
***Bakke* at 40: Transcript of Lunchtime Discussion**

Professor Lisa Pruitt: Thanks to all the Law Review members and editors, their enormously hard work in putting this together, and also to Professor Soucek and to Professor Glater, who had the germ of an idea to bring together a *Bakke* at 40 Symposium. When I heard about it, I said, “I really want to be involved in that, too,” because of the very exciting opportunity to bring together such an exciting and important group of scholars. That was confirmed by one of my students a few days ago. I was encouraging, well actually, I will admit, I am requiring my students to be here for at least part of the day. That includes students in my Working-Class Whites and the Law course and also, I’m teaching a seminar right now to undergrads who are first in their families to go to college. Both groups of students are familiar with a lot of the content that we are covering today regarding *Bakke*, and so I was excited a few days ago when I was again mentioning the lineup and one of my former students said, “Oh, it’s going to be worth going just to hear Cheryl Harris.” Because, I show them, in my class, Harris’s keynote from the UCLA Whiteness as Property Symposium from a few years ago; Prof. Harris is very memorable in that article and in the keynote from the symposium commemorating its twentieth anniversary.

Professor Cheryl Harris: Maybe I could just replay it.

Professor Lisa Pruitt: That would be a hit, no doubt. This is again, a really great honor for me to be moderating this lunchtime discussion, which we expect to be extremely wide-ranging because we have purposefully brought together an interdisciplinary panel and we even have a state supreme court justice. I’m going to introduce them in the order in which they’re going to be speaking. First is Justice Melissa Hart, who was appointed to the Colorado Supreme Court just about a year ago by Governor John Hickenlooper. Before joining the Colorado Supreme Court, Justice Hart was a professor at the University of Colorado Law School, where she directed the Byron White Center for

the Study of American Constitutional Law. When she was still an academic, Justice Hart's work focused on employment discrimination and civil rights. She was an active advocate for affirmative action and wrote several articles about the role of class in selecting college admits. In 2008, she ran a campaign against Amendment 46, which is the Colorado version of Prop 209 and it was an unsuccessful . . .

Justice Melissa Hart: Actually, it's not the Colorado version of Prop 209, it's nothing.

Professor Lisa Pruitt: Sorry, yes, pardon me. It was to be the Colