority officers and adopted positive

[539] Police (Northern Ireland) Act 2000, s. 46(1).
[540] See G. Mills, 'Combating Institutional Racism in the Public Sector', *op. cit.*, pp. 96 – 98.
[541] C. Patten, *A New Beginning: Policing in Northern Ireland. The Report of the Independent Commission on Policing in Northern Ireland* (1999).
[542] Official Report, Hansard HC Debs 19 January 2000, col 847.
[543] Home Office, 'Report of the MacPherson Inquiry', Cm 4262 (24th February 1999), para 46.27.
[544] See International Convention on the Elimination of all Forms of Racism, art 2(1)(a).
[545] Report of MacPherson Inquiry, *op. cit.*, para 46.27.

action measures in an effort to fulfil these.[546] These measures enabled the conclusion that, ten years after the publication of the Report, 'tremendous strides' had been made in countering racism within the police force, despite the continued underrepresentation of black and ethnic minority officers and failure to meet the original targets.[547] These measures are also in accordance with the ECJ's endorsement of quotas in *Badeck* and *Abrahamsson*, in which quota-based schemes were accepted as permissible provided that the individuals were equally qualified.[548] However, because these numerically-based positive action programmes were instigated before UK law had incorporated the principles espoused in the *Badeck* and *Abrahamsson* decisions such use of positive action measures has faced some opposition. For example, the Somerset and Avon Police faced an investigation by the Commission for Racial Equality, a predecessor organisation to the EHRC, after rejecting 186 white applicants in favour of minority and female candidates on the basis that the force was 'overrepresented by white men'.[549] This action followed the receipt of 242 applicants from white men, which represented over 40 per cent of all applications received, in response to a recruitment drive.[550]

In contrast to the numerically-framed positive action measures used in Northern Ireland and in response to the MacPherson Inquiry the UK has experienced less success with such measures when they have been based on governmental initiatives, as opposed to legislative changes.[551] One reason for the limited success of non-legislative use of numerical targets in positive action is that the measures are arguably in excess of what can be lawfully attained in the current framework.[552] In the absence of specific legal provisions mandating these measures organisations risked being 'steered, not only towards positive action, but to legally questionable measures'.[553] The position of numerical considerations in UK positive action is, however, currently undergoing a

[546] *ibid*, Recommendation 64, which set a target of 7% black and minority ethnic police officers by 2001.
[547] House of Commons, Home Affairs Committee, 'The MacPherson Report – Ten Years On' (14 July 2009), pp. 5 – 7. See also EHRC, *Police and Racism: What has been achieved 10 years after the Stephen Lawrence Inquiry Report?*, (January 2009).
[548] See *Badeck, op. cit*, para 33 and *Abrahamsson, op. cit*, para 62.
[549] See 'Force accused of Discrimination', BBC News, 28th Nov 2005, http://www.news.bbc.co.uk/1/hi/england/ bristol/4479276.stm. Accessed 26.11.08.
[550] *ibid.*
[551] S. Rutherford and S. Ollerearnshaw, *The Business of Diversity – how organizations in the public and private sectors are integrating equality and diversity to enhance business performance*, (Schneider-Ross, Andover, 2002).
[552] L. Barmes with S. Ashtiany, 'The Diversity Approach to Achieving Equality: Potential and Pitfalls' (2003) *Industrial Law Journal* 32(4), 274 – 296.
[553] L. Barmes, 'Equality Law and Experimentation: the Positive Action Challenge', *op.cit*. 623 – 654 See also J. Wrench, 'Diversity Management Can be Bad for You', 46(3) *Race and Class* (2005), 73 – 84.

change in line with the ECJ's implicit approval of the use of quotas in positive action policies, provided that there is not an unconditional benefit afforded to the underrepresented individual and that they are 'designed to eliminate the causes of women's reduced opportunities of access to employment and careers and intended to improve the ability of women to compete on the labour market and pursue a career on an equal footing with men'.[554] Further, provided the sections are enacted in their present form, under the Equality Act 2010 targets and goals will constitute lawful positive action, as long as they do not form part of a blanket policy for appointing underrepresented individuals.[555]

Overall, therefore, the US has tried to use quotas widely, resulting in on-going challenges to their legal basis as well as judicial and popular opposition. Subject to judicially imposed criteria for permissible quotas, however, they continue to be used in government contracting and in university admissions. UK numerically-based positive action targets are hesitantly increasing in their field of operation, from having being solely deployed in circumstances where there are specific legislative derogations, such as Northern Ireland,[556] and as non-legally binding initiatives. Such use confines this controversial form of action to narrow circumstances in which there is the greatest need for reform, matching the type of measures employed to the particular problem they are required to remedy. However, the extremely limited scope for numerically-based action within UK law has led to some discrepancy between legally mandated and actual practice, though this may reconciled through the Equality Act 2010.

### 5.3 Voluntary and Mandatory Affirmative Action in the US and UK

Alongside the different uses of numerically-aimed affirmative action the US and UK have also adopted different approaches to voluntary and mandatory forms of action. This is despite the apparent similarity between the two countries whereby both have similarly focused on voluntary policies while marginalising mandatory action, because despite this similarity wholly different views exist between the two countries concerning the legality of each form of action, as will be considered below.

[554] See *Lommers, op. cit.*, paras 24 – 50, esp. para. 33.
[555] Equality Act 2010, s. 159(4).
[556] See the Employment Equality Directive, art. 15(1).

### 5.3.1 The US' Use of Voluntary and Mandatory Affirmative Action

Within the US both voluntary and mandatory affirmative action has been justified as a means of remedying the existing segregation and exclusion of women and minority groups, although the permissibility of each use has been variously supported and rejected where there is a lack of clarity in the legal permissibility of each form of action. One area in which there has been a progression from voluntary to mandatory measures is in the desegregation of school districts, which was pioneered in the four decades following the decision in *Brown v Board of Education*.[557] In *Brown*, the Supreme Court rejected the notion of a 'separate but equal'[558] educational system, stating that 'separate educational facilities are necessarily unequal'.[559] Although *Brown* declared segregated schools to be unlawful it did not create mandatory mechanisms to eliminate existing discriminatory practices or their effects, so that a decade after *Brown* voluntary action had prompted virtually no action towards the achievement of educational integration.[560] Consequently, while the judgment delivered in *Brown* was a ground-breaking legal precedent its impact was limited by failing to require more than for voluntary desegregation to proceed with 'all deliberate speed'.[561] Instead, further court judgments were required to set out specific obligations on States to pursue desegregation. One such case was *Green v County School Board* which stated that school boards had an 'affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch'.[562] The reluctant move from voluntary to mandatory affirmative action is illustrative of the US social mindset against affirmative action, which limits both forms of affirmative action by avoiding voluntary positive action measures, whilst confining mandatory action to very restricted circumstances.

The US' application of mandatory affirmative action to overcome segregation was demonstrated by the judgment in *Swann v Charlotte-Mecklenberg Board of Education* which required the implementation of a range of measures, including altering school districts, pairing and clustering of schools, and the positive racial assignment of pupils, in

[557] Starting with Executive Order 10730: Desegregation of Central High School, 1957.
[558] *Plessy v Fergusson* 163 US 537 (1896).
[559] *Brown v Board of Education op. cit.* at 494 – 495.
[560] G. Rosenberg*, The Hollow Hope: Can Courts Bring About Social Change?,* (University of Chicago Press, Chicago, 1991), p. 51.
[561] *Brown v Board of Education, op. cit.* at 301.
[562] See Justice Brennan in *Green v County School Board of New Kent County* 391 US 430 (1968) 437 –438.

order to eliminate the educational segregation arising from segregated housing.[563] The *Swann* judgment showed that the Supreme Court was making efforts to spread the judicial use of affirmative action by setting out specific guidelines to assist school districts and the lower courts.[564] Whilst the Supreme Court acknowledged that *de facto* segregation did not necessarily imply the existence of *de jure* discrimination, and that the Equal Protection Clause did not automatically require year by year adjustment to achieve representative racial composition,[565] it left no doubt that racially neutral plans would not, in the majority of cases, be constitutionally or socially sufficient to remedy segregation.[566] The early cases concerning school desegregation show that the US resorted to mandatory affirmative action in response to judicial findings of actual discrimination where voluntary action failed to yield significant changes.[567]

In the employment context mandatory affirmative action has been predominantly used to punish unlawful discrimination as in the case of *Carter v Gallagher*, in which, following a finding of discrimination, the Federal Court ordered that one out of every three employees hired by the department should be a suitably qualified minority worker, until at least 20 minority workers were employed.[568] The court has also ruled that positive action may be mandated despite the absence of any finding of past discrimination, as in the case of *Keyes v School District No. 1, Denver, Colorado*.[569] In *Keyes* the court cited the indirect impact of slavery and race discrimination as the basis upon which to promote affirmative action, although this marked an atypical departure from the generally limited punitive use of mandatory affirmative action.[570] US affirmative action has therefore been squeezed by the dual effects of the limited mandatory use sanctioned by the courts combined with criticism of voluntary positive action on the grounds that it violates civil rights laws and is ineffective in achieving equality.[571] The constitutional reality of the

[563] *Swann v Charlotte-Mecklenburg Board of Education* 402 US 1 (1971). Swan saw the court apply the duty of desegregation which in *Green* had been applied to a two-school, 1,300 pupil county, to a school system of 107 schools and over 80,000 pupils.
[564] *ibid*, at 18 – 19.
[565] *ibid*, at 28 – 31.
[566] R.S. Markovits, *Matters of Principle Legitimate Legal Argument and Constitutional Interpretation*, (New York University Press, New York, 1998), p. 255.
[567] See also *Albermarle Paper Co. v Moody* 422 US 405 (1975) at 418.
[568] *Carter v Gallagher* 452 F. 2d 315 (8th Cir.).
[569] *Keyes v School District No. 1 Denver, Colorado* 413 US 189 (1972).
[570] See, for example, *Dayton Board of Education v Brinkman* 433 US 406 (1979) which stated that 'because racial imbalance is not inevitably linked to unconstitutional segregation it is not unconstitutional in and of itself', at 413.
[571] USCCR, 'Affirmative Action in the 1980s: Dismantling the Process of Discrimination', (Clearing House Publication 70, November 1980).

argument against voluntary affirmative action has been largely avoided by the courts,[572] which have only looked at the question of whether Title VII forbids voluntary affirmative action.[573] Opponents of voluntary affirmative action have used the lack of judicial comment on its legality as a basis for arguing that it is contrary to the equality principles within the Civil Rights Act.[574] However, where the court has commented on voluntary forms of affirmative action it has indicated some support for them on the grounds that the Civil Rights Act was implemented to 'eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history […and] cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges'.[575]

It would be wrong to characterise the US as wholly rejecting voluntary preferential treatment. The Supreme Court has held, for example, that an agency acted appropriately when it voluntarily promoted a female employee over her male colleague, who achieved a slightly higher test score, because a manifest imbalance existed in the workforce and the employer had properly used a 'moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women'.[576] However, examples of such judicial support stand out against the general trend of hostility towards voluntary affirmative action which has influenced affirmative action use because of the lack of clarity regarding its permissibility in the legal framework.[577] This inconsistency is indicative of the non-linear progress made by US affirmative action whereby the rapid gains, as illustrated by the *Johnson* judgment, have been frequently followed by a judicial and legal retreat that is 'stunningly successful in changing the terms of the debate by erasing public memory'.[578] Such cycles of advancement and regression show the conflicting influences on US affirmative action and how the competing principles within the US have acted as counter-balances preventing any significant and continued period of expansion.

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[572] See *Minnick v California Dep't of Corrections* 452 US 105 (1981) which the court refused to hear because of ambiguities in the court records and legal developments since the lower court's ruling despite this meaning that an important opportunity to clarify the permissible extent of voluntary affirmative action was missed.
[573] *United Steelworkers of America v Weber op. cit.*
[574] *ibid*, at 120.
[575] *Albermarle Paper Company v Moody, op. cit.*
[576] *Johnson v Transport Agency* 480 US 616, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (1987).
[577] See L. Alexander, 'What Makes Wrongful Discrimination Wrong? *op. cit.*, pp 162 – 3.
[578] N. MacLean, *Freedom is Not Enough, op. cit.,* p. 34.

### 5.3.2 The UK's Use of Mandatory and Voluntary Positive Action

In the UK arguments concerning the legality of mandatory and voluntary affirmative action are diametrically opposed to those in the US. This means that whereas in the US voluntary measures are criticised for being unconstitutional and mandatory action legal but unpopular, in the UK voluntary positive action is accepted as coming within the letter and spirit of the law through the permissible positive action in the Equality Act 2010. By contrast, mandatory measures have generally been considered to constitute unlawful discrimination. The key exceptions to the avoidance of mandatory action have been the range of specific obligations imposed on employers and service providers to avoid claims of discrimination, which include the requirement for employers to make reasonable adjustments to accommodate disabled workers and to enact certain positive measures, for example, by changing shift patterns or allowing flexible workers to avoid a claim of indirect discrimination.[579] These measures may require substantial action to be taken to accommodate the needs of specific individuals, and represent a significantly different approach from the highly restricted forms of action permitted within the key positive action provisions, but it is contested that these forms of action are more properly part of non-discrimination law than positive action because they are needed to prevent a claim of discrimination, and are subject to separate legislative provisions.[580]

Aside from these measures the UK has adopted a mandatory action approach in the positive duty placed on public authorities to actively promote gender and race equality.[581] However, this duty is only mandatory in terms of processes the authority must go through, as opposed to being mandatory in terms of achieving a particular outcome or taking any particular action, meaning that the likelihood of substantial advances in equality being achieved by this provision is limited.[582] The public authority requirement for 'due regard' also gives little indication of the importance that should be placed on this duty, and in particular when positive action considerations may be overridden by other policy considerations. The proposed duty has consequently faced criticism that it should be replaced by an obligation for public bodies to take specific mandatory steps to achieve

[579] See, for example, *London Underground Limited v Edwards (No. 2)* [1999] ICR 494; [1998] IRLR 364 which reached this conclusion. See also Caruso, 'The Limits of the Classic Method', *op. cit.*
[580] See before at section 2.3.2 of this thesis.
[581] Equality Act 2010, s. 149.
[582] S. Fredman and S. Spencer, 'Delivering Equality: Towards an Outcome-Focused Positive Duty', Submission to the Cabinet Office Equality Review and to the Discrimination Law Review, (June 2006).

equality.[583] However, the case of *R (Elias) v Secretary of State for Defence* might be useful in this regard because it held that a failure to consider whether a particular policy raised issues relating to racial equality, to assess whether any adverse impact was possible, or to consider what steps might be necessary to eliminate any impact, would breach a duty for particular regard to be paid to the achievement of equality.[584] One problem inherent in this decision is that the symmetrical approach to discrimination utilised in relation to all protected characteristics, apart from disability, arguably means that an obligation to take specific steps to counter inequality, if not directly permitted by legal provisions, runs counter to the requirement of equal treatment within non-discrimination legislation. The impact of this is that there is a pervasive uncertainty as to the lawfulness of any measures taken by public authorities in pursuit of their mandatory duty.[585] This situation is further confused by the Government's confirmation that there is no compulsory requirement for any positive action under the Equality Act 2010.[586]

The situation as to what action is, and may in future be, imposed on public authorities, therefore, exhibits a high degree of uncertainty, with authorities caught between the risk of engaging in direct discrimination if they take actual measures to redress underrepresentation but of failing to fulfil their statutory duty if they do not go some way to at least considering how to redress disproportionality, and presumably taking action if it is discovered to be necessary. Coupled with this, the expansive scope of discrimination law leaves little room for even voluntary actions, which in itself is criticised for its naivety in expecting improvement without the imposition of mandatory positive action obligations.[587]

A further exception to the general avoidance of mandatory positive action are the measures used in Northern Ireland[588] and it is arguably through these mandatory measures that equality has moved from being peripheral to being of mainstream significance within

[583] *ibid*, pp. 9 – 10.
[584] *R (Elias) v Secretary of State for Defence* [2005] IRLR 788.
[585] L. Barmes, 'Promoting Diversity and the Definition of Direct Discrimination' (2003*) Industrial Law Journal* 200.
[586] See Government Equalities Office, 'Equality Act 2010 – Frequently Asked Questions', at http://www.equalities.gov.uk/equality_act_2010/faqs_pn_commencement_of_the _eq/positive_action.aspx. Accessed 06.10.10.
[587] See B. Hepple, M. Coussey, and T. Choudhury, *Equality: A New Framework. Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation*, (Hart Publishing, Oxford, 2000), paras 3.41 - 3.50.
[588] See C. McCrudden, 'Mainstreaming Equality in the Governance of Northern Ireland', 22 *Fordham Intl L Journal* 1969 (1998 – 9).

the province.[589] Pursuant to the FETO the Northern Irish police service may use quotas as a means of increasing Catholic recruitment,[590] and further measures include provisions permitting employers to recruit directly from Catholics not in employment and to offer religion specific training.[591] The use of mandatory measures, as opposed to purely voluntary, has been linked to an improvement in workplace representation of Catholics. In a study by Chris McCrudden, for example, the proportion of Catholics employed within monitored firms rose across both the public and private sectors, so that while the monitored workforce grew in line with the general employment, rising by 42,350 (around 12 per cent), Catholic employment in the monitored companies rose by 32,700 (28 per cent) while Protestant employment rose by 10,300 (4.8 per cent).[592]

Whilst the UK arguments against mandatory measures resonate with the arguments of opponents of compulsory affirmative action in the US, in the UK such arguments do not conclude with a call for inaction but instead for the use of voluntary positive action 'so that the talents of women, disabled people and other discriminated-against groups can be fully utilised'.[593] By contrast the unpopularity of US mandatory affirmative action, combined with the claimed unconstitutionality of voluntary action has prevented a parallel development in the US of affirmative action as a legislative tool to enable social change. Conversely, the UK has faced criticisms for being unduly tentative in its approach to mandatory positive action, with voluntary measures also being confined to a limited area of use. This has, however, meant that UK positive action has avoided the divisiveness of the debate surrounding the subject in the US.

Apart from being comparable under the same headline categories the uses of affirmative action in the US and UK have been subject to very different arguments and influences, which in turn has given them a country-specific nature. Both countries have used exclusionary action but, while in the US this use has been widespread in the UK it has been confined to a very narrow context, although this may change following the commencement of relevant sections of the Equality Act 2010. In addition, both countries

[589] See in particular sections 2.3.2, 3.2.2, 5.1.2 and 5.2.2 above.
[590] Police (Northern Ireland) Act 2000, s. 46(1).
[591] FETO, arts. 75 – 6. See also arts. 72 – 4.
[592] See C. McCrudden, 'Legal Regulation of Affirmative Action in Northern Ireland', *Oxford Journal of Legal Studies* 2004, pp. 401 – 402.
[593] Tessa Jowell, Official Report Hansard HC 21st July 2005, col 1399. See http://www.publications.parliament.uk/pa/pahansard. Accessed 23.07.08.

have used numerical targets in positive action policies, although US hostility to this form of action may be contrasted with dubious legality of the UK's 'soft law' initiatives. Finally, the two countries have taken wholly opposite approaches to voluntary and mandatory action. These differences in use of positive action between the US and UK may, however, be starting to undergo a degree of convergence, especially in light of the current and likely future developments in this area of law, as will be explored in the next chapter.

## 6. The Future of Positive and Affirmative Action in the US and the UK

So far this thesis has examined the past and present influences that have shaped positive action in the US and the UK and has established the existence of fundamental differences at the heart of affirmative action in each country. Against the backdrop of this analysis this chapter will explore the new forms of action that are developing in each country, and assess the possibility of convergence in policies and principles between the US and UK. Because any such assessment necessarily involves a high level of conjecture this chapter will not attempt to cover all conceivable forms of development but just a selection of possible ways in which the context of affirmative action within the two countries is changing, and will consider how this might affect the legal provisions in each country. This chapter will show that contemporary and likely future developments in each country may offer the opportunity for the two countries to look across the Atlantic to the legal provisions and lessons learnt in the other, as a means of best addressing continuing inequality. Firstly, however, this chapter will explore one of the most pertinent contemporary influences on the development of affirmative action in the US and the UK, namely that of the increasing fluidity of identity amongst protected individuals, and will consider how each country's experiences could help to inform the other's approach to dealing with this challenge.

### 6.1 The Growth in Fluidity of Individual Identity

Affirmative action has functioned on the premise that individuals can be categorised according to a single characteristic, such as race or gender, and that there are fixed criteria for membership of protected groups. However, policy implementers have found it increasingly difficult to place individuals in one of a finite number of homogenous categories amid growing ethnic diversity and recognition of the role of intersectionality in delineating an individual's experience of societal opportunities.[594] Within the US the position of African Americans as the principal excluded minority has also been changing with new minorities becoming an increasingly vocal presence within the country.[595] As a

[594] See J. Squires, *The New Politics, op. cit*., pp. 161 – 170.

[595] Hispanics, in particular, are a rapidly increasing proportion of the minority population, having grown from 32% in 1980 to 37% in 1990, and were recorded as constituting over 50% of the minority population in the 2000 Census. See H.D. Graham, *Collision Course. The Strange Convergence of Affirmative Action and Immigration Policy in America*, (Oxford University Press, Oxford, 2002), p. 149, and appendix 1, tables 3 and 4. Projections forecast that by 2050 non-Hispanic whites will constitute 30.25% of the entire

result of such developments the successful integration of minorities into effective multicultural societies has become one of the major challenges of the early twenty-first century in both the US and UK.[596] In addition to the changing identity of the benefited classes there have also been shifting attitudes towards affirmative action from within the groups themselves. The feminist movement, for example, has contributed diverging views to the debate on the impact on gender-based preferences, including the concern that positive action may perpetuate misogynistic notions of female inferiority and their need for male protection, alongside continuing support for affirmative action as an important means of securing still-elusive substantive gender equality.[597] Both of these developments have differently influenced the key foci of affirmative action although the changes themselves may open up the possibility for a closer relationship between US and UK positive action, as will be shown below.

### 6.1.1 Changing Racial Identity

In the US the inclusion of 'new' minorities within the affirmative action debate, albeit that their presence in the country may not be new, has caused uncertainty as to the operation and aims of positive preferences aimed predominantly at remedying black/white inequality.[598] The country's demography which was previously characterised as being split between black and white is increasingly racially diverse and it is estimated that by 2042 non-Hispanic white Americans will no longer make up the majority of the country's population, although this will still be the country's largest racial group.[599] The problem of minority exclusion, therefore, is increasingly an issue for all minority groups[600] and this has raised opposition to the unique treatment of African Americans

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US population, see US Census Bureau, 'Projections of the Population by Race and Hispanic Origin for the United States: 2010 – 2050' (2008), table 6, http://www.census.gov/population/www/projections/summarytables.html. Accessed 23.03.08.

[596] K. Henrard and R. Dunbar, *Synergies in Minority Protection: European and International Law Perspectives*, (Cambridge University Press, Cambridge, 2009), p. 12.

[597] See, W. McElroy, *Sexual Correctness: The Gender-Feminist Attack on Women*, (McFarland and Co Publishers, North Carolina, 2001). Also W. McElroy, 'What Does Affirmative Action Affirm?', pp. 181 – 188, pp. 184 – 6, in W. McElroy (ed.)., *Liberty for Women: Freedom and Feminism in the 21st Century*, (Ivan R. Dee, Chicago, in association with the Independent Institute, 2002).

[598] T. Wise, *Affirmative Action: Racial Preference in Black and White* (Routledge, London, 2005). See also C. Edley, Jr., *Not all Black and White: Affirmative Action and American Values*, (Hill and Wang, New York., 1996).

[599] US Census Bureau, 'Projections of the Population by Sex, Race and Hispanic Origin for the United States: 2010 – 2050' (table 4). http://www.census.gov/population/www/projections/summarytables.html. Accessed 23.08.10.

[600] See appendix 3, table 4 and appendix 4, tables 4 and 5 demonstrating the continued underrepresentation across minority groups in university and professional occupations.

within affirmative action.[601] Whilst there remains a strong historical embarrassment surrounding slavery in the US and the particular societal and institutional discrimination against black Americans following its abolition the growing ability for African Americans to access previously closed institutions, and the emergent black middleclass,[602] have been used to argue that if African Americans do not constitute a uniquely excluded minority within society they should not constitute a special group within affirmative action. Such arguments are bolstered by empirical evidence which reveals that whilst the proportion of black Americans leaving school with no high school diploma is nearly double that of white, non-Hispanic Americans, it is only around half the rate of Hispanic Americans.[603] In addition, between 1978 and 2000, there was a lower rate of improvement in the educational attainment of Hispanics than for African Americans, suggesting that the Hispanic community is falling further behind African Americans and the majority community in educational opportunities.[604] This demonstrates that in one of the key forums within which affirmative action operates African Americans are not the most disadvantaged group and have been improving in status and achievement, whilst other minorities, particularly Hispanics, have been declining. A more accurate reflection of contemporary patterns of educational achievement and occupational disadvantage within affirmative action would make it less easily condemned as unnecessary, in light of black achievement, or unconcerned with actual disadvantage.[605] Such a development would be likely to require a more equal focus across different racial groups, which would bring US affirmative action more into line with UK provisions.

In the UK, as in the US, increasing racial heterogeneity is affecting the development of positive action, although minority issues remain on an entirely different scale in the UK than the US,[606] with UK diversity having being predominantly driven by post-colonial immigration after the Second World War.[607] Amidst the increasing racial diversity within

[601] See, for example, J. Perea, 'The Black/White Binary Paradigm of Race' in R. Delgado and J. Stefancic, *Critical Race Theory. The Cutting Edge,* (2nd ed. Temple University Press, Philadelphia, 2000), pp. 344 – 353.
[602] M. Patillo-McCoy, *Black Picket Fences: Privileges and Perils among the Black Middle-Class*, (University of Chicago Press, Chicago, 1999).
[603] See appendix 3, table 3. See also appendix 3 table 4 which shows that the percentage of black individuals who had attended higher education in 2000 (17.5%) was nearly double that of Hispanic students (9.7%).
[604] See appendix 3, table 4.
[605] See M. Boylan, 'Affirmative Action: Strategies for the Future', *Journal of Social Philosophy*, Vol 33, No. 1, (Spring 2002), 117 – 130.
[606] See appendix 1 which summarises the different ethnic break-downs of the US and UK.
[607] See H. Goulbourne, *Race Relations in Britain since 1945*, (MacMillan Press, London, 1998).

the country UK positive action may be equally directed at individuals belonging to underrepresented ethnic minority groups, or other protected groups, provided that the general legislative criteria are met.[608] The result of this is that the UK has not experienced the tension between the legal provisions for positive action and the changing pattern of minority disadvantage, as in the US. Despite the restrictiveness of the permitted forms of positive action in the UK there has also been a disproportionate increase of minority students at UK universities compared to the overall rise in higher education.[609] By contrast, the proportion of minority individuals within higher education in the US continues to lag behind the proportion of white students.[610] The extent to which improvements in educational achievement for minorities is directly attributable to positive action is, however, questionable and even the 'presence of a handful of women or blacks in positions of power is not necessarily of assistance in reversing discrimination against women or blacks in society in general'.[611] However, the Equality Act 2010 broadens the range of affirmative action methods that may be employed in the UK, thus going some way to combining the UK's existing breadth of coverage with a wider, US-style, range of measures. This trend will be even more pronounced once the full range of positive action provisions under the Act commence.[612]

In order that affirmative action measures can remain relevant in the face of changing demographics within the US and UK more research needs to be conducted into the nature of on-going prejudice faced by different minority groups and particularly the reason why certain racial minorities continue to be underrepresented in the highest educational and occupational levels. Empirical evidence supporting the normalisation of African Americans within affirmative action could also be a valuable means of strengthening calls for equal positive action provision for all minorities and moving US affirmative action away from its black/white focus. In the light of such developments the UK approach in which all minorities are afforded the same legislative protection may prove instructive for the US in shaping future affirmative action law, although the continuing social tension between minority and majority groups may limit its acceptability. Conversely the UK

[608] The equivalent protection across protected classes is demonstrated by the comparable legal protect for all groups in the Equality Act 2010.
[609] See appendix 3, table 2 which shows that minority students are overrepresented amongst undergraduate and post-graduate students.
[610] See appendix 3, table 4.
[611] S. Fredman, *Discrimination Law, op. cit*., p. 125,
[612] In particular Equality Act 2010, ss. 149 and 159.

could look at the antagonism caused by the concentration of affirmative action on African Americans as a warning against the development of any significant discrepancy in focus between protected groups within UK policy.

### 6.1.2 Gender Identity

Since the instigation of affirmative action policies the position of women within US and UK society, especially in relation to their participation in higher education and professional employment, has changed significantly,[613] though this may owe more to the general increase in accessibility of higher education and the diminution in status or pay in the jobs in question rather than to improvements arising out of positive action programmes.[614] The similar progress towards gender equality in both the US and UK has led to both women and men raising the question of whether gender inequality is still an appropriate basis for affirmative action preferences or whether the time for the temporary measures for promoting opportunities for women is now coming to an end.[615] Consequently, for the first time arguments for the elimination of affirmative action that were motivated by the white, male desire to retain a dominant societal position are being voiced by women, the very group the policies were intended to help.[616] Despite such arguments there continues to be a gap between male and female earnings in the US and UK.[617] Such evidence has led to calls for a new focus to gender-based action which does not solely target the inability of women to access education and employment but also the glass-ceiling they routinely encounter having done so.[618]

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[613] See appendix 3, table 4 showing this increase in the US, and table 1, showing comparable numbers of female and males achieving the highest academic levels in the UK. See also appendix 4 tables 1, 4 and 5 regarding the distribution of females within certain occupation. In addition women are now more likely to attend and graduate from college than men, B. Jacob, 'Where the Boys Aren't: Non-Cognitive Skills, Returns to School and the Gender Gap in Higher Educations', *Economics of Education Reviews*, 21 (2002), pp. 581 – 598.

[614] S. Fredman, *Discrimination Law*, p. 191.

[615] See W. McElroy, *Sexual Correctness: The Gender-Feminist Attack on Women*, (McFarland and Co Publishers, North Carolina, 2001) and W. McElroy (ed.)., *Liberty for Women: Freedom and Feminism in the 21st Century*, (Ivan R. Dee, Chicago, in association with the Independent Institute, 2002).

[616] For example when David Cameron tried to instigate all-women short-lists he faced opposition from a number of female MPs. See G. Jones, 'Tories Shy away from all women shortlists', *The Telegraph*, 22nd August 2006. http://www.telegraph.co.uk/news/1526943/tories-shy-away-from-all-women-shortlists.html. Accessed 03.07.08.

[617] See appendix 2, tables 1 and 4. In addition, a survey conducted in 2008 found that women in the UK earned on average 22.6 per cent an hour less than men. See *Labour Force Survey*, Q3 (2008), 'Average of Gross Weekly/Hourly Earnings by Occupation', table 36, http://www.statistics.gov.uk/downloads/theme_labour/LFSHQS/Table36.xls. Accessed 08.10.10.

[618] See L. Wirth, *Breaking Through the Glass Ceiling: Women in Management*, (International Labour Office, Geneva, 2001).

One concern regarding measures to aid women's advancements in the workplaces and society is their potential to reinforce existing social stereotypes and 'perpetuate...sexual paternalism'.[619] This risk is illustrated by the case of *Abdoulaye* in which a payment made to women taking maternity leave was challenged on the grounds that it was discriminatory to men.[620] The ECJ rejected the claim holding that the payment did not breach the equal pay principle because it was designed to compensate for long-term occupational disadvantages stemming from taking maternity leave.[621] Although this judgment defended women's rights it demonstrates the potential for measures that are designed to relieve the practical realities of women's role as primary carers to entrench this position and reinforce the idea that women, and not men, care for children, and consequently face occupational disadvantage.[622] In addressing these new dimensions of gender-exclusion both the US and UK need to conduct further studies to assess the social pressures on women that impinge upon their ability to operate freely in the work and educational environment.[623] Measures to equalise internal family roles, for example, in the equal provision of either maternity or paternity leave, may be a means of addressing continuing limits placed on women's equal opportunities whilst avoiding the use of positive action. Learning from the examples of such initiatives in both the UK and US would give the two countries an increased range of reference when forming future policy, rather than relying on solely domestic experiences.[624]

As well as ensuring that positive action does not unnecessarily perpetuate stereotypical notions about societal roles, whilst remedying exclusion and under-representation of

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[619] R. S. Dhami, J. Squires and T. Modood., *Developing Positive Action Policies: Learning from the Experiences of European and North America*, Department for Work and Pensions, (HMSO, Norwich, 2006), p. 66.
[620] *Abdoulaye and others v Regie Nationale des Usines Renault SA* [1999] ECR I-5723. See C. McGlynn, 'Pregnancy, Parenthood and the Court of Justice in Abdoulaye', (2000) *European Law Review*, 654.
[621] *ibid,* para 20.
[622] See C. McGlynn, 'Ideologies of Motherhood in European Community Sex Equality Law' (2000) 6 *European Law Journal* 29.
[623] See, for example, the more holistic approach to gender equality described in Government Equalities Office, *A Fairer Future. The Equality Bill and other Actions to Make Equality a Reality*, (April 2009).
[624] An example of an initiative that has already been used to promote women without the use of positive action was the European Community 'NOW' ('New Opportunities for Women') initiative (1991 – 1994), which aimed at increasing women's skills and to bring them back into the labour market and was funded by the European Social Fund. See also the European Commission Gender Equality Framework Strategy (2001 – 5) which included action to counter gender stereotypes and developing strategies for mainstreaming gender equality as a business and Member State priority. In relation to the US see, for example, the US-based Gender Equality Principles Initiative which helps companies 'achieve greater gender equality and build more productive workplaces' through practical implementation of gender equality principles. See http://www.genderprinciples.org/index.php. Accessed 09.10.10.

minorities and women, both the US and UK may also benefit from developing a more flexible understanding of individual identity and cumulative disadvantage.[625] This more nuanced understanding does not solely necessitate the acknowledgement that an individual may be of mixed ethnic origin, of an underrepresented gender, or have undergone gender reassignment,[626] but also that identity may be made up of a number of different minority characteristics.[627] Further empirical evidence concerning the cumulative effect of several minority characteristics would offer valuable evidence to show that an individual's treatment and opportunities are not simply dependent on whether they are a 'minority' or 'majority' individual, but instead recognise that 'women [and other minorities] are often the victims of multiple discrimination'.[628] The UK Equality Act 2010 demonstrates the use of such an approach in its recognition of direct discrimination on up to two combined grounds.[629] In time this could open the door for recognition and promotion of this within positive action,[630] an approach that may be useful within both US and UK positive action.

### 6.2 New Forms of Positive Protection

As well as changes in the nature of the groups benefited by affirmative action and the way that their interests are protected there are also developments in which groups are formally recognised as needing protection. Legislated positive action for people on the basis of religious affiliation, sexual orientation and age has already significantly broadened the scope of positive action law within the UK on the basis that social exclusion is not fully dealt with by focusing only on race and gender. In the case of *P v S*, for example, the ECJ supported the idea that a more general prohibition of discrimination extending beyond gender and nationality was within the remit of the existing laws.[631] The expansive approach to positive action was reaffirmed by the implementation into national law of the

[625] See R. Blank, 'Tracing the Economic Impact of Cumulative Discrimination', *The American Economic Review*, Vol 95, No. 2, (May 2005), pp. 99 – 103.
[626] See the Equality Act 2006, s. 81 and Equality Act 2010, s. 4 which build on the provisions in the Gender Recognition Act 2004 (c. 7).
[627] See M. Verloo, 'Multiple Inequalities, Intersectionality and the European Union', *European Journal of Women's Studies,* (2006), Vol. 13(3), pp. 211–228 and L. McCall, 'The Complexity of Intersectionality.' *Signs: Journal of Women in Culture and Society,* (2005), Vol 30(3), pp. 1771 – 1880.
[628] Race Equality Directive, 2000/43/EC preamble para 14, (incorporated into UK law by the Race Relations Act 1976 (Amendment) Regulations 2000). See also appendix 2, table 2 showing that minority women in the UK are disproportionately economically inactive or unemployed compared to white women.
[629] Equality Act 2010, s. 14.
[630] However, the Government's decision to keep this under consideration, instead of planning to enact it in April 2011 as originally envisaged, suggests that such a development may be a significant way off.
[631] *P v S and Cornwall County Council* [1996] ECR-I 2143, especially paras 18 – 22.

requirements set out in the Framework Equality Directive which expressly protect individuals from discrimination on the grounds of sexual orientation and religion or belief.[632] European developments are brought together on an equal footing within UK law by the Equality Act 2010 which was specifically designed to increase the consistency and uniformity in how positive action is applied.[633]

The increasingly integrated approach of the UK, exemplified by the Equality Act 2010, is contrasted by the position in the US where affirmative action continues to be based on a narrow set of conceptually disputed principles, the use of which is frequently attacked by popular and judicial hostility, and which cannot be expanded easily to cover additional groups. This is not to say that the scope of affirmative action has been entirely static, as there was some early expansion in groups protected, to include disabled individuals and Vietnam War veterans,[634] and some development in the nature of protection given to already benefited groups.[635] However, these examples have been superseded by relative stagnancy in the scope of the law and also support the claims that white-benefitting affirmative action has been more readily incorporated into the US legal system than minority-promoting measures.[636] US unwillingness to expand affirmative action to new minority groups is not just a factor of the inflexibility of the existing regime but can also be attributed to the popular hostility towards preferences, as shown in the widespread support of Colorado's Amendment 2 which prevented the development of affirmative action preferences based on sexual orientation.[637]

Despite these different approaches to new forms of positive action they may still offer a fruitful avenue for US and UK collaboration. The US may be able to look to the UK for ways to protect a wider range of protected groups by using more cautious, and consequently less antagonistic, forms of action. Reciprocally, the UK, to the degree permitted within evolving European parameters, may be able to import some of the US'

[632] Council Directive, 2000/78, preamble para 12, (incorporated into UK law by the Employment Equality (Sexual Orientation) Regulations 2003 and Employment Equality (Religion or Belief) Regulations 2003.
[633] Department for Communities and Local Government, 'A Framework for Fairness', *op. cit*.
[634] Rehabilitation Act 1973 PL 101-336, 104 Stat 327 (codified at 39 USC ss 791), s. 503, and Vietnam Era Veterans Adjustment Act 1974 PL 92-450, 86 Stat 1074 (codified at 38 USC ss 2012).
[635] For example through the expansion of the scope of the gender equality assurance in Title VII to include sexual harassment and pregnancy leave. See *Merritor Sav. Bank v Vinson* 477 US 57 (1986), and *Nashville Gas Co. v Satty* 434 US 136 (1977).
[636] I. Katznelson, *When Affirmative Action Was White: An Untold History of Racal Inequality in Twentieth Century America*, (W.W. Norton & Co., New York, 2006).
[637] E. Gerstman, *The Constitutional Underclass, Gays, Lesbian and the Failure of Class-Based Equal Protection*, (University of Chicago, Chicago, 1999), p. 103.

more radical forms of action to bolster its own tentative measures across the wide range of protected groups, a trend that may already be evident in the forms of action permitted by the Equality Act 2010.

One potential avenue for development of positive action, which avoids the divisiveness of race and gender-based measures in both the US and UK are class-based actions. Such measures have lready been promoted in the US as more accurately focusing affirmative efforts where there is the greatest need,[638] especially amid the emergence of a new black middle-class.[639] In line with this approach it has been acknowledged that 'an applicant's prior achievement in light of the barriers that he had to overcome' should not be solely relevant to black candidates.[640] Martin Luther King also advocated measures that, whilst benefiting poor African Americans, would also benefit poor white individuals, as illustrated by his proposal for a Bill of Rights for the Disadvantaged.[641] Although class-based measures have been advocated within US affirmative action they have not escaped criticism, including from the growing numbers of middle-class minorities for whom the change would be the most detrimental.[642] Opponents have also argued that the position of middle-class African Americans is more economically fragile than that of their white counterparts and therefore that race continues to be a socially relevant basis on which to found positive action.[643] The US response to class-based affirmative action is revealing in that it suggests that minority protectionism may also be influencing the development of this form of US affirmative action, although such an argument disregards the vociferous and long-standing calls that even the 'poor white male from Appalachia' is not exempt from the reality of race and gender privilege.[644]

In the UK there is not the same history of solidly polarised views concerning positive action or any comparable debate as to the particular need to remedy past race discrimination and its continuing impact as there is in the US. In addition the UK has less

[638] Scalia, in *Richmond v Croson op. cit.* at 526.
[639] See appendix 2, table 3, appendix 3, tables 3 and 4 and especially appendix 4, tables 4 and 5 which illustrate the development of a new African American middle class in terms of educational attainment and economic status.
[640] *De Funis v Odegaard op. cit.,* at 331.
[641] See M.L King, *Why We Can't Wait* (Signet Classics) (Longman Publishing, London, 2000), p. 138.
[642] F. Pincus, *Reverse Discrimination*, *op. cit.* pp. 143 – 144.
[643] B.P. Bowser, *The Black Middle Class: Social Mobility and Vulnerability*, (Lynne Rienner Publishers, Inc., Boulder, 2007). See also, D. Muhammad and B. Ehrenreich, 'From Recession to Depression, The Destruction of the Black Middle Class', *Counter Punch*, (5th August 2009).
[644] C.R. Lawrence, III and M.J. Matsuda, *We Won't Go Back: Making the Case for Affirmative Action*, (Houghton Mifflin Company, Boston, 1997).

entrenched racial classifications, meaning that social reforms have more generally been aimed at eradicating a wider range of problems, such as childhood poverty, as opposed to the narrow focus of US positive action.[645] Therefore, whilst there has been no general positive action requirement or permission for employers to undertake socio-economic-based positive action there has also been no prohibition of such action. Therefore, employers have been able to implement measures to help remedy this form of inequality.[646] However, a key opportunity to place socio-economic considerations alongside non-discrimination and positive action provisions, envisaged by the Equality Act 2010,[647] which placed an obligation on public authorities to consider, when they are making decisions, how their decision might help to reduce inequalities associates with socio-economic disadvantage has been rejected by the coalition government.[648] More studies to show the correlation between minority characteristics and economic disadvantage may make class-based action a more accessible form of affirmative action and whilst there would need to be a fundamental shift in the centrality of race within US affirmative action for this to be successfully adopted, the Equality Act 2010 may represent the sort of mild form of socio-economic action that also may be successfully implemented in the US.

This chapter has shown that whilst significant background differences continue to affect the form of, and reception to, any development in US and UK positive action by selectively borrowing from each other's legal framework, both countries could enjoy a wider frame of reference from which they can choose the affirmative action measures best suited to the country's needs and background context.[649] Cross-referencing between the US and UK in future positive action development could enable the US to revisit the legitimacy and merits of various forms of action on the basis of the UK's experience, whilst the UK, within the framework set out by Europe, could draw from a wider range of positive action measures already tested in the US.[650] The result of this greater degree of cross-referencing may not be a significant convergence in the forms of action employed,

[645] B. Hepple, 'The European Legacy of Brown v Board of Education' *U. Ill L. Rev*, (2006) 605, pp.621 – 2.
[646] See EHRC, *Positive Action Briefing Note*, (July 2009) providing an example of two schemes, p. 13.
[647] Equality Act 2010, s. 1(1).
[648] Announced by Theresa May, the Home Secretary and Minister for Women and Equalities, on 17 November 2010. See http://www.equalities.gov.uk/equality_act_2010.aspx, accessed 03.01.2011.
[649] See T. Trelogan, S. Mazurana, and P. Hodapp, 'Can't We Enlarge the Blanket and the Bed? A Comparative Analysis of Positive /Affirmative Action in the European Court of Justice and the United States Supreme Court' 28 *Hastings Int'l & Comp. Rev*. 39 (2004 – 5).
[650] See D. Caruso, 'Limits of the Classic Method', *op. cit.*, p. 331.

as the measures adapt to their contexts,[651] but it may mean that each country's measures are better suited to their context and therefore able to operate more successfully. For example, the experience of the use of positive action in Northern Ireland could encourage the US to adopt a more focused approach to the most extreme forms of affirmative action, reserving them for contexts of incontestable inequality, or as close to such circumstances as possible. This may be a way of limiting the destructive opposition faced by US affirmative action programmes. In addition, the UK might look to the US for evidence of the relatively ineffective nature of voluntary action, as compared to mandatory action, and use this as a basis for the implementation of mandatory action requirements. The UK could also provide an example to the US of the equivalent treatment of all underrepresented groups under positive action. This 'case study' could help the US to implement a greater degree of comparability across underrepresented groups which, as well as benefitting a wider range of individuals, could also benefit African Americans if it had the effect of decreasing opposition to affirmative from currently non-benefitted groups. These examples seek to demonstrate how the very different trans-Atlantic experiences of affirmative and positive action may offer a useful source of cross-referencing that could shape the future development of the laws in each country.

[651] B. Hepple, 'The European Legacy of Brown' *op. cit.*

## 7. Conclusion

US and UK affirmative action consist of two distinct sets of legal principles which are fundamentally conditioned by the different developmental contexts within which they were founded and which have been instrumental in determining the uses to which the policies have been applied. Subject to some generalised and superficial similarities the differences between US affirmative action and UK positive action are present in the foundations of each country's equal opportunities movement and permeate to the core of the country-specific laws.

This thesis has shown that central to the fundamental differences between US and UK affirmative action is the historical context within which the policies have developed. The social context of affirmative action in the US is greatly influenced by widespread racial segregation and the lasting impact that this has had on race relations, particularly relations between the white majority and African Americans, which have fuelled very specific arguments concerning African American treatment within affirmative action. Consequently, for 'many Americans, the concept of freedom for African Americans … is simply based upon the absence of slavery or segregation' as opposed to more subtle indicators of equality and this has influenced the principles upon which affirmative action has been based.[652] By contrast, UK history has not afforded any single group the unquestionable moral right to compensation for past discrimination and there has been no mass social movement for positive action, as has marked US development of affirmative action. Instead economically-driven European policies form the background framework against which the combined economic and social priorities of UK positive action operate.

A further differentiating impact of each country's history of minority relations is the extent of continuing inequality that affirmative action seeks to redress, including the continuing concentration of minorities in the poorest and least educated sections of society.[653] Not only is the disproportionate representation of minorities among the poorest social groups more pronounced in the US than the UK but minorities are also more numerically significant within the population, thereby affording the black minority an important voice in demanding equal opportunities. This economic and social polarisation has meant that US affirmative action measures are significantly at odds with

[652] C.J. Ogletree, Jr, *All Deliberate Speed*, *op. cit.*, p. 303.
[653] See appendix 1, table 3, appendix 2, table 3, appendix 3, table 3 and appendix 4, tables 4 and 5.

popular sentiment of the protectionist white majority. By contrast the history of race relations within the UK has from its outset been affected by the small size of the minority population and its own ethnic and cultural plurality. The way in which political and judicial opposition to positive action in each country has shaped the law is also fundamentally different in each country because whilst both have faced criticism for their response to positive action the rationales behind their decisions have related to the specific context and legal framework within which the policies exist.

The country-specific contexts for the development of affirmative and positive action have led to the varying interpretation and application of equal opportunities principles. Central among these differences are the US and UK constructions of the principle of equality which have meant that while US arguments that equality requires identical treatment have stunted the progress of affirmative action the UK has increasingly advocated the achievement of substantive equality irrespective of the need for differential treatment. Further principles upon which affirmative action has been based have also been crafted in accordance with contemporary legal, political and social priorities so that the role of concepts such as merit is highly value-laden in this context. The final and arguably most obvious manifestation of the fundamental differences between US and UK affirmative action are the different programmes actually implemented and their success in creating the sought-after equality. Here, the same US hostility that has encouraged the restrictive interpretation of the principles behind affirmative action and opposed the expansion of legal measures also seeks the restriction of both voluntary and mandatory forms of action. UK use of positive action, by contrast, has consistently prioritised voluntary action and while this has been criticised for being too weak an approach to remedy societal inequality it has avoided the divisive debate that overshadows US affirmative action. Therefore whilst US and UK affirmative action can be compared under the same headline terms beneath these they are very different, often polar opposite, sets of legal provisions.

However, in the most recent developments in US and UK affirmative action there may be the possibility for closer cross-referencing between the two countries. This potential is particularly suggested by the new forms of action contained in the Equality Act 2010. The new scope and provisions in the Equality Act may encourage the UK to look to the US for practical guidance of how to implement the new forms of action, and amid the less hostile background attitude towards affirmative action in the UK these comparable forms

of action may be able to be more successfully implemented within the UK than they have been in the US. In addition, EU and UK law may be able to offer 'concrete suggestions'[654] to the US regarding how to develop affirmative action policies which gradually expand in scope and form without exacerbating the polarisation of popular views that has previously hindered the development of affirmative action. Accordingly, the fundamental differences between US and UK positive action may lie at the foundation of possible future cross-referencing between the two countries as the different forms of action find a context within which they can finally thrive.

[654] T. Trelogan, et al, 'Can't We Enlarge the Blanket and the Bed? *op. cit*, p. 93.

## Appendix One: The Current Demographic Make-up of the US and UK

### Table 1: UK Demographic Make-up by Gender and Race

| | | Male | % | Female | % | Total | % |
|---|---|---|---|---|---|---|---|
| All People | | 25,325,926 | 48.7 | 26,715,990 | 51.3 | 52,041,916 | 100 |
| White | British | 22,175,065 | 42.6 | 23,358,676 | 44.9 | 45,533,741 | 87.5 |
| | Irish | 302,543 | 0.6 | 339,261 | 0.7 | 641,804 | 1.2 |
| | Other | 626,682 | 1.2 | 718,639 | 1.4 | 1,345,321 | 2.6 |
| Mixed (White &) | Black Caribbean | 115,929 | 0.2 | 121,491 | 0.2 | 237,420 | 0.5 |
| | Black Africa | 38,736 | 0.1 | 40,175 | 0.1 | 78,911 | 0.2 |
| | Asian | 95,134 | 0.2 | 93,881 | 0.2 | 189,015 | 0.4 |
| | Other Mixed | 75,342 | 0.2 | 80,346 | 0.2 | 155,688 | 0.3 |
| Black | Caribbean | 261,308 | 0.5 | 302,535 | 0.6 | 563,843 | 1.1 |
| | Africa | 231,052 | 0.4 | 248,613 | 0.5 | 479,665 | 0.9 |
| | Other | 45,670 | 0.1 | 50,369 | 0.1 | 96,069 | 0.2 |
| Indian | | 515,431 | 1.0 | 521,376 | 1.0 | 1,036,807 | 2.0 |
| Pakistani | | 362,258 | 0.7 | 352,568 | 0.7 | 714,826 | 1.4 |
| Bangladeshi | | 141,755 | 0.3 | 139,075 | 0.3 | 280,830 | 0.6 |
| Asian | | 132,117 | 0.3 | 109,157 | 0.2 | 241,274 | 0.5 |
| Chinese | | 109,033 | 0.2 | 117,915 | 0.2 | 226,948 | 0.4 |
| Other | | 97,871 | 0.2 | 121,883 | 0.2 | 219,754 | 0.4 |

Source: Office of Population Census and Surveys, 'Census: Great Britain', CEN 01 CM 56 (OPCS, London, 2002), table S101 http://www.statistics.gov.uk/census2001.pdf. Accessed 08.05.09.

### Table 2: Summary of the Demographic Make-up of the UK

| | England | Wales | Scotland | Northern Ireland | United Kingdom |
|---|---|---|---|---|---|
| White | 90.9 | 97.9 | 98 | 99.3 | 92.1 |
| All Ethnic Minority Groups | 9.1 | 2.1 | 2.0 | 0.8 | 7.9 |

Source: Office of Population Census and Surveys, 'Census: Great Britain', CEN 01 CM 56 (OPCS, London, 2002), table UV 01. http://www.statistics.gov.uk/census2001.pdf. Accessed 08.05.09.

**Table 3: US Demographic Make-up by Gender and Race**

| | Number | % |
|---|---|---|
| **Total Population** | 281,421,906 | 100.0 |
| | | |
| **Gender** | | |
| Male | 138,053,563 | 49.1 |
| Female | 143,368,343 | 50.9 |
| | | |
| **Race** | | |
| One race | 274,595,678 | 97.6 |
| White (including Hispanics) | 211,460,626 | 75.1 |
| (White (excluding Hispanics)) | (170,154,808) | (62.6) |
| Black or African American | 34,658,190 | 12.3 |
| American Indian and Alaska Native | 2,475,956 | 0.9 |
| Asian | 10,242,998 | 3.6 |
| Asian Indian | 1,678,765 | 0.6 |
| Chinese | 2,432,585 | 0.9 |
| Filipino | 1,850,314 | 0.7 |
| Japanese | 796,700 | 0.3 |
| Korean | 1,076,872 | 0.4 |
| Vietnamese | 1,122,528 | 0.4 |
| Other Asian category | 1,061,646 | 0.4 |
| Two or more Asian categories | 223,588 | 0.1 |
| Native Hawaiian and Other Pacific Islander | 398,835 | 0.1 |
| Two or more races | 6,826,228 | 2.4 |

**Table 4: US Demographic Make-up: Proportion of Hispanics and Latinos**

| | Number | % |
|---|---|---|
| **Total population** | 281,421,906 | 100.0 |
| | | |
| Hispanic or Latino (of any race) | 35,305,818 | 12.5 |
| Mexican | 20,640,711 | 7.3 |
| Puerto Rican | 3,406,178 | 1.2 |
| Cuban | 1,241,685 | 0.4 |
| Other Hispanic or Latino | 10,017,244 | 3.6 |
| Not Hispanic or Latino | 246,116,088 | 87.5 |

Source for tables 3 and 4: US Census Bureau, *Census 2000 Summary File 1*, Matrices P3, P4, PCT4, PCT5, PCT8 and PCT11. http://www.census.gov/census2001. Accessed 19.01.09.

## Appendix Two: Average Earning of US and UK Workers, by Race and Gender

### Table 1: UK Average Weekly Earnings Comparison by Gender

| | All | | Males | | Females | |
|---|---|---|---|---|---|---|
| **Year** | **Employees ('000s)** | **Mean (£)** | **Employees ('000s)** | **Mean (£)** | **Employees ('000s)** | **Mean (£)** |
| 1993 | 16,146 | 291 | 10,325 | 324 | 5,820 | 232 |
| 1994 | 16,109 | 300 | 10,299 | 335 | 5,810 | 239 |
| 1995 | 16,305 | 310 | 10,394 | 348 | 5,911 | 244 |
| 1996 | 16,439 | 328 | 10,487 | 365 | 5,952 | 265 |
| 1997 | 16,775 | 336 | 10,675 | 374 | 6,100 | 268 |
| 1998 | 17,128 | 350 | 10,947 | 390 | 6,181 | 280 |
| 1999 | 17,448 | 367 | 11,058 | 407 | 6,390 | 298 |
| 2000 | 17,775 | 385 | 11,337 | 426 | 6,438 | 312 |
| 2001 | 17,922 | 401 | 11,359 | 443 | 6,563 | 330 |
| 2002 | 18,036 | 416 | 11,346 | 457 | 6,691 | 348 |
| 2003 | 18,026 | 432 | 11,340 | 475 | 6,686 | 361 |
| 2004 | 18,046 | 448 | 11,298 | 496 | 6,748 | 369 |
| 2005 | 18,328 | 463 | 11,349 | 505 | 6,979 | 396 |

Source: Labour Force Survey, Historical Quarterly Supplement Table 34 - Distribution of gross weekly earnings of full-time employees, as of May 2006. http://www.statistics.gov.uk. Accessed 23.01.09.

### Table 2: UK Economic Activity for Women by Race 2000 - 2002

| | **Economically Inactive (%)** | | **Economically Active (%)** | | | | |
|---|---|---|---|---|---|---|---|
| | Not in labour force | Full time student | Full-time | Part-time | Self-Employed | Unemployed | Unemployment rate |
| White | 24 | 2 | 38 | 28 | 5 | 3 | 4 |
| Black African | 30 | 10 | 34 | 16 | 3 | 9 | 15 |
| Black Other | 27 | 5 | 33 | 22 | 3 | 10 | 15 |
| Indian | 31 | 5 | 37 | 17 | 6 | 4 | 7 |
| Pakistani | 65 | 3 | 14 | 12 | 2 | 4 | 15 |
| Bangladeshi | 78 | 3 | 9 | 6 | 1 | 4 | 21 |
| Chinese | 28 | 16 | 27 | 15 | 11 | 2 | 5 |
| Other | 34 | 8 | 33 | 16 | 4 | 5 | 9 |
| All | 25 | 3 | 38 | 27 | 5 | 3 | 4 |

Source: J. Lindley and A. Dale, 'Ethnic Differences in Women's Demographic Family Characteristics and Economic Profiles, 1992 – 2002', *Labour Market Trends*, Vol. 112, No. 4, (April 2004).

**Table 3: US Average Money Income Comparison by Race**

| **Race and Hispanic Origin** | **2001** | | **2002** | |
|---|---|---|---|---|
| | Workers (‘000s) | Median Income ($) | Workers (‘000s) | Median Income Estimate ($) |
| All Races | 109,297 | 42,900 | 111,278 | 42,409 |
| White | 80,818 | 47,041 | 81,166 | 46,900 |
| Black | 13,315 | 29,939 | 13,778 | 29,177 |
| Asian and Pacific Islander | 4,071 | 54,488 | 4,079 | 52,285 |
| Hispanic | 10,499 | 34,099 | 11,339 | 33,103 |

‘Money Income’ includes: earnings, unemployment compensation, social security, public assistance, interest, dividends, child support etc, before deductions.

Source: US Census Bureau, *Household Income by Race and Hispanic Origins. Income in the United States: 2002*, (September 2003), table 1, pp. 3 – 5. http://www.census.gov/census2001. Accessed 19.01.09.

**Table 4: US Average Income Comparison by Gender of Full-time Workers**

| **Gender** | **2005** | | **2006** | |
|---|---|---|---|---|
| | Workers (‘000s) | Median Income ($) | Workers (’000s) | Median Income Estimate ($) |
| Men | 61,500 | 42,743 | 63,055 | 42,261 |
| Women | 43,351 | 32,903 | 44,663 | 32,515 |

Source: US Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2006* (Issued August 2007), table I, p. 5. http://www.census.gov/census2006. Accessed 19.01.09.

## Appendix Three: Educational Attainment in the US and UK by Race and Gender

### Table 1: UK Gender and Highest Level of Qualification

| | **Male (aged 16 – 74 years)** | **Female (aged 16 – 74 years)** | **All (aged 16 – 74 years)** |
|---|---|---|---|
| All People | 18,504,583 | 19,102,855 | 37,607,438 |
| No Qualification | 5,096,416 | 5,840,626 | 10,937,042 |
| Level 1 | 3,106,513 | 3,123,520 | 6,230,033 |
| Level 2 | 3,380,122 | 3,907,952 | 7,288,074 |
| Level 3 | 1,524,265 | 1,585,870 | 3,110,135 |
| Level 4/5 | 3,718,729 | 3,714,233 | 7,432,962 |
| Other Qualifications - Level Unknown | 1,678,538 | 930,654 | 2,609,192 |

Source: Office of Population Census and Surveys, 'Census: Great Britain', CEN 01 CM 56 (OPCS, London, 2002), table S0105. http://www.statistics.gov.uk/census2001.pdf. Accessed 08.05.09.

### Table 2: UK Race and Participation in Higher Education

| | **Total** | **White** | **Total Minority** | **Black & Black British** | **Asian** | **Chinese & Other Asian** | **Mixed & Other** |
|---|---|---|---|---|---|---|---|
| Total in UK (%) | 52,941,916 (100%) | 47,520,866 (90.9%) | 5,421,050 (9.1%) | 1,139,577 (2.4%) | 2,273,737 (4.5%) | 446,702 (0.8%) | 661,034 (1.4%) |
| Total in HE (%) | 829,795 (100%) | 688,520 (83%) | 141,270 (17%) | 46,695 (5.6%) | 47,830 (5.8%) | 18,810 (2.3%) | 27,935 (3.6%) |
| Postgrd (%) | 166,430 (100%) | 139,160 (83.6%) | 27,270 (16.4%) | 7,960 (4.8%) | 9,560 (5.7%) | 4,330 (2.6%) | 5,420 (3.3%) |
| Undergrd (%) | 663,365 (100%) | 549,365 (82.8%) | 114,000 (17.2%) | 38,735 (5.8%) | 38,270 (5.8%) | 14,480 (2.2%) | 25,205 (3.8%) |

Source: Higher Education Statistics Agency, *First year UK domiciled HE students by qualification aim, mode of study, gender and ethnicity 2007/08*, (2009), table 10b. Note: contains some rounding.

**Table 3: US Educational Attainment by Gender and Race**

| **Highest Educational Level Reached** | **Race/ Ethnicity (%)** | | | | **Gender (%)** | |
|---|---|---|---|---|---|---|
| | White, non-Hispanic | Asian | Black, non-Hispanic | Hispanic | Male | Female |
| No high school diploma | 11.5 | 14.4 | 21.1 | 43.0 | 15.8 | 16.0 |
| High school diploma | 34.1 | 22.1 | 35.3 | 27.9 | 31.9 | 34.3 |
| Some College | 26.3 | 19.6 | 27.0 | 18.4 | 24.5 | 26.1 |
| Bachelor's Degree | 18.6 | 28.7 | 11.5 | 7.3 | 17.8 | 16.3 |
| Advanced Degree | 9.5 | 15.2 | 5.1 | 3.3 | 10.0 | 7.3 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

Source: Chronicle of Higher Education (2002); US Census Bureau, 'The Big Payoff: Educational Attainment and Synthetic Estimates of Work-Life Earnings', *Current Population Studies* (P23 – 210) (2001) http://www.census.gov/census2001. Accessed 19.01.09.

**Table 4: US Participation in Higher Education: Changes over Time**

| | **Individuals who have attended Higher Education (%)** | |
|---|---|---|
| | 1978 | 2000 |
| Race/ Ethnicity | | |
| White | 24.5 | 29.6 |
| Black | 11.8 | 17.5 |
| Hispanic | 9.6 | 9.7 |
| White/ Black[655] | 2.1 | 1.7 |
| White/ Hispanic | 2.6 | 3.1 |
| | | |
| Gender | | |
| Male | 26.0 | 27.9 |
| Female | 20.6 | 30.1 |
| Male/ Female[656] | 1.3 | 0.9 |

Source: W.B. Harvey, *Minorities in Higher Education 2001 – 2002: Nineteenth Annual Status Report*, (American Council on Education, Washington D.C., 2002).

[655] The white graduation rate is divided by that of the black or Hispanic population. A ration greater than 1.0 indicated a white advantage, a ratio of less that 1.0 indicates a black or Hispanic advantage

[656] The male graduation rate is divided by that of the female population. A ration of greater than 1.0 indicates male advantage; a ration of less than 1.0 indicates a female advantage.

## Appendix Four Occupation Type in the US and UK by Race and Gender

### Table 1: UK Occupation Type by Gender of Economically Active People

| Occupation | Male (%) | Female (%) | Total (%) |
|---|---|---|---|
| Manager and Senior Officials | 10.0 | 5.1 | 15.1 |
| Professionals | 6.6 | 4.6 | 11.2 |
| Associate Professional /Technical | 7.3 | 6.5 | 13.8 |
| Administrative and Secretarial | 2.9 | 10.4 | 13.3 |
| Skilled Trades | 10.5 | 1.1 | 11.6 |
| Sales, Customer & Personal Services | 2.3 | 11.3 | 14.6 |
| Plant and Machine Operatives | 7.1 | 1.4 | 8.5 |
| Elementary | 6.4 | 5.5 | 11.9 |

Source: Office of Population Census and Surveys, 'Census: Great Britain', CEN 01 CM 56 (OPCS, London, 2002), table S033. http://www.statistics.gov.uk/census2001.pdf. Accessed 08.05.09.

### Table 2: UK Economic Activity by Ethnic Group

| | All (16 – 74yrs) | Manager/ Senior Role | Professional | Associate & Technical | Admin Secretarial | Skilled Trades | Personal Services | Sales & Customr Services | Plant Operative | Elementary |
|---|---|---|---|---|---|---|---|---|---|---|
| All | 100 | 15.11 | 11.17 | 13.78 | 13.32 | 11.64 | 6.91 | 7.67 | 8.51 | 11.78 |
| White | 93.08 (100) | 13.98 (15.02) | 10.21 (10.97) | 12.89 (13.79) | 12.40 (13.33) | 11.10 (11.92) | 6.48 (6.97) | 6.98 (7.50) | 7.90 (8.50) | 11.01 (11.83) |
| Asian | 3.44 (100) | 0.52 (15.24) | 0.52 (15.22) | 0.36 (10.53) | 0.43 (12.54) | 0.25 (7.27) | 0.13 (3.88) | 0.40 (11.56) | 0.41 (11.92) | 0.41 (11.86) |
| Black | 1.94 (100) | 0.19 (9.63) | 0.22 (11.14) | 0.33 (17.19) | 0.33 (16.17) | 0.15 (7.44) | 0.19 (10.19) | 0.16 (8.18) | 0.13 (6.64) | 0.26 (13.41) |
| Chinese | 0.41 (100) | 0.07 (17.00) | 0.07 (18.10) | 0.05 (12.86) | 0.04 (9.53) | 0.07 (17.39) | 0.001 (2.51) | 0.04 (8.65) | 0.001 (2.49) | 0.47 (11.47) |
| Mixed | 0.76 (100) | 0.10 (13.18) | 0.09 (13.10) | 0.33 (16.95) | 0.31 (13.55) | 0.02 (7.77) | 0.02 (7.42) | 0.16 (10.05) | 0.13 (5.67) | 0.26 (12.37) |
| Other | 0.37 (100) | 0.06 (16.31) | 0.05 (13.91) | 0.08 (20.02) | 0.04 (9.78) | 0.03 (6.62) | 0.03 (8.62) | 0.03 (7.23) | 0.02 (4.62) | 0.05 (14.03) |

Table shows the percentage of individuals from major racial groups within different forms of economic activity. Non-bracketed numbers show the percentage of individuals as a percentage of the UK population; bracketed numbers show the percentage of individuals within each ethnic group as a percentage of that ethnic group to enable comparison between ethnic groups and show relative over or under-representation of groups in particular employment sectors.

Source: Office of Population Census and Surveys, 'Census: Great Britain', CEN 01 CM 56 (OPCS, London, 2002), table S109 http://www.statistics.gov.uk/census2001.pdf. Accessed 08.05.09.

**Table 3: UK Ethnicity and Economic Activity of People (%)**

| | All | Full time | Part time | Self Emplyd | Unemp lyd | Student | Retired | Other |
|---|---|---|---|---|---|---|---|---|
| All | 100 | 40.55 | 11.78 | 8.28 | 3.35 | 2.57 | 13.60 | 9.63 |
| White | 91.76 | 37.8 | 11.09 | 7.68 | 2.86 | 2.15 | 13.14 | 8.26 |
| Mixed | 0.86 | 0.31 | 0.80 | 0.60 | 0.50 | 0.70 | 0.40 | 0.12 |
| Asian | 4.26 | 1.31 | 0.37 | 0.36 | 0.22 | 0.18 | 0.24 | 0.85 |
| Black inc African | 2.19 | 0.85 | 0.2 | 0.15 | 0.19 | 0.13 | 0.16 | 0.26 |
| Chinese & other | 0.95 | 0.30 | 0.07 | 0.09 | 0.04 | 0.05 | 0.04 | 0.15 |

Source: Information extracted from Office of Population Census and Surveys, 'Census: Great Britain', CEN 01 CM 56 (OPCS, London, 2002), amended version of table T13.
http://www.statistics.gov.uk/census2001.pdf. Accessed 08.05.09.

**Table 4: US Occupation Type by Race**

| | Total Workers ('000s) | Full time ('000s) | Part time ('000s) | Unemployed ('000s) |
|---|---|---|---|---|
| All | 154,286 (100%) | 120,030 (77.8%) | 25,332 (16.4%) | 8,924 (5.8%) |
| White | 125,635 (100%) | 97,724 (77.8%) | 21,401 (17%) | 6,510 (5.2%) |
| Black inc African | 17,740 (100%) | 13,653 (76.9%) | 2,299 (12.9%) | 1,788 (10.1%) |
| Asian | 7,202 (100%) | 5,923 (82.2%) | 994 (13.8%) | 285 (4.0%) |
| Hispanic | 22,025 (100%) | 17,298 (78.5%) | 3,048 (13.8%) | 1,679 (7.6%) |

Source: Labor Force Statistics from the Current Population Survey, 'Employed and Unemployed, full and part-time workers by age, sex, race, and Hispanic or Latino ethnicity', table 8 (2008). See http://www.bls.gov/cps/cps_aa2008.htm. Accessed 21.10.09.

**Table 5: US Occupation Type by Gender and Race**

| | Women (%) | African American (%) | Hispanic (%) |
|---|---|---|---|
| Population Overall | 50.9 | 12.3 | 12.5 |
| Category of Occupation: | | | |
| Management, business & financial occupations | 42.7 | 7.0 | 7.6 |
| Legal occupations (inc. lawyers, judges, magistrates and other judicial workers) | 38.3 | 4.8 | 4.9 |
| Service Occupations | 57.2 | 15.4 | 20.6 |
| Sales and Office occupations | 63.0 | 11.2 | 12.4 |
| Natural Resources, Construction and Maintenance occupations | 4.4 | 6.8 | 24.2 |
| Production and Transportation occupations | 21.4 | 13.5 | 21.1 |

Source: Labor Force Statistics from the Current Population Survey, 'Employment by detailed occupation, sex, race, and Hispanic ethnicity, 2008 annual averages'. See http://www.bls.gov/cps/cps_aa2008htm. Accessed 21.10.09.

## Appendix Five: Political Representation in the US and UK by Race and Gender

### Table 1: UK Female Members of Parliament following General Elections

| Year | Female MPs | % | Con | Lab | Lib | Others |
|---|---|---|---|---|---|---|
| 1945 | 24 | 3.8 | 1 | 21 | 1 | 1 |
| 1950 | 21 | 3.4 | 6 | 14 | 1 | - |
| 1961 | 17 | 2.7 | 6 | 11 | - | - |
| 1955 | 24 | 3.8 | 10 | 14 | - | - |
| 1959 | 25 | 4 | 12 | 13 | - | - |
| 1964 | 29 | 4.6 | 11 | 18 | - | - |
| 1966 | 26 | 4.1 | 7 | 19 | - | - |
| 1970 | 26 | 4.1 | 15 | 10 | - | 1 |
| 1974 (Feb) | 23 | 3.6 | 9 | 13 | - | 1 |
| 1974 (Oct) | 27 | 4.3 | 7 | 18 | - | 2 |
| 1979 | 19 | 3 | 8 | 11 | - | - |
| 1983 | 23 | 3.5 | 13 | 10 | - | - |
| 1987 | 41 | 6.3 | 17 | 21 | 2 | 1 |
| 1992 | 60 | 9.2 | 20 | 37 | 2 | 1 |
| 1997 | 120 | 18.2 | 13 | 101 | 3 | 3 |
| 2001 | 118 | 17.9 | 14 | 95 | 5 | 4 |
| 2005 | 128 | 20 | 17 | 98 | 10 | 3 |
| 2010 | 143 | 22 | 50 | 80 | 7 | 6 |

Source: House of Commons Research Papers 01/75 & 05/33.
http://www.parliament.uk/commons/lib/research/briefings/dnpc/05057.pdf. Accessed 01.02.09. 2010 information collated from the list of MPs at www.parliament.uk/mps-lords-and-offices/mps/. Accessed 06.08.10.

### Table 2: UK Ethnicity of Members of Parliament following General Elections

| Election Year | 1987 | 1992 | 1997 | 2001 | 2005 | 2010 |
|---|---|---|---|---|---|---|
| White MPs | 647 (99.4%) | 645 (99.1%) | 650 (98.6%) | 647 (98.2%) | 631 (97.7%) | 622 (95.8%) |
| Non-White MPs | 4 (0.6%) | 6 (0.9%) | 9 (1.4%) | 12 (1.8%) | 15 (2.3%) | 27 (4.2%) |
| Total MPs | 651 (100%) | 651 (100%) | 659 (100%) | 659 (100%) | 646 (100%) | 649 (100%) |

Source: D. Butler and D. Kavanagh, 'The British General Election of 1997: Operation Black Vote', House of Commons Library Research Paper 05/33 Notes
http://www.parliament.uk/commons/lib/research./notes/sn-SG-01528.pdf. Accessed 01.02.09.
2010 information collated from information at www.parliament.uk/about/faqs/house-of-commons-faqs/members/faqs-page2/. Accessed 06.08.10.

**Table 3: US Political Representation by Gender**

| Congress and Year | | Male | % | Female | % | Total |
|---|---|---|---|---|---|---|
| **Representatives** | | | | | | |
| 103rd | 1993 | 388 | 89.2 | 47 | 10.8 | 435 |
| 104th | 1995 | 388 | 89.2 | 47 | 10.8 | 435 |
| 106th | 1999 | 379 | 87.1 | 56 | 12.9 | 435 |
| 107th | 2001 | 376 | 86.4 | 59 | 13.6 | 435 |
| 108th | 2003 | 376 | 86.4 | 59 | 13.6 | 435 |
| 109th | 2005 | 369 | 85.0 | 65 | 15.0 | 434 |
| 110th | 2007 | 361 | 83.0 | 74 | 17.0 | 435 |
| 111th | 2010 | 364 | 82.7 | 76 | 17.3 | 441 |
| **Senators** | | | | | | |
| 103rd | 1993 | 93 | 93 | 7 | 7 | 100 |
| 104th | 1995 | 92 | 92 | 8 | 8 | 100 |
| 105th | 1999 | 91 | 91 | 9 | 9 | 100 |
| 106th | 2001 | 87 | 87 | 13 | 13 | 100 |
| 107th | 2003 | 86 | 86 | 14 | 14 | 100 |
| 108th | 2005 | 86 | 86 | 14 | 14 | 100 |
| 109th | 2005 | 86 | 84 | 14 | 16 | 100 |
| 110th | 2007 | 84 | 84 | 16 | 16 | 100 |
| 111th | 2010 | 83 | 83 | 17 | 17 | 100 |

Source: 'Members of Congress: Selected Characteristics', table 308, http://www.census.gov/compendia/statab/tables/308/pdf. Accessed 21.10.09. For figures relating to the 111th Congress' see J.E. Manning, 'Membership of the 111th Congress: A Profile', Congressional Research Service (4th February 2010).

**Table 4: US Political Representation by Race**

| Congress and Year | | White | % | Black | % | Asian & Pacific Islander | % | Hispanic | % | Native Americans | % | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Representatives** | | | | | | | | | | | | |
| **Congress** | **Year** | | | | | | | | | | | |
| 103rd | 1993 | 373 | 85.8 | 38 | 8.7 | 7 | 1.6 | 17 | 3.9 | - | 0 | 435 |
| 104th | 1995 | 371 | 85.3 | 40 | 9.2 | 7 | 1.6 | 17 | 3.9 | - | 0 | 435 |
| 106th | 1999 | 371 | 85.3 | 39 | 9.0 | 6 | 1.4 | 19 | 4.4 | - | 0 | 435 |
| 107th | 2001 | 370 | 85.1 | 39 | 9.0 | 7 | 1.6 | 19 | 4.4 | - | 0 | 435 |
| 108th | 2003 | 368 | 84.6 | 39 | 9.0 | 5 | 1.2 | 22 | 5.1 | 1 | .3 | 435 |
| 109th | 2005 | 364 | 83.9 | 42 | 9.7 | 4 | 0.9 | 23 | 5.3 | 1 | .3 | 434 |
| 110th | 2007 | 363 | 82.7 | 42 | 9.6 | 4 | 1.1 | 23 | 6.2 | 1 | .3 | 439 |
| 111th | 2010 | 362 | 82.1 | 41 | 9.3 | 10 | 2.3 | 28 | 6.4 | 1 | .3 | 441 |
| **Senators** | | | | | | | | | | | | |
| 103rd | 1993 | 96 | 96 | 1 | 1 | 2 | 2 | - | 0 | 1 | 1 | 100 |
| 104th | 1995 | 96 | 96 | 1 | 1 | 2 | 2 | - | 0 | 1 | 1 | 100 |
| 106th | 1999 | 97 | 97 | - | 0 | 2 | 2 | - | 0 | 1 | 1 | 100 |
| 107th | 2001 | 97 | 97 | - | 0 | 2 | 2 | - | 0 | 1 | 1 | 100 |
| 108th | 2003 | 97 | 97 | - | 0 | 2 | 2 | - | 0 | 1 | 1 | 100 |
| 109th | 2005 | 94 | 94 | 1 | 1 | 2 | 2 | 2 | 2 | 1 | 1 | 100 |
| 110th | 2007 | 95 | 95 | 1 | 1 | 2 | 2 | 3 | 3 | - | 0 | 100 |
| 111th | 2010 | 96 | 96 | 1 | 1 | 2 | 2 | 1 | 1 | - | 0 | 100 |

Source: 'Members of Congress: Selected Characteristics', table 308, http://www.census.gov/compendia/statab/tables/308/pdf. Accessed 21.10.09. For figures relating to the 111th Congress' see J.E. Manning, 'Membership of the 111th Congress: A Profile', Congressional Research Service (4th February 2010).

**Table of Cases**

*Jepson v The Labour Party* [1996] IRLR 116 ET.
*Johnson v Transport Agency* 480 US 616, 107 S. C. 1442, 94 L. Ed. 2d 615 (1987).
*Johnston v Chief Constable of the RUC* [1986] ECR I-1651.
*Kalanke v Frieie Hasestadt Breman* Case C-450/93 [1995] ECR I-3051.
*Katzenbach v Morgan* 384 US 641 (1966).
*Kent County Council v Mingo* [2000] IRLR 90, EAT.
*Keyes v School District No. 1 Denver, Colorado* 413 US 189 (1972).
*Knight v Nassau County Civil Service Commission* 649 F. 2d. 157 (2nd Cir), cert denied, 454 U.S. 818 (1981).
*Korematsu v United States* 323 U.S. 214 (1944).
*Kotch v Board of River Port Pilot Commissioners* 330 US 552 (1947).
*Kromnick v School District of Philadelphia* 739 F.2d 894 (3rd Cir. 1984).
*Lau v Nichols* 414 US 563 (1974).
*League of Latin American Citizens v Perry* 548 US 399 (2006).
*Lommers v Minister van Landbouw Natuurbeheer in Visserij* (Case C-476/99) [2002] ECR I – 2891.
*London Borough of Lambeth v CRE* [1990] IRLR 230 (CA).
*London Clubs Management Ltd v Hood* [2001] IRLR 719 EAT.
*Loving v Virginia* 388 US 1 (1967).
*Lutheran Church Missouri Synod v FCC* 141 F.3d 344 (D.C. Cir. 1998).
*Marschall v Land Nordhein-Westfalen* Case C-490/95 [2001] ECR 45; [1998] IRLR 39.
*Martin v Wilks* 490 US 755 (1989).
*McDonald v Santa Fe Transportation Co* 427 US 273 (1976).
*McLaughlin v Florida* 379 US 184 (1964).
*Merritor Sav. Bank v Vinson* 477 US 57 (1986).
*Messer v Meno* 130 F.3d 130 (5th Cir. 1997).
*Miller v Johnson* 515 US 900 (1995).
*Milliken v Bradely* 418 US 717 (1974).
*Minnick v California Department of Corrections* 452 US 105 (1981).
*Missouri v Jenkins* 515 US 70 (1995).
*Morse v Wiltshire County Council* [1998] IRLR 352.
*Nashville Gas Co. v Satty* 434 US 136 (1977).
*Northcross v Board of Education of Memphis City Schools* 412 US 427 (1973).
*NTL Group Ltd v Difolco* [2006] EWCA Civ 1508.
*Paradise v Prescott* 767 F.2d 1514, 1533 (1985).
*Parents Involved in Community Schools v Seattle School District No. I* Nos 05-908, 426 F.3d 1162 and 05-915, 426 F.3d 513 (2007).
*Pasadena City Board of Education v Spangler* 427 US 242 (1976).
*Patterson v McLean Credit Union* 491 US 164 (1989).
*Plessy v Fergusson* 163 US 537 (1896).
*Podberesky v Kirwan* 38 F. 3d 147 (4th Cir. 1994).
*Price Waterhouse v Hopins* 490 US 228 (1989).
*R (Hooper) v Work and Pensions Secretary* [2005] 1 WLR 1681.
*R (Wilkinson) v Inland Revenue Commissioners* [2005] 1 WLR 1718.
*Re Baden and Others (Landesanwalt beim Staatsgerichshof des Landes Hessen and Hessischer Ministerpasident Intervening* (2000).
*Reeves v Co., Inc*., 446 F.3d 637 (6th Cir. 2006).
*Regents of the University of California v Bakke* 438 US 265 (1978).
*Roberts v Birds Eye Walls Limited* [1993] ECR I-5579.
*Romer v Evans* 517 US 620 (1996).
*Shah v The Commissioners of HM Customs and Excise ET Case* 2302040/98.

*Shaw v Reno* 113 S Ct. 2816 (1993).
*Stec v UK* (2006) (App Nos. 6573/01 and 65900/01).
*Stauder v City of Ulm* Case C-29/69 [1969] ECR 419.
*Swann v Charlotte-Mecklenberg Board of Education* 402 US 1 (1971).
*Tangren v Wackenhut Services*, Inc. 480 F. Supp 539 (D. Nev), (aff'd No. 79 – 3796) (9th Cir. Oct. 5, 1981).
*Tanja Kreil v Bundesrepublik Deutschland* [2000] ECR I-69.
*Taxman v Piscataway Township Board of Education* 91 F 3d. 1547 (3rd Cir. 1996).
*Texas Department of Community Affairs v Burdine* 450 US 248 (1981).
*The Queen v Ministry of Agriculture, Fisheries and Food ex parte Hedley Thomas (Ireland) Ltd* [1996] ECR I-2553.
*Thlimmenos v Greece* ECHR 2000-14. No. 34369/97.
*Thompson v School Board of City of Newport News* 465 F. 2d 83 (1972).
*Thornburg v Gingles* 478 US 30 (1986).
*Totterham Green Under-Fives' Centre v Marshall* (No. 2) [1991] IRLR 162 (EAT).
*Trimble v Gorden* 430 US 762 (1977).
*Tysinger v. Police Department of the City of Zanesville* 463 F.3d 569 (6th Cir. 2006).
*United Jewish Organizations v Carey* 430 US 144 (1977).
*United Steelworkers of America v Weber* 443 US 193 (1979).
*US v Paradise* 480 US 149 (1987).
*Ward's Cove Packing v Antonio* 490 US 642 (1989).
*Washington v Davis* 426 US 229 (1976).
*Washington v Seattle School District No. 1* 458 US 457 (1982).
*Webb v EMO Air Cargo (UK) Ltd* [1994] ICR 700 ECJ and [1995] ICR 1021 HL.
*White v Gates, Secretary of the Navy* 253 F.2d 868 (1958).
*Wittmer v Peters* 87 F.3d (7th Cir. 1996) cert denied 519 US 1111 (1997).
*Wygant v Jackson Board of Education* 476 US 267 (1986).

**Table of Legislation, Secondary Legislation Statutory Instruments and Official Publications**


Cabinet Office, *Policy Appraisal for Equal Treatment Guidelines* (1998).
Cabinet Office, *Delivering a Diverse Civil Service, A 10-Point Plan* (2005).
Cabinet Office, *Promoting Equality, Delivering Diversity, A Strategy for the Civil Service* (2005).
Commission for Racial Equality, *Code of Practice for the Elimination of Racial Discrimination and the Promotion of Equality of Opportunity* (1984).
Commission for Racial Equality, *Code of Practice on Racial Equality in Employment* (2006).
Committee for the Elimination of Racial Discrimination, *General Recommendation XXI*, (48th Session, 1996).
Discrimination Law Review, *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*' (June 2007).
Council Recommendation 694/96 EC of 2 December 1996 on the balanced participation of women and men in the decision-making process (OJ L319, 10 December 1996, P. 0011-0015).
Civil Rights Act 1964, 83-352 (78 Stat 241).
Disability Discrimination Act 1995 (c. 50).
Disability Discrimination Act 2005 (c. 13).
Disability Discrimination Act 1995 (Amendment) Regulations 2004 SI 2003/1673.
Employment Equality Directive, 2000/78/EC.
Equal Employment Opportunities Act of 1972, (Public Law 92-261).
Equal Opportunities Commission, *Response to the Discrimination Law Review Green Paper 'A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*' (HMSO, London, September 2007).
Equal Opportunities (Age) Regulations 2006 SI 2006/1031.
Equal Opportunities (Religious Beliefs) Regulations 2003 SI 2003/1160.
Equal Opportunities (Sexual Orientation) Regulations 2003 SI 2003/1161.
Equal Pay Act 1970 (c. 41).
Equal Pay Directive 75/117/EEC.
Equal Treatment Directive 76/207/EEC.
Equal Treatment (Amendment) Directive, 2002/73/EC.
Equality Act (Commencement No. 1) Order 2006, SI 2006/1082 (c. 36).
Equality Act (Commencement No. 1) Order 2010, SI 2010/1736 (c. 91).
Equality Act (Commencement No. 2) Order 2010, SI 2010/1996 (c. 104).
Equality Act (Commencement No. 3) Order 2010, SI 2010/2191 (c. 109).
Equality Act (Commencement No. 4, Savings, Consequential, Transition, Transitory and Incidental Provisions and Revocation) Order 2010, SI 2010/2317 (c. 112).
Equality Act 2006 (c. 3).
Equality Act 2010 (c. 15).
Equality and Human Rights Commission, *Positive Action Briefing Note,* (July 2009).
European Commission, *Communication from the Commission to the European Parliament and the Council on the Interpretation of the Judgment of the Court of Justice on 17 October 1995 in Case C-450/93, Kalanke v Freie Hansestadt Breman*, COM(96) 88 final.
Equality Commission, *Monitoring Report, No 19, A Profile of the Northern Ireland Workforces, Summary of Monitoring Returns*, (2008).
European Commission, *The Business Case for Diversity European Commission: Good*

*Practices in the Workplace* (2005).
Equality Commission for Northern Ireland, *Code of Practice Fair Employment In Northern Ireland*, (2003).
European Convention on Human Rights and Fundamental Freedoms, of 4th November 1950 (plus the Protocols).
European Council, Recommendation on the Promotion of Positive Action for Women 84/0635/EEC OJ L 331, 19/12/1984.
European Framework Convention for the Protection of National Minorities, (February 1995).
Executive Order 10730, 23rd September 1957 (22 Fed Reg 8423).
Executive Order 10925, 6th March 1961 (26 Fed Reg 1977).
Executive Order 11246, 24th September 1965 (30 Fed Reg 12319).
Executive Order 11375, 13th October 1967 (32 Fed Reg 14303).
Executive Order 11478, 8th August 1969 (34 Fed Reg 12955).
Fair Employment (Northern Ireland) Act 1989 (c. 32).
Fair Employment and Treatment (Northern Ireland) Order SI 1998 No. 3162 (N121).
Framework Convention for the Protection of National Minorities, ETS 157.
Framework Convention for the Protection of National Minorities: Explanatory Report (CoE Press, Strasbourg, 1995).
Framework Directive 2000/60/EC.
Gender Equality Duty Code of Practice (November 2006).
Gender Equality In the Provision of Goods and Services Directive 2004/113/EC
Government Equalities Office, *A Fairer Future. The Equality Bill and Other Action to Make Equality a Reality*, (April 2009).
Government Equalities Office, *Equality Bill: Making it Work. Policy Proposals for Specific Duties. A Consultation*, (June 2009).
HM Government, *The Coalition Agreement: our Programme for Government*, (Cabinet Office, London, May 2010).
Higher Education Guidelines to Executive Order 11246 (Office for Civil Rights, Washington D.C., October 1972).
House of Commons Information Office *Women in the House of Common*', Information Factsheet M4, (June 2008).
Local Government Act 1988 (c. 9).
Local Government Best Value (Exclusion of Non-Commercial Considerations) Order 2001 SI 2001/99.
Northern Ireland Act 1998 (c. 47).
Police (Northern Ireland) Act 2000 (c. 32).
Pregnancy Discrimination Act 1978 (P.L. 95-555, 92 Stat. 2076).
Race Equality Directive 2000/43/EC.
Race Equality Directive (Explanatory Memorandum).
Race Relations Act 1968 (c. 71).
Race Relations Act 1976 (c. 34).
Race Relations Act 1976 (Amendment) Regulations 2008 SI 2003/1626.
Race Relations (Amendment) Act 2000 (c. 34).
Sex Discrimination Act 1975 (c. 65).
Sex Discrimination Act 1975 (Amendment) Regulations 2008 SI 2008/656.
Sex Discrimination (Election Candidates) Act 2002 (c. 2).
Statutory Code of Practice on the Disability Equality Duty (England and Wales), (2006).
Statutory Code of Practice on the Duty to Promote Race Equality' (May 2002).
Statutory Code of Practice on Racial Equality in Employment (November 2005).
The Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660.

The Employment Equality (Age) Regulations 2006 SI 2006/1031.
The Employment Equality (Age) Regulations (Amendment) Regulations 2008 SI 2008/573.
The Employment Equality (Sexual Orientation) Regulations 2003 SI 2003/1661.
The Treaty of Amsterdam 1997.
The Treaty of Rome 1957.
The Constitution on the United States of America, with amendments.
UN Convention on the Elimination of All Forms of Discrimination against Women, 1979.
UN Convention on the Elimination of All Forms of Racial Discrimination, 1996.
UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res. 47/135 (1992).
Vietnam Era Veterans Readjustment Assistance Act, 1974, 38 US Code Chapter 42.
White Paper, *Modernising Government* Cmnd 4310 (HMSO 1999),
White Paper, *Racial Discrimination*, Cmnd 6234 (HMSO, 1975).
White Paper, *Competing for Quality*, Cmnd 1730 (HMSO, 1991).

**Bibliography**

**Books**


Alston, P., Heenan, J. and Bustelo, M. (eds.), *The EU and Human Rights*, (Oxford University Press, Oxford, 1999).

Anderson, T.H., *The Pursuit of Fairness: A History of Affirmative Action*, (Oxford University Press, Oxford, 2004).

Appelt, E. and Jarosch, M. (eds.), *Combating Racial Discrimination: Affirmative Action as a Model for Europe*, (Berg Publishers, Oxford, 2000).

Appiah, K. A. and Gutman, A., *Color Conscious: The Political Morality of Race*, (Princeton University Press, New Jersey, 1996).

Armor, D.J., *Forced Justice, School Desegregation and the Law*, (Oxford University Press, New York and Oxford, 1995).

Baer, J.A., *Women in American Law: The Struggle toward Equality from the New Deal to the Present* (2nd edn., Holmes and Meier, New York, 1996).

Bagehot, W. (auth) and Taylor, M. (ed.), *The English Constitution, Oxford World's Classics*, (1st pub. 1873) (rev edn., Oxford University Press, Oxford, 2001).

Barrett, K.H. and George, W.H. (eds.), *Race, Culture, Psychology and Law: Five Challenges for Culturally Competent Professionals*, (Sage Publications Inc., California, 2005).

Bergmann, B.R., *In Defense of Affirmative Action*, (Basic Books, Inc., New York, 1996).

*Beyond the Rodney King Story. An Investigation of Police Conduct in Minority Communities*, (Northeastern University Press, Boston, 1995).

Birkinshaw, P., *European Public Law,* (Butterworths Lexis Nexis, London, 2003).

Bloch, F., *Anti Discrimination Law and Minority Employment Recruitment Practices and Regulatory Constraint*, (University of Chicago Press, Chicago, 1994).

Bogdanor, V., *The New British Constitution*, (Hart Publishing, London, 2009).

Boger, J. and Orfield, G. (eds.), *School Resegregation. Must the South Turn Back?*, (University of North Carolina Press, NC, 2005).

Bowen, W.G. and Bok, D., *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*, (Princeton University Press, New Jersey, 1998).

Bowen, W., Kurzweil, M. and Tobin. E., *Equity and Excellence in American Higher*

*Education*. (University of Virginia Press, Charlottesville VA, 2005).

Bowser, B.P., *The Black Middle Class: Social Mobility and Vulnerability*, (Lynne Rienner Publishers Inc., Boulder, 2007).

Breitenbach, E., Brown, A., Mackay, F. and Webb, J. (eds.), *The Changing Politics of Gender Equality in Britain* (Palgrave, Basingstoke, 2002).

Brown, P., *Minority Party: Why Democrats Face Defeat in 1992 and Beyond*, (Regency Gateway, Washington DC, 1991).

Bryner G. and Sorensen, A. (eds.), *The Bill of Rights: A Bicentennial Assessment*, (State University of New York Press, New York, 1993).

Bush, G.W., 'Remarks on the Michigan Affirmative Action Case', (Office of the Press Secretary, The Roosevelt Room, 15th January, 2003), www.whitehouse.gov/news/releases/2003/01/2003115-7.html.

Bybee, K.Y., *Mistaken Identity. The Supreme Court and the Politics of Minority Representation*, (Princeton University Press, New Jersey, 1998).

Cahn, S.M. (ed.), *The Affirmative Action Debate*, (Routledge, New York, 1995).

Carter, S., *Reflections of an Affirmative Action Baby*, (Basic Books Inc., New York, 1991).

Cavanagh, M., *Against Equality of Opportunity*, (Clarendon Press, Oxford, 2002).

Chaney, P., *A Report Commissioned by the Equality and Human Rights Commission Equal Opportunities and Human Rights: The First Decade of Devolution in Wales*, (April 2009).

Chinn, S.E., *Technology and the Logic of American Racism. A Cultural History of the Body as Evidence,* (Continuum, New York, 2000).

Clayton, M. and Williams, A. (eds.), *The Ideal of Equality*, (Palgrave MacMillan, New York, 2002).

Coffield, F. and Vignoles, A., *Widening Participation in Higher Education by Ethnic Minorities, Women and Alternative Students,* (The National Committee of Enquiry into Higher Education, 1997).

Cohen, C. and Sterba, J.P., *Affirmative Action and Racial Preference*, (Oxford University Press, Oxford, 2003).

Cohen, C., *Naked Racial Preference*, (Madison Books Inc. Maryland, 1995).

Cohen, M., Nagel, T., Scanlon, T. and Dworkin, R. (eds.), *Equality and Preferential Treatment*, (Princeton University Press, New Jersey, 1977).

Coleman, J., Kelly, S. and Moore, J., *Trends in School Segregation 1968 – 1973,* (The

Urban Institute Press, Washington DC, 1975).

Cormack, R. and Osborne, R. (eds.), *Discrimination and Public Policy in Northern Ireland*, (Clarendon Press, Oxford, 1991).

Craig, P. and De Burca, G., *EU Law. Text, Cases and Material*, (3rd edn., Oxford University Press, Oxford, 2003).

Curry, C., *Silver Rights. The Story of the Carter Family's Brave Decision to Send their Children to an All-White School and Claim their Civil Rights*, (Algonquin Books of Chapel Hill, N.C., 1995).

D'Souza, D., *The End of Racism: Principles for a Multiracial Society*, (Simon & Schuster Limited, London, 1997).

D'Souza, D., *Illiberal Education: The Politics of Race and Sex on Campus*, (Macmillan Inc, New York, 1999).

Dashwood, A. and O'Leary, S., *The Principle of Equal Treatment in EC Law*, (Sweet and Maxwell, London, 1997).

Delgado, R. and Stefancic, J., *Critical Race Theory,* (New York University Press, New York and London, 2000).

Delgado, R. and Stefancic, J., *Critical Race Theory. The Cutting Edge,* (2nd ed. Temple University Press, Philadelphia, 2000).

Demour, M. and Kelly, T., *Paths to International Justice: Social and Legal Perspectives,* (Cambridge University Press, Cambridge, 2007).

Devins, N. and Douglas, D.M., *Redefining Equality*, (Oxford University Press, Oxford, 1998).

Dhami, R.S., Squires, J. and Modood. T., *Developing Positive Action Policies: Learning from the Experiences of European and North America*, (Department for Work and Pensions, HMSO, Norwich, 2006).

Downs, D.A., *Restoring Free Speech and Liberty on Campus*, (Cambridge University Press, Cambridge, 2005).

Dworkin, R., *A Matter of Principle*, (Harvard University Press, Cambridge, Mass, 1985).

Dworkin, R., *Taking Rights Seriously,* (Gerald Duckworth & Co. Ltd, London, 1987).

Dworkin, R., *Freedom's Law. The Moral Reading of the American Constitution*, (Oxford University Press, Oxford, 1996).

Dworkin, R., *Sovereign Virtue: The Theory and Practice of Equality*, (Harvard University Press, Cambridge, Mass, 2002).

Eastland, T., *Ending of Affirmative Action: the Case for Colorblind Justice*, (Basic Books

Inc., New York, 1997).

Edley, C. Jr., *Not all Black and White: Affirmative Action and American Values*, (Hill and Wang, New York, 1996).

Ellis, E., *European Community Sex Equality Law,* (2nd edn, Clarendon Press, Oxford, 1998).

Ellis, E., *EU Anti-Discrimination Law*, (Oxford University Press, Oxford, 2005).

Epstein, R., *Forbidden Grounds: The Case Against Employment Discrimination Laws*, (Harvard University Press, Cambridge, Mass., 1992).

Erlichman, J., *Witness to Power*, (Simon & Schuster Limited, London, 1982).

Fottrell, D. and Bowring, B., *Minority and Group Rights in the New Millennium*, (Martinus Nijhoff Publishers, Boston, 1999).

Fredman, S., *Discrimination Law*, (Oxford University Press, Oxford, 2001).

Fredman, S. (ed.), *Discrimination and Human Rights. The Case of Racism*, (Clarendon Press, Oxford, 2001).

Fredman, S., *Human Rights Transformed. Positive Rights and Positive Duties*, (Oxford University Press, Oxford, 2008).

Fullinwider, R.K. *The Reverse Discrimination Controversy: A Moral and Legal Analysis*, (Rowman and Littlefield, Totowa, N.J., 1980).

Fullinwider, R.K. and Mills, C. (eds.), *The Moral Foundations of Civil Rights*, (Rowman and Littlefield, Totowa, N.J., 1986).

Fullinwider, R.K. and Mills, C. (eds.), *Leveling the Playing Field: Justice, Politics, and College Admissions*, (Rowman and Littlefield, Totowa, New Jersey, 2004).

Garraty, J. (ed.), *Quarrels That Have Shaped the Constitution*, (Harper and Row Publishers, New York, 1987).

Gerstman, E., *The Constitutional Underclass, Gays, Lesbian and the Failure of Class-Based Equal Protection*, (University of Chicago, Chicago and London, 1999).

Glazer, N., *Affirmative Action*, (Basic Books Publishers Inc. New York, 1975).

Glazer, N., *Affirmative Discrimination. Ethnic Inequality and Public Policy*, (Basic Books Publishers, Inc., New York, 1975).

Goldman, A.H., *Justice and Reverse Discrimination***,** (Princeton University Press, New Jersey, 1979).

Gottfried, P. and Flemming, T., *The Conservative Movement. Social Movements Past and Present*, (Twayne Publishers, Boston, 1992).

Goulbourne, H., *Race Relations in Britain Since 1945*, (MacMillan Press, London, 1998).

Graglia, L.A., *Disaster by Decree. The Supreme Court decisions on Race and the Schools*, (Cornell University Press, London, 1976).

Graham, H.D., *Collision Course. The Strange Convergence of Affirmative Action and Immigration Policy in America*, (Oxford University Press, Oxford, 2002).

Green, P., *The Pursuit of Inequality*, (Martin Robertson, Oxford, 1981).

Greenawalt, K., *Discrimination and Reverse Discrimination*, (Alfred A Knopf Inc, New York, 1983).

Gross, B.R. (ed.), *Reverse Discrimination*, (Prometheus Books, Buffalo, New York, 1977).

Gross, B.R., *Discrimination in Reverse. Is Turnabout Fair Play?*, (New York University Press, New York, 1978).

Gutman, A., *Liberal Equality*, (Cambridge University Press, Cambridge, 1980).

Harris, D.J., O'Boyle, M. and Warbrick, C., *Law of the European Convention of Human Rights*, (Butterworths, London, 1995)

Henrard, K. and Dunbar, R., *Synergies in Minority Protection: European and International Law Perspectives*, (Cambridge University Press, Cambridge, 2009).

Hepple, B., *Race and the Law in Britain*, (2nd edn, Penguin Books, London, 1970).

Hepple, B. and Szyszczak, E.M. (eds.), *Discrimination: The Limits of Law*, (Mansell Publishing Limited, London, 1992).

Hepple, B., Coussey, M., and Choudhury, T., *Equality: A New Framework. Report of the Independent Reivew of the Enforcement of UK Anti-Discrimination Legislation*, (Hart Publishing, Oxford, 2000).

Heritier, A., *Policy-Making and Diversity in Europe. Escape from Deadlock*, (Cambridge University Press, Cambridge, 1999).

Hero, R., *Face of Inequality: Social Diversity in American Politics,* (Oxford University Press, Oxford, 2000).

Hill, H. and Jones, J. (eds.), *Race in America: the Struggle for Equality*, (University of Wisconsin Press, Maddison, 1993).

Hochschild, J., *Facing up to the American Dream: Race, Class, and the Soul of the Nation*, (Princeton University Press, New Jersey, 1995).

Hoskyns C., *Integrating Gender; Women, Law and Politics in the EU,* (Verso, London, 1996).

Holt, K. and George, W.H. (eds.), *Race, Culture, Psychology and Law*, (Sage Publications, Inc, London, 2005).

Jacobs, L.A., *Pursuing Equal Opportunities. The Theory and Practice of Egalitarian Justice*, (Cambridge University Press, Cambridge, 2004).

Jenkins, R. and Solomos, J. (eds.), *Racism and Equal Opportunity Policies in the 1980s*, (Cambridge University Press, Cambridge, 1987).

Jowell, J. and Oliver, D., *The Changing Constitution*, (3rd edn, Clarendon Press, Oxford, 1996).

Kahlenberg, R., *The Remedy: Class, Race and Affirmative Action*, (New York: Basic Books, 1996).

Karst, K.L., *Belonging to America. Equal Citizenship and the Constitution,* (Yale University Press, New Haven and London, 1989).

Katznelson, I., *Black Men, White Cities: Race, Politics and Migration in the United States, 1900 – 30 and Britain, 1948 - 68*, (Oxford University Press for the Institute of Race Relations, London, 1973).

Katznelson, I., *When Affirmative Action was White. An Untold Story of Racial Inequality in Twentieth Century American*, (W.W. Norton, New York, 2005).

Keiser, R.A., *Subordination or Empowerment? African American Leadership and the Struggle for Urban Political Power,* (Oxford University Press, Oxford, 1997).

Klug, F., *Value for a Godless Age. The Story of the United Kingdom's New Bill of Rights*, (Penguin Books, London, 2000).

Koppelman, A., *Anti-discrimination Law and Social Equality*, (Yale University, New Haven and London, 1996).

Kull, A., *The Color-Blind Constitution*, (Harvard University Press, Cambridge, Mass, 1992).

Landsberg, B. K., *Enforcing Civil Rights. Race Discrimination and the Department of Justice* (University Press of Kansas, Kansas, 1997).

Lawrence, C. R. and Marsuda, M.R., *We Won't Go Back: Making the Case for Affirmative Action*, (Houghton Mifflin Company, Boston, 1997).

Lester, A. and Bindman, G., *Race and Law*, (Longman, London, 1972).

Lester, R.A., *Reasoning about Discrimination. The Analysis of Professional and Executive Work in Federal Antibias Programs*, (Princeton University Press, New Jersey, 1980).

Lister, R., *Citizenship: Feminist Perspectives*, (MacMillan, Basingstoke, 1997).

Locke, A. (auth) and Rampersal, A. (ed.), *The New Negro: An Interpretation* (1st pub 1925, Atheneum, New York, 1992).

Lovenduski, J., *Feminizing Politics*, (Polity Press, Cambridge, 2005).

Lowe, R., *The Welfare State in Britain Since 1945*, (3rd edn., Palgrave MacMillan, London, 2004).

Lynch, F.R., *Invisible Victims. White Males and the Crisis of Affirmative Action*, (Greenwood Press, New York, 1989).

Mabey, C. and Iles, P. (eds.), *Managing Learning*, (Routledge, London, 1994).

MacLean, N., *Freedom is Not Enough. The Opening of the American Workplace*, (Harvard University Press, Cambridge, Mass, 2006).

Macnicol, J., *Age Discrimination. An Historical and Contemporary Analysis,* (Cambridge University Press, Cambridge, 2006).

MacKinnon, C., *Feminism Unmodified. Discourses on Life and Law*, (Harvard University Press, Cambridge, Mass, 1988).

Mappes, T. and Zembaty, J. (eds.), *Social Ethics*, (McGraw-Hill, New York, 1987).

Markovits, R.S., *Matters of Principle Legitimate Legal Argument and Constitutional Interpretation*, (New York University Press, New York, 1998).

McCall, L., *Complex Inequality. Gender, Class and Race in the New Economy*, (Routledge, New York, 2001).

McColgan, A., *Discrimination Law: Text, Cases, Law*, (2nd ed. Hart Publishing, Oxford, 2005).

McCrudden, C. (ed.), *Anti-Discrimination Law*, (Ashgate Publishing, Aldershot, 1991).

McCrudden, C., *Buying Social Justice: Equality, Government Procurement and Legal Change*, (Oxford University Press, Oxford, 2007).

McCrudden, C. and Chambers, G. (eds.), *Individual Rights and the Law in Britain*, (Clarendon Press, Oxford, 1994).

McCrudden, C, Smith D. and Brown, C., *Racial Justice at Work: the Enforcement of the Race Relations Act 1976 in Employment,* (Policy Studies Institute, London, 1991).

McElroy, W., *Sexual Correctness: The Gender-Feminist Attack on Women*, (McFarland and Co. Publishers, North Carolina, 2001).

McElroy, W. (ed.), *Liberty for Women: Freedom and Feminism in the 21st Century*, (Ivan R. Dee., Chicago, in association with the Independent Institute, 2002).

Miller, V., *Human Rights in the EU: the Charter of Fundamental Rights*, International Affairs and Defence Section, Paper 00/32, (House of Commons Research Library, 2000).

Monaghan, K., *Equality Law*, (Oxford University Press, Oxford, 2007).

Modood, T., Beishon, S. and Videe, S., *Changing Ethnic Identities*, (Policy Studies Institute, London, 1994).

Moreno, P., *From Direct Action to Affirmative Action. Fair Employment Law and Policy in America, 1933 – 1972*, (Louisiana State University Press, Baton Rouge and London, 1997).

Mosley, A.G. and Capaldi, N., *Affirmative Action. Social Justice or Unfair Preference?,* (Rowman and Littlefield Publishers, Inc. Maryland, 1996).

Newman, R. and Weissbrodt, D., *International Human Rights Law, Policy and Process*, (Anderson Publishing Company, Cincinnati, 1996).

Numhauser-Henning, A. (ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination*, (Kluwer Law International, The Netherlands, 2001).

Obasogie, O.K., *Race in Law and Society*, (Ashgate, London, 2006).

Ogletree, C.J., Jr., *All Deliberate Speed. Reflections on the First Half-Century of Brown v Board of Education,* (W.W. Norton & Company, New York and London, 2005).

Pannick, D., *Sex Discrimination Law*, (Clarendon Press, Oxford, 1985).

Parekh, B., *Colour, Culture and Consciousness*, (George Allen and Unwin, London, 1974).

Parekh, B., *Britain: A Plural Society*, (Commission for Racial Equality, London, 1990).

Patillo-McCoy, M., *Black Picket Fences: Privileges and Perils among the Black Middle-Class*, (University of Chicago Press, Chicago, 1999).

Pennock, R. and Chapman, J.W., *Equality*, (Atherton Press, New York, 1967).

Perry, M., *We the People: The Fourteenth Amendment and the Supreme Court*, (Oxford University Press, Oxford, 1999).

Pincus, F., *Reverse Discrimination. Dismantling the Myth*, (Lynne Rienner Publishers, London, 2003).

Podair, J.E., *The Strike that Changed New York. Blacks, Whites and the Ocean Hill-Brownsville Crisis*, (Yale University Press, New Haven and London, 2002).

Podhoretz, N., *Breaking Ranks. A Political Memoir*, (Harper and Row, New York, 1979).

Polyvios, G.P., *The Equal Protection of the Law,* (Gerald Duckworth & Co. Ltd, London,

1980).

Post, R., Appiah, A., Butler, J. and Grey, T.C., *Prejudicial Appearances*: *The Logic of American Anti-Discrimination Law*, (Duke University Press, North Carolina, 2001).

Post, R. and Rogin, M. (eds.) *Race and Representation: Affirmative Action,* (Zone Books, New York, 1998).

Potomac Institute, *Affirmative Action: the Unrealized Goal. A Decade of Opportunity*, (The Potomac Institution Inc., 1973).

Power, S. and Allison, G. (eds.), *Realizing Human Rights: Moving from Inspiration to Impact*, (Palgrave MacMillan, New York, 2006).

Rabe, J., *Equality, Affirmative Action and Justice*, (Books on Demand, Nordestedt, Germany, 2001).

Rawls, J., *A Theory of Justice*, (Harvard University Press, Cambridge, 1971).

Reed, M.E., *Seedtime for the Modern Civil Rights Movement: The President's Committee on Fair Employment Practice, 1941-46,* (Louisiana State University, Louisiana, 1991).

Reskin, B.F., *The Realities of Affirmative Action in Employment*, (American Sociological Association, Washington DC, 1998).

Richards, D.A.J., *Women, Gays and the Constitution. The Grounds for Feminism and Gay Rights in Culture and Law,* (University of Chicago Press, Chicago, 1998).

Richards, R.J., *The Sceptical Feminist* (Routledge & Kegan Paul, London, 1980).

Rodgers, H. and Bullock, C., *Law and Social Change. Civil Rights Law and their Consequences,* (McGraw-Hill Inc., New York, 1972).

Rosenburg, G.N., *The Hollow Hope: Can Courts Bring About Social Change?*, (University of Chicago Press, Chicago, 1991).

Rosenfeld, M., *Affirmative Action and Justice: A Philosophical and Social Inquiry,* (Yale University Press, New Haven, 1991).

Rutherford, S. and Ollerearnshaw, S., *The Business of Diversity – how organizations in the public and private sectors are integrating equality and diversity to enhance business performance*, (Schneider-Ross, Andover, 2002).

Sarat, A. (ed.), *Race, Law and Culture. Reflections on Brown v Board of Education,* (Oxford University Press, Oxford, 1997).

Sarat, A. (ed.), *Blackwell Companion to Law and Society*, (Blackwell Publishing, Oxford, 2004).

Schmidt, F. (ed.), *Discrimination in Employment. A Study of Six Countries by the Comparative Law Group*, (Almquist and Wiksell International, Sweden, 1978).

Shaw, J., *The Transformation of Citizenship in the European Union. Electoral Rights and the Restructuring of Political Space*, (Cambridge University Press, Cambridge, 2007).

Shujaa, M. (ed.), *Beyond Desegregation: The Politics of Quality in African American Schooling*, (Corwin Press, California, 1996).

Skrentny, J.D., *The Ironies of Affirmative Action: Politics, Culture, and Justice in America,* (The University of Chicago Press, Chicago and London, 1996).

Sowell, T., *Affirmative Action around the World: An Empirical Study*, (Yale University Press, New Haven, 2004).

Spann, G.A., *Race against the Court. The Supreme Court and Minorities in Contemporary America*, (New York University Press, New York and London, 1993).

Squires, J., *The New Politics of Gender Equality*, (Palgrave MacMillan, London, 2007).

Stephanopoulos, G. and Edley, C., *Review of Federal Affirmative Action Programs: Report to the President*. (Government Printing Office, Washington DC, 1995).

Street, H., Howe, G. and Bindman, G., *Street Report on Anti-Discrimination Legislation*, (PEP, London, 1967).

Thernstrom, S. and Thernstrom, A., *America in Black and White: One Nation, Indivisible*. (Simon & Schuster, New York, 1997).

Thernstrom, S. and Thernstrom, A., *No Excuses: Closing the Racial Gap in Learning*. (Simon & Schuster, New York, 2002).

Thompson, N., *Anti-Discriminatory Practice*, (The MacMillan Press Limited, New York, 1993).

Thornberry, P., *The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations, and an Update,* (Minority Rights Group, London, 1993).

Tsoukalis, L. (ed.), *The European Community. Past, Present and Future*, (Basil Blackwell, Oxford, 1983).

Tucker, D.F.B., *The Rehnquist Court and Civil Rights*, (Dartmouth Publishing Company Limited, Brookfield, Vermont, 1995).

Tushnet, M.V., *Making Civil Rights Law, Thurgood Marshall and the Supreme Court, 1936 – 1961*, (Oxford University Press, Oxford, 1994).

Wacks, R., *Understanding Jurisprudence. An Introduction to Legal Theory*, (2nd edn. Oxford University Press, Oxford, 2009).

Walzer, M., *Spheres of Justice*, (Basic Books, New York, 1983).

Weizer, P. I., *The Opinions of Justice Antonin Scalia: The Caustic Conservative*, Teaching Texts in Law and Politics, Vol. 13, (Peter Lang Publishing, New York, 2004).

Welch, F. and Light, A., *New Evidence on School Desegregation USCCR*, (Clearinghouse Publications 92, Washington D.C, 1987).

Weller, M. (ed.), *The Rights of Minorities. A Commentary on the European Framework for the Protection of National Minorities*, (Oxford University Press, Oxford, 2005).

Wilkinson, J.H., *From Brown to Bakke: The Supreme Court and School Integration 1954 – 1978*, (Oxford University Press, Oxford, 1979).

Wilson, W.J., *The Declining Significance of Race. Black and Changing American Institutions,* (University of Chicago Press, Chicago, 1978).

Wirth, L., *Breaking Through the Glass Ceiling: Women in Management*, (International Labour Office, Geneva, 2001).

Wise, T., *Affirmative Action: Racial Preference in Black and White* (Routledge, London, 2005).

Witherspoon, J.P., *Administrative Implementation of Civil Rights*, (University of Texas Press, Texas, 1968).

Young, I.M., *Justice and the Politics of Difference*, (Princeton University Press, Princeton, 1990).

Yuill, K., *Richard Nixon and the Rise of Affirmative Action*, (Rowman and Littlefield Publishers, Totowa, New Jersey, 2007).

Zack, N., *Thinking about Race*, (Belmont Publishers, Wadsworth, California, 1998).

Zander, M., *A Bill of Rights?*, (3rd edn. Sweet and Maxwell, London, 1985).

Zweigenhoft, R. and Domhoff, W.G., *Blacks in the White Establishment? A Study of Race and Class in America*, (Yale University Press, New Haven, 1991).

**Articles, Studies and Reports**


Abram, M.B., 'Affirmative Action: Fair Shakers and Social Engineers', 99 *Harvard Law Review* 1312 – 26 (1986).

Alexander, L., 'What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes and Proxies', *University of Pennsylvania Law Review*, Vol. 141, No. 1 (November 1992). pp. 149 – 219.

Alon, S. and Tienda. M., 'Assessing the Mismatch Hypothesis: Differentials in College Graduations Rates by Institutional Selectivity', *Sociology of Education*, Vol. 78, No. 4, (October 2005).

American Bar Association News Release, 'First Year Law School Enrollment Increases: Gain Among Men Slightly Higher than for Women', http://www.abanet.org/abanet/media/release/news.

American Small Business Administration Office of Advocacy, 'Women in Business', (October 2001), http://www.sba.gov/advo.

American Small Business Administration Office of Advocacy, 'Minorities in Business', (November 2007), http://www.sba.gov/advo.

Anderson, C.E., 'A Current Perspective: The Erosion of Affirmative Action in University Admissions', 32 *Akron Law Review* 181, (1999).

Anderson, E.S., 'Integration, Affirmative action, and Strict Scrutiny,' *New York University Law Review*, 77 (November 2002), pp.1195 – 1271.

Antonio, A.L et al., 'Effects of Racial Diversity on Complex Thinking in College Students', *Psychological Science*, Vol. 15, (2004), pp. 507 – 510.

Appiah, A., 'But Would that Still Be Me? Notes on Gender, 'Race', and Ethnicity, as Sources of Identity', 87 *Journal of Philosophy* 493 (1990).

Arcidiacono, P. and Vigdor J.L., 'Does the River Spill Over: Estimating the Economic Returns to Attending a Racially Diverse College', *Economic Inquiry*, Vol 48, No. 3 (July 2010), pp. 537 – 557.

Association of American Medical Colleges, 'Applicants and Matriculants by School and Sex', (2003), http://www.aamc.org.

Athey, S., Avery, C. and Zemsky, P., 'Mentoring and Diversity', *American Economic Review*, Vol. 90, No. 4, (September 2000), pp. 765 – 786.

Austin, R., 'Sapphire Bound!', *Wisconsin Law Review*, 3 (1989), pp. 539 – 578.

Ayres, I. and Brooks, R., 'Does Affirmative Action Reduce the Number of Black Lawyers?', *Stanford Law Review*, Vol. 57, No. 6, (May 2005), pp. 1807 – 1854.

Baker, A., 'Proportional, Not Strict, Scrutiny: Against a US "Suspect Classifications" Model under Article 14 ECHR in the UK', 56 *American Journal of Comparative Law* 847 (2008).

Badgett, L., 'Affirmative Action in a Changing Legal and Economic Environment', *Industrial Relations*, Vol. 34, No. 4, (1995), pp. 489 – 506.

Barbezat, D., 'Affirmative Action in Higher Education', *Research in Labor Law,* (1989).

Barnard, C., 'The Principles of Equality in the Community Context: P, Grant, Kalanke and Marschall: Four Uneasy Bedfellows', *The Cambridge University Law Journal* (1998) Vol 57, Issue 2, pp. 353 – 373.

Barnard, C. and Hepple, B., 'Substantive Equality', *The Cambridge University Law Journal* (2000) Vol 59, Issue 3, pp.562 – 585.

Barnes, K.Y., 'Is Affirmative Action Responsible for the Achievement Gap between Black and White Students?', *Northwestern University Law Review*, 101 (Fall 2007), pp. 1759 – 1808.

Barmes, L. 'Equality and Experimentation: the Positive Action Challenge', *Cambridge Law Journal* (2009) 68(3), pp. 623 – 654.

Barmes, L., 'Promoting Diversity and the Definition of Direct Discrimination' *Industrial Law Journal* (2003) Vol 32, No. 3, pp. 200 - 213.

Barmes, L. and Ashtiany, S., 'The Diversity Approach to Achieving Equality: Potential and Pitfalls', *Industrial Law Journal* (2003) Vol 32, No 4, pp. 274 – 296.

Bates, T. and Williams, D.L., 'Preferential Procurement Programs and Minority-Owned Businesses', *Journal of Urban Affairs*, Vol. 17, No. 1, (1995), pp. 1 – 17.

Bates, T. and Williams, D.L., 'Racial Politics: Does it Pay?', *Social Science Quarterly*, Vol. 74, (1993), pp. 507 – 522.

Bayard, K., Hellerstein, J., Neumark, D. and Troske, K., 'New Evidence on Sex Segregation and Sex Differences in Wages from Matched Employee-Employer Data', *Journal of Labor Economics*, Vol. 21, No. 4, (2003), pp. 887 – 922.

Baynes, L.M., 'Paradoxes of Racial Stereotyping. Diversity and Past Discrimination in Establishing Affirmative Action in FCC Broadcast Licensing', 52 *Administrative Law Review* (2000), 979.

Beauchamp, T.L., 'In Defense of Affirmative Action', *Journal of Ethics*, 2 (1998), pp. 99 – 124.

Bell, M. 'The Patchwork of Protection: The Anti-discrimination Law Framework', 67 *Mod. L. Rev*. (2004), pp. 465 – 477.

Black, D. and Smith, J., 'How Robust is the Evidence on College Quality and Earnings?',

*Journal of Econometrics*, Vol. 121, No. 1, (2004), pp. 93 – 115.

Black, V., 'The Erosion of Legal Principles in the Creation of Legal Policies', *Ethics,* 84 (January 1974), pp 93 - 115.

Blank, R., 'Tracing the Economic Impact of Cumulative Discrimination', *The American Economic Review*, Vol 95, No. 2, (May 2005), pp. 99 – 103.

Boylan, M., 'Affirmative Action: Strategies for the Future', *Journal of Social Philosophy*, 33 (Spring 2002), pp. 117 – 130.

Brooks, D.H.M., 'Why Discrimination is Especially Wrong', *Journal of Value Enquiry* 17 (1983), pp. 305 – 312.

Brown, C. and Corcoran, M., 'Sex-Based Differences in School Content and the Male/Female Wage Gap', *Journal of Labor Economics*, Vol. 15, No. 3, Pt. 1, (1997), pp.431 - 465.

Browne, K.R., 'Nonremedial Justifications for Affirmative Action in Employment: A Critique of the Justice Department's Position', 12 *Labor Law* 451, (1996 – 7).

Butler, D. and Kavanagh, D., 'The British General Election of 1997: Operation Black Vote', House of Commons Library Research Paper 05/33 Notes**,** http://www.parliament.uk/commons/lib/research./notes/sn-SG-01528.pdf.

Bureau of Labor Statistics, 'Current Population Survey' (various dates), http://www.census.gov/cps.

Cameron, S. and Heckman. J., 'The Dynamics of Educational Attainment for Blacks, Hispanics and Whites', *Journal of Political Economy*, Vol. 109, No. 3, (2001), pp. 455 – 499.

Campbell, J., 'Group Differences and Personnel Decisions: Validity, Fairness, and Affirmative Action', *Journal of Vocational Behavior*, Vol. 49, No. 2, (1996), pp. 122 – 158.

Cancian, M., 'Race-Based versus Class-Based Affirmative Action in College Admissions', *Journal of Policy Analysis and Management*, Vol. 17, No. 1, (1998), pp. 94 – 105.

Canes, B. and Rosen, H., 'Following in Her Footsteps? Faculty Gender Composition and Women's Choices of College Majors', *Industrial and Labor Relations Review*, Vol. 48, No. 3, (1995), pp. 486 – 504.

Card, D. and Krueger A., 'Would the Elimination of Affirmative Action Affect Highly Qualified Minority Applicants? Evidence from California and Texas', *National Bureau of Economic Research Working Paper No. 10366* (2004).

Caruso, D., 'Limits of the Classic Method: Positive Action in the European Union after the New Equality Directives', 44 *Harv Int'l L. J.* (2003) 331.

Chambers, D.L. et al, 'The Real Impact of Eliminating Affirmative Action in American Law, Schools: An Empirical Critique of Richard Sander's Study', *Stanford Law Review*, 57 (May 2005), pp. 1855 – 1898.

Charles, C.Z., 'Processes of Racial Residential Segregation', pp. 217 – 271, in O'Connor, A., Tilly, C. and Bobo, L. (eds.) *Urban Inequality: Evidence from Four Cities*. (Russell Sage Foundation, New York, 2001).

Clabaugh, G., 'Positive Discrimination', *Educational Horizon*, Vol 73, No. 3 (Spring 1995).

Clinton, W., 'Remarks by the President on Affirmative Action, Office of the Press Secretary', (The White House, The Rotunda National Archives, 19th July 1995).

Clydesdale, T., 'A Forked River Runs through Law School: Toward Understanding Race, Gender, Age and Related Gaps in Law School Performance and Bar Passage', 29 *Law & Social Inquiry* 711 (2004).

Coate, S. and Loury, G., 'Will Affirmative Action Policies Eliminate Negative Stereotypes?', *American Economic Review*, Vol. 83, No. 5, (1993), pp. 1220 – 1240.

Coffield, F. and Vignoles, A., 'Committee of Enquiry into Higher Education, Widening Participation in Higher Education by Ethnic Minorities, Women and Alternative Students' (Committee of Enquiry into Higher Education, 1997).

Collins, H., 'Discrimination, Equality and Social Inclusion', 66(1) *MLR* (2003).

Conrad, C. and Sharpe, R., 'The Impact of the California Civil Rights Initiative (CCRI) on University and Professional School Admissions and the Implications for the California Economy', *Review of Black Political Economy*, Vol. 25, No. 1, (1996), pp. 13 – 59.

Corlett, A.J., 'Racism and Affirmative Action', *Journal of Social Philosophy*, 24 (Spring, 1993), pp. 163 – 175.

Cox, K., 'Positive Action in European Union: From Kalanke to Marschall' 8 *Columbia Journal of Gender and Law* 101 (1998): 105.

Coyle, M., 'The Fallout Begins: In Its Final Week of the Term, the Supreme Court Hands Down Landmark Rulings That Give Legal Backing to Two Kinds of Diversity: Affirmative Action and Gay Rights.' *The National Law Journal* 25 (7th July 2003).

Crain, R.L. and Mahard, R.E. 'Desegregation and Black Achievement: A Review of the Research', 42 *Law & Contemporary Problems*, 17 (1978).

Cunningham, C. and Menon, N.R.M., 'Race, Class, Caste…? Rethinking Affirmative Action', 97 *Michigan Law Review* 1296 (1999).

Dale, S. B. and Krueger, A., 'Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables*', Quarterly Journal of Economics*, Vol. 117, No. 4, (2002), pp. 1491 – 1528.

Daniel, K., Black, D. and Smith, J., 'Racial Differences in the Effects of College Quality and Student Body Diversity on Wages', pp. 221 – 232 in Orfield, G.(ed)., *Diversity Challenged*, (Harvard Education Publishing Group, Cambridge, Mass, 2000).

Darity, W.A. and Mason, P.A., 'Evidence on Discrimination in Employment: Codes of Color, Codes of Gender', *Journal of Economic Perspectives*, Vol. 12, No. 2, (1998) pp. 63 – 90.

Datcher, L., Garman, L. and Garman, K., 'College Selectivity and Earnings', *Journal of Labor Economics*, Vol. 13, No. 2, (1995), pp. 289 – 308.

Davis, A., 'Key Note Address. Race, Law and Justice Conference: The Rehnquist Court and the American Dilemma', 45 *American University Law Review* (1996).

De Burca, G., 'The Principle of Proportionality and its Application in EC Law', 13 *Y.B. Eur. L*. 111 - 2 (1993).

DeVille, K. and Kopelman, L.M., 'Diversity. Trust and Patient Care: Affirmative Action in Medical Education 25 years after Bakke', *Journal of Medicine and Philosophy*, 28 (August 2003), pp. 489 – 516.

Defeis, E.F., 'The Treaty of Amsterdam: The Next Step towards Gender Equality?', 23 *B.C. Intl & Comp L. Rev 1* (1999 – 2000).

Dickens, W. and Kane, K., 'Racial Test Score Differences as Evidence of Reverse Discrimination: Less than Meets the Eye', *Industrial Relations*, Vol. 28, No. 3, (1999), pp. 331 – 363.

Donohue, J. and Heckman, J., 'Continuous versus Episodic Change: The Impact of Federal Civil Rights Policy on the Economic Status of Blacks', *Journal of Economic Literature*, 29, (1991), pp. 1603 – 1643.

Douglas-Scott, S., 'Affirmative Action in the US Supreme Court: the Adarand Case – the Final Chapter', *Public Law* 43 (1997).

DuBois, W.E.B., 'Votes for Women', 17 *Crisis* 8, (8 Nov 1917).

Du Bois, W.E.B., 'The Souls of Black Folk', (1st pub. 1903), in Huggins, N. (ed.), *Du Bois: Writings*, (Library of America Publishers, New York, 1986).

Ely, J.H., 'The Constitutionality of Reverse Discrimination', 41 *University of Chicago Law Review* 723, (1974).

Epstein, R.A., 'Standing Firm, on Forbidden Grounds', *San Diego Law Review*, Vol. 31, No. 1 (1994).

Equality and Human Rights Commission, *Police and Racism: What has been achieved 10 years after the Stephen Lawrence Inquiry Report?*, (January 2009).

Equality Commission, 'Minority Report No. 15: A Profile of the Northern Ireland Workforce, Summary of Monitoring Return', (2004).

Estland, C., 'Putting Grutter to Work: Diversity, Integration and Affirmative Action in the Workplace', 26 *Berkeley University Journal, Employment and Labor Law*, 3 (2005).

Fair Employment Commission, 'The Key Facts: Religion and Community Background in Northern Ireland', (1995).

Fallon, R.H., 'Affirmative Action based on Economic Disadvantage', 43 *UCLA Law Review* 1913, (1995 – 6).

Fenwick, H. and Hervey, T., 'Sex Equality in the Single Market: New Directions for the European Court of Justice' (1995) 32 *Common Market Law Rev* 443.

Fiss, O., 'Groups and the Equal Protection Clause', *Philosophy & Public Affairs*, 5 (Winter 1976), pp. 107 – 177.

Fredman, S., 'European Community Discrimination law: A Critique', 21 *International Law Journal*, 199 (1992).

Fredman, S., 'Reversing Discrimination', 113 *Law Quarterly Review* 575, (1997).

Fredman, S., 'Affirmative Action before the Court of Justice: A Critical Analysis', in J. Shaw (ed.) *Social Law and Policy in an Evolving EU*, (Hart Publishing, Oxford, 2000).

Fredman, S. and Spencer, S., 'Delivering Equality: Towards an Outcome-Focused Positive Duty', Submission to the Cabinet Office Equality Review and to the Discrimination Law Review, (June 2006).

Freeman, A., 'Legitimizing Discrimination through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine', 62 *Minnesota Law Review*, 1049, (1977).

Fryer, R. G., Jr. and Levitt, S.D., 'Understanding the Black-White Test Score Gap in the First Two Years of School', *Review of Economics and Statistics*, Vol. 86, No. 2, 447-64 (2004).

Fryer, RG, Loury, G.C. and Yuret, T., 'An Economic Analysis of Color-Blind Affirmative Action', *Journal of Law, Economics and Organization*, 319 (2008).

Fuches, L.H., 'What Do Immigrants Deserve?', *Washington Post*, (29 January 1995).

Fullinwider, R.K., 'Preferential Hiring and Compensation', *Social Theory and Practice*, (Spring 1975), pp. 307 – 320.

Fullinwider, R. K., 'The Life and Death of Racial Preferences', *Philosophical Studies*, 85 (March 1997), pp. 163 – 180.

Gahringer, R.E., 'Race and Class: The Basic Issues of the Bakke Case', *Ethics*, 90 (October 1979), pp. 97 – 114.

Gardner, J., 'Liberals and Unlawful Discrimination', 9 *Oxford Journal of Legal Studies* 1 (1989).

Ginsburg, R.B. and Merritt, D.J., 'Affirmative Action: An International Human Rights Dialogue', *1 Rutgers Race and Law Review 193*, (1998 – 1999).

Glazer, N., 'For Racial Dispensation in Admissions', *Academic Questions* 11 (Summer 1998), pp. 22 – 32.

Glazer, N., 'The Case for Racial Preferences', *Public Interest*, (Spring 1999).

Goldin, C. and Rouse, C., 'Orchestrating Impartiality: The Impact of 'Blind' Auditions on Female Musicians', *American Economic Review*, Vol. 90. No. 4, (2000), pp. 714 – 741.

Goldman, A., 'Reparations to Individuals or Groups?', *Analysis* 35 (April), pp. 168 – 170.

Goring, D.C., 'Private Problem, Public Solution: Affirmative Action in the 21st Century', 33 *Akron Law Review*, 209, (1999).

Government Equalities Office, 'A Fairer Future. The Equality Bill and other Actions to Make Equality a Reality', (April 2009).

Government Equalities Office, 'Equality Bill: Making it Work. Policy Proposals for Specific Duties. A Consultation', (June 2009).

Gurin, P., 'The Educational Value of Diversity', in Gurin, P., Lehman J. and Lewis, E. (eds.), *Defending Diversity: Affirmative Action at the University of Michigan*, (University of Michigan Press, Michigan, 2000).

Hair, P.D., 'Justice Blackmun and Racial Justice', *The Yale Law Journal*, 104.1, (October 1994).

Hanushek, E., 'The Failure of Input-Based Schooling Policies', *National Bureau of Economic Research Working Paper*, (2002).

Harding-Hill, R. and Thomas, J.T., 'Reasonable Adjustment: Ruling Amounts to Positive Discrimination', *Employment Law Journal*, Number 22, (February 2007).

Harvey, W.B., 'Minorities in Higher Education, 2001 – 2002: Nineteenth Annual Status Report', (American Council of Education, Washington, D.C., 2002).

Heckman, J., 'Detecting Discrimination', *Journal of Economic Perspectives*, Vol. 12, No. 2, (1998), pp. 101 – 116.

Henderson, R.D., Greenberg, N.M., Schneider, J.M., Uribe, Jr., O. and Verdugo, R.R., 'High Quality Schooling for African American Students', in Shujaa, M. (ed.), *Beyond Desegregation. The Politics of Quality in African American Schooling,* (Corwin Press, California, 1996).

Hepple, B., 'Discrimination and Equality of Opportunity: Northern Irish Lesson', [1990] 10 *Oxford Journal of Legal Studies* 408.

Hepple, B., 'The European Legacy of Brown v Board of Education' *U. Ill L. Rev* (2006) 605.

Higher Education Statistics Agency, 'First Year UK Domiciled HE Students by Qualification Aim, Mode of Study, Gender and Ethnicity 2007/8', (Issued 2009).

Hill, A., 'Equality Law Rendered "toothless" by Coalition Review', *The Guardian*, 30 September 2010, www.guardian.co.uk/society/2010/sep/30/equality-law-gender-pay-gap.

Ho, D.E., 'Why Affirmative Action Does Not Cause Black Students to Fail the Bar', 114 *Yale Law Journal* (June 1997).

Holzer, H., 'Why Do Small Establishments Hire Fewer Blacks than Larger Ones?' *Journal of Human Resources*, Vol. 33, No. 4, (1998), pp. 896 – 914.

Holzer, H. and Neumark, D., 'Are Affirmative Action Hires Less Qualified?', *Journal of Labor Economics*, Vol. 17, No. 3, (1999), pp. 534 – 569.

Holzer, H. and Neumark, D., 'What Does Affirmative Action Do?', *Industrial and Labor Relations Review*, Vol. 53, No. 2, (2000), pp. 240 – 271.

Holzer, H. and Neumark, D., 'Assessing Affirmative Action', *Journal of Economic Literature*, Vol. 38, No. 3, (2000), pp. 483 – 568.

Holzer, H. and Neumark, D., 'Affirmative Action: What do We Know?', *Journal of Policy Analysis and Management*, Vol 25, No. 2, (2006), pp. 463 – 490.

Home Office, 'The Stephen Lawrence Inquiry: Report of an Inquiry by Sir. William MacPherson, of Cluny', Cm 4262-1 (The Stationary Office, London, February 1999).

Hughes, 'Disability and the Duty to Make Reasonable Adjustments', *Industrial Law Journal*, Vol. 33 (2004), pp. 358 – 366.

Hyer, P., 'Affirmative Action for Women Faculty: Case Studies of Three Successful Institutions', *Journal of Higher Education*, Vol. 56, No. 3, (1985), pp. 282 – 299.

Jacob, B., 'Where the Boys Aren't: Non-Cognitive Skills, Returns to School and the Gender Gap in Higher Educations', *Economics of Education Reviews*, 21 (2002), pp. 581 – 598.

Johnson, A., 'The Voice of Color 100', *Yale Law Journal* 2007, (1991).

Johnson, L.B., 'Commencement exercises for Executive Order No. 11246', (Howard University, 4th June 1965).

Johnson, W. and Neal, D., 'Basic Skills and the Black-White Earnings Gap', pp. 480 – 497, in Jenks, C. and Phillips, M. (eds.), *The Black-White Test Score Gap*. (Washington DC: The Brookings Institution, 1998), pp. 480 – 497.

Jones, G., 'Tories Shy away from all women shortlists', *Telegraph*, (22 August 2008),

http://www.telegraph.co.uk.

Jones, N., 'Positive Action and the Problem of Merit: Employment policies in the National Health Service', *Critical Social Policy* (2005) Vol 25: 139.

Kahlenberg, R., 'Getting Beyond Racial Preferences: The Class-Based Compromise' 45 *American University Law Review*, 721, (1996).

Kairys, D., 'Unexplainable on Grounds other than Race', *American University Law Review,* Vol.45, Book 3 (1996)
http://www.wcl.american.edu/journal/lawrev/45/kairys.cfm.

Kane, T., 'College Entry by Blacks since 1970: The Role of College Costs, Family Background, and the Returns to Education', *Journal of Political Economy*, Vol. 102, No. 5 (1994), pp. 878 – 911.

Kane, T., 'Racial Preferences and Higher Education', in Jencks, C. and Phillips, M. (eds.) *The Black-White Test Score Gap*, (The Brookings Institution, Washington, DC, 1998), pp. 431 – 456.

Kinsley, M., 'Generous Old Lady or Reverse Racist?', *Time*, (August 28th 1995).

Kleijkamp, G., 'Comparing the Application and Interpretation of the US Constitution and the European Convention on Human Rights', 12 *Transnational & Contemp Problems*, 307 (2002).

Kolpin, V. and Singell, L., 'The Gender Composition and Scholarly Performance of Economics Departments: A Test for Employment Discrimination', *Industrial and Labor Relations Review* Vol. 49, No. 3, (1996), pp. 408 – 423.

Kronman, A., 'Is Diversity a Value in American Higher Education?, 52 *Florida Law Review* 861 (2000).

Kupenda, A.M., 'The Obama Election and a Blacker America: Lawfully Creating Tension for Change' 1 *Faulkner Law Review* 187 (2009-10).

Lamb, J.D., 'The Real Affirmative Action Babies: Legacy Preferences at Harvard and Yale', 26 *Columbia Journal of Law and Social Problems* 491, 504 (1993).

Landes, W.M., 'The Economics of Fair Employment Laws', *Journal of Political Economy*, Vol. 76, No. 4, (July/August,1968), pp. 507 – 552.

Landsberg, B.K., 'Affirmative-Action Decision Indicated Shifts in Position', *The Los Angeles Daily Journal* 116 (30 June 2003).

LaNoue, G. and Sullivan, J., 'Race Neutral Programs in Public Contracting', *Public Administration Review*, Vol. 55, (1995).

Law, S.A., 'White Privilege and Affirmative Action', 32 *Akron Law Review* 603 (1999).

Lederman, D., 'Justice Department Urges High Court to Uphold Affirmative Action',

*The Chronicle of Higher Education*, (1996).

Lempert, R., et al, 'Affirmative Action in US Law Schools: A Critical Response to Richard Sander's 'A Reply to Critics', *University of Michigan Law School: The John M. Olin Center for Law and Economics Working Paper Serious*, Year 2006, Paper 60.

Leonard, J., 'Anti- Discrimination or Reverse Discrimination? The Impact of Changing Demographics, Title VII, and Affirmative Action on Productivity', *Journal of Human Resources*, Vol. 19, No. 2, (1984), pp. 145 – 174.

Leonard, J., 'The Effectiveness of Equal Employment Law and Affirmative Action Regulation', *MBER Working Paper, No. 1745* (1985).

Leonard, J., 'The Impact of Affirmative Action Regulation and Equal Opportunity Law on Employment', *Journal of Economic Perspectives*, Vol. 4, No. 4, (1990), pp. 47 – 63.

Levin, M.E., 'Is Racial Discrimination Special?, 15 *Journal of Value Inquiry* 225, (1981), pp. 227 – 228.

Lindley, J. and Dale, A., 'Ethnic Differences in Women's Demographic Family Characteristics and Economic Profiles, 1992 – 2002', *Labor Market Trends*, Vol. 112, No. 4, (April 2004).

Long, M., 'Race and College Admissions: An Alternative to Affirmative Action?, *The Review of Economics and Statistics*, Vol. 86, No. 4, (2004), pp. 1020 – 1033.

Lott, J., 'Does a Helping Hand Put Others at Risk? Affirmative Action, Police Departments, and Crime', *Economic Inquiry*, Vol. 38, No. 2, (2000), pp. 239 – 277.

Lovenduski, J., 'Implementing Equal Opportunities in the 1980s: An Overview', in *Public Administration* 1, (1989), 67.

Lundberg, S. and Startz. R., 'Private Discrimination and Social Intervention in Competitive Labor Markets', *American Economic Review*, Vol. 73, No. 3, (1983) pp. 340 – 347.

Ma, J. and Kurlaender, M., 'The Future of Race Conscious Policies in K – 12 Public Schools: Support from Recent Legal Opinions and Social Science Research' in Boger, J. and Orfield, G. (eds.) *School Resegregation: Must the South Turn Back?,* (University of North Carolina Press, N.C., 2005), pp. 239 – 260.

Manning, J.E., 'Membership of the 111th Congress: A Profile', *Congressional Research Service* (4th February 2010).

Mayeri, S., 'A Common Fate of Discrimination: Race-Gender Analogies in Legal and Historical Perspective', *The Yale Law Journal*, (2000 – 1), 110.2.

McCall, L., 'The Complexity of Intersectionality.' *Signs: Journal of Women in Culture and Society,* (2005), Vol 30(3), pp. 1771 – 1880.

McCrudden, C. 'Rethinking Positive Action', (1986) 15 *Industrial Law Journal* 219.

McCrudden, C., 'The Effectiveness of European Equality Law: National Mechanisms for Enforcing Gender Equality Law in the Light of European Requirements', (1993) 13 *Oxford Journal of Legal Studies* 320.

McCrudden, C., 'Equality of Treatment between Women and Men in Social Security', *Industrial Law Journal*, Vol. 23, No. 2 (June 1994).

McCrudden, C. 'Mainstreaming Equality in the Governance of Northern Ireland' 22 *Fordham Int L.J*. 1696 (1998 – 9).

McCrudden, C., 'Theorising European Equality Law' in Costello, C. and Barry, E. (eds.), *Equality and Diversity: The New Equality Directives*, (Irish Centre for European Law, 2003).

McCrudden, C. and Heath, A., 'Legal Regulation of Affirmative Action in Northern Ireland: An Empirical Assessment', *Oxford Journal of Legal Studies*, (2004), 24 (3), pp. 363 – 415.

McElroy, W., 'Affirmative Action: What does it Matter?', *International Society for Individual Liberty Educational Pamphlet*, (June 2001).

McGlynn, C.M.S., 'Ideologies of Motherhood in European Community Sex Equality Law' (2000) 6 *European Law Journal* 29.

McGlynn, C.M.S., 'Pregnancy, Parenthood and the Court of Justice in Abdoulaye', (2000) *European Law Review*, 654.

McGlynn, C.M.S., 'Families and the European Charter of Fundamental Rights: Progressive Change or Entrenching the Status Quo?', *European Law Review* 26(6), (2001), pp. 582 – 598.

McHugh, C., 'The Equality Principle in EU Law: Taking a Human Rights Approach?', 14 *ISLR* 31 (2006)

Middlemiss, S., 'Sex and Race Discrimination', in Sargeant, M. (ed.), *Discrimination Law*, (Pearson Education, London, 2004).

Mills, G., 'Combating Institutional Racism in the Public Sector' 31 *ILJ* (2002), pp. 96 – 8.

Moran, R.F., 'Rethinking Race, Equality and Liberty: The Unfulfilled Promise of Parents Involved' 69 *Ohio State L.J*. 1321 (2008).

Morton, F. A., Jr., 'Class-Based Affirmative Action: Another Illustration of America Denying the Impact of Race', 45 *Rutgers Law Review*, 1089, (1993).

Murray, P., 'Jane Crow and the Law: Sex Discrimination and Title VII', in *George Washington Law Review* 34 (December 1965).

Natapoff, A., 'I.A. Madisonian Approach to Race', *American University Law Review*,

Vol 45, No. 3, (February 1996).

Natapoff, A., 'Trouble in Paradise: Equal Protection and the Dilemma of the Inter-minority Group Conflict', 47 *Stanford Law Review*, 1059 (May 1995).

Needham, A., 'Leveling the Playing Field – Affirmative Action in the European Union: A Comparison of Marschall v Land Nordrhein-Westfalen and Johnson v Transportation Agency of Santa Clara County', 19 *N.Y.L Sch. J. Int. & Comp L.* 479 (1999 – 2000).

Neumark, D., 'Affirmative Action: What Do We Know?', *Journal of Policy Analysis and Management*, (November 2005).

Newton, L., 'Reverse Discrimination as Unjustified', *Ethics,* 83 (July 1973), pp. 308 – 312.

Nichel, J., 'Should Reparations be to Individuals or to Groups', *Analysis* 34.5 (1974), pp. 154 – 160.

Note on Affirmative Action and Electoral Reform', Vol 90, *Yale Law Journal*, 1811, (1980 – 1981).

O'Cinneide, C., 'Fumbling towards Coherence: The Slow Evolution of Equality and Anti-Discrimination Law in Britain', 57 *Nr. Ireland Legal Quarterly*, 57 (2006).

OFCCP, 'US Department of Labor, EEO and Affirmative Action Guidelines for Federal Contractors Regarding Race, Color, Religions and National Origin' http://www.dol.gov/esa/OFCCP/regs/compliance/fs11246.htm.

Office for Official Publications for the European Commission*, Continuing the Diversity Journey: Business Practices, Perspectives, and Benefits* (2008).

Office of Population Censuses and Surveys '1981 Census: Great Britain', CEN 81 CM (OPCS, London, 1982). http://www.statistics.gov.uk/census81.pdf.

Office of Population Censuses and Surveys, '1991 Census: Great Britain', CEN 91 CM 56 (OPCS, London, 1992). http://www.statistics.gov.uk/census91.pdf.

Office of Population Censuses and Surveys, '2001 Census: Great Britain', CEN 01 CM 56 (OPCS, London, 2002). http://www.statistics.gov.uk/census01.pdf.

Pager, S., 'Strictness and Subsidiarity: An Institutional Perspective on Affirmative Action in the European Court of Justice' 26 *B.C. Int and Comp L. Rev* 35 (2003).

Patten, C., 'A New Beginning: Policing in Northern Ireland' (September 1999).

Peller, G., 'Race Consciousness: Exploring the Roots of Critical Race Theory', *Duke Law Journal,* 758, 1990.

Peters, A., 'The Many Meanings of Equality and Positive Action in Favour of Women under European Community Law - A Conceptual Analysis', 2 *European Law Journal*, 177 (1996), 1999.

Pilon, R., 'Discrimination, Affirmative Action, and Freedom: Sorting Out the Issues', *American University Law Review* Vol 45, Book 3, February 1996.

Prince, R., 'Positive Action for Recruitment to be Enshrined in Law', *The Telegraph*, (3rd December 2008).

Quality Support Centre, UK Higher Education in the 1990s, 'Diversity: Too Much or Too Little?', *Higher Education Digest*, (Open University Press, Milton Keynes, 1996).

Raskin, J., 'Beyond Black and White: Race Conscious Policies and the 'Other Minorities' at Americas University', *Washington College of Law*, (21st September 1995).

Raskin, J., 'Race, Law and Justice: The Rehnquist Court and the American Dilemma'*, 45 American University Law Review* 567 (February 1996).

Rasmussen, H., 'Between Self Restrain and Activism: A Judicial Policy for the European Court', (1998), 13 *E.L. Rev*, pp. 28 – 38.

Reinhardt, S., 'Remarks at UCLA Law School Forum on Affirmative Action: 'Where Have You Gone, Jackie Robinson?' 43 *UCLA Law Review*, (1995 – 6), 1731.

Rosenburg, G. N., 'African-US Rights after Brown', *Journal of Supreme Court History*, 24, pp. 201 – 225, (1999).

Rothstein, J. and Yoon, A.H., 'Affirmative Action in Law School Admissions: What Do Racial Preferences Do?', *University of Chicago Law Review*, 75 (Spring 2008), pp. 649 – 714.

Russell, K., 'The Racial Hoax as Crime: The Law as Affirmation', 77 *Industrial Law Journal*, 593 (1996).

Russell, M. and O'Cinneide, C., 'Positive Action to Promote Women in Politics: Some European Comparisons'*, The International and Comparative Law Quarterly*, Vol. 52, No. 3 (July 2003), pp. 587 – 614.

Rutherglen, G. and Ortiz, D.R., 'Affirmative Action under the Constitution and Title VII: From Confusion to Convergence', 35 *UCLA Law Review* 467 (1987 – 1988).

Sander, R., 'Experimenting with Class Based Affirmative Action', 47 *Journal of Legal Education* 472, 492 (1997).

Sander, R., 'A Systematic Analysis of Affirmative Action in American Law Schools', *Stanford Law Review*, Vol. 57, No. 4, (2004), pp. 368 – 483.

Sander, R., 'A Reply to Critics. Response to Article by Ian Ayres and Others', *Stanford Law Review*, Vol. 57, No. 6, (May 2005), pp. 1963 – 2016.

Saunder, M.L., 'Reconsidering Shaw: The Miranda of Race-Conscious Districting', *The Yale Law Journal*, 109.3, (2000), pp. 1603 – 1637.

Schmidt, J., 'Post Adarand Guidance on Affirmative Action in Federal Employment', *EEO/ Civil Rights Office*, (29 February 1996).

Schnapper, E., 'Affirmative Action and the Legislative History of the Fourteenth Amendment', *Virginia Law Review*, LXXX1 (1985), pp. 753 – 798.

Schiek, D. 'Positive Action in Community Law Case C-450/93 Kalanke v Freie Hansestadt Bremen [1995]', *Industrial Law Journal*, No 25 (1996), pp. 239 – 246.

Senden, L, 'Positive Action in the EU Put to the Test. A Negative Score? Case C-450/93 Kalanke v Freie Hansestadt Bremen' [1995] ECR I-3051', *Maastricht Journal of European and Comparative Law* (1996), pp. 146 – 164.

Sher, G., 'Reverse Discrimination the Future and the Past', *Ethics* 90 (October 1979), pp. 81 – 82.

Silva, J. and Jacobs. R., 'Performance as a Function of Increased Minority Hiring', *Journal of Applied Psychology*, Vol. 78, No. 4, (1993) pp. 591 – 601.

Simon, R.L., 'Preferential Hiring: A Reply to Judith Jarvis Thompson', *Philosophy and Public Affairs* 3 (Spring 1974), pp. 315 – 319.

Smith, B., 'Ethnic Minorities in Politics, Government and Public Life', (November 2008).

Spann, G., 'Pure Politics' 88 *Michigan Law Review* 1971 (1990).

Squires, J. and Wickham-Jones, M., 'New Labour, Gender Mainstreaming and the Women and Equality Unit', *British Journal of Politics and International Relations,* Vol 6 (2004), pp. 81 – 98.

Steele, C., 'A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance', *American Psychologist*, Vol. 52 (1997).

Stephanopolous, G., et. al '*Review of Federal Affirmative Action Programs, Report to the President*', (19th July 1995).

Strauss, D., 'The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards'*, Georgetown Law Journal*, Vol. 79 (1991), pp. 1619 – 1657.

Strossen, N., 'Blaming the Victim: A Critique of Attack on Affirmative Action', 77 *Cornell Law Review*, 974, (1992).

Szyszczak, E., 'Positive Action after Kalanke', (1996) 59 *Modern Law Review* 876.

Szyszczak, E., 'Antidiscrimination Law in the European Community', 32 *Fordham Intl L.J.* 624 (2008 – 9).

Taylor, W.L., and Liss, S.M., 'Affirmative Action in the 1990s: Staying the Course', *The Annals of the American Academy of Political and Social Science*, (1992), 523, pp. 30 –

37.

Thernstron, S., 'Farewell to Preferences?', *The Public Interest*, (Winter 1998).

Thomson, J. J., 'Preferential Hiring', *Philosophy & Public Affairs*, 2 (Summer 1973).

Trelogan, T., Mazurana, S. and Hodapp, P., 'Can't We Enlarge the Blanket and the Bed? A Comparative Analysis of Positive/ Affirmative Action in the European Court of Justice and the United States Supreme Court', 28 *Hastings Int'l & Comp. L. Rev* (2004 – 5).

Underwood, K., 'Sinners and Judges', *Solicitors Journal*, Vol 151, No. 14, p. 446 (13th April 2007).

USCCR, 'Statement on Affirmative Action', 54 (Clearinghouse Publications, October 1977).

USCCR, 'Affirmative Action in the 1980s: Dismantling the Process of Discrimination. A Statement of the United State Commission on Civil Rights', 70 (Clearing House Publication, November 1980).

USCCR, 'The Benefits of Racial and Ethnic Diversity in Elementary and Secondary Education', (November 2006).

US Census Bureau, 'Projections of the Population by Race and Hispanic Origin for the US, 2008 – 2050', http://www.census.gov/Press-Release.

US Census Bureau, 'Attendance Status of College Students 15 Years Old and Over, by Age. Sex, Year and Types', (October 2000), http://www.census.gov/population.socdemo/school/ PP1 -148.

Van de Heyning, C.J., 'Is it still a Sin to Kill a Mocking Bird? Remedying Factual Inequalities through Positive Action – What Can be Learned from the US Supreme Court and the European Court of Human Rights case law?' *E.H.R.L.R*. 2998 (3) 376 – 390.

Verloo, M., 'Multiple Inequalities, Intersectionality and the European Union', *European Journal of Women's Studies,* (2006), Vol. 13(3), pp. 211–228.

Voss, R., 'The National Perception of the Court of First Instance and the European Court of Justice', 30 *CMLR* (1993).

Warren, M.A., 'Secondary Sexism, and Quota Hiring', *Philosophy and Public Affairs*, 6 (Spring 1977), pp. 240 – 261.

Weizer, P.I., 'The Opinions of Justice Antonin Scalia: The Caustic Conservative', *Teaching Texts in Law and Politics*, Vol. 13.

Wilkins, D., 'A Systematic Response to Systematic Disadvantage? A Response to Sander', *Stanford Law Review* 57 (May), pp. 1915 – 1961.

Williams, A., 'Color-Coded Scholarships', *Washington Times*, (25th May 1995).

Williams, K.Y. and O'Reilly, C.A., 'Demography and Diversity in Organizations: A Review of 40 Years of Research', 20 *Research In Organizational Behavior* 77, 112 (1998).

Wrench, J., 'Diversity Management Can be Bad for You', 46(3) *Race and Class* (2005), 73 – 84.

Wu, F.H.E., 'Changing America: Three Arguments About Asian Americans and the Law', *American University Law Review*, (February 1996), Vol 45, book 3.

Wu, F.H.E., 'Neither Black Nor White: Asian Americans and Affirmative Action and the Limits of Borders. A Moderate Proposal for Immigration Reform', 15 B.C. *Third World Law Journal* 225 (1995).

**Selected Websites**

American Bar Association, http://www.abanet.gov.
American Small Business Administration Office, http://www.sba.gov/advo.
British and Irish Legal Information Institute, http://www. baili.org.
US Bureau of Labor Statistics, http://www.bls.gov.
Cornell University Library, http://www.library.cornell.edu.
Government Equalities Office, http://www.equalities.gov.uk.
Hansard, http://www.publications.parliament.uk/pa/pahansard.
Hein Online, http://www.heinonline.org.
Labour Force Survey, http://www.statistics.gov.uk.
Law Gazette, http://www.lawgazette.co.uk.
Law Library of Congress, http://www.loc.gov/LawLibrary.
Lexis Nexis, http://www.lexisnexis.com/uk/legal.
Office of Federal Compliance Programs, http://www.dol.gov/esa/OFCCP.
Solicitors Journal, http://www.solicitorsjournal.com.
Supreme Court, http://www.supremecourt.gov.uk.
The Telegraph, http://www.telegraph.co.uk.
UK Parliament, http://www.parliament.gov.uk.
US Case law, http://www.case-law.us.
US Census Bureau, http://www.census.gov.
US House of Representatives, http://www.house.gov.
US Senate, http://www.senate.gov.
Westlaw, http://www.westlaw.co.uk.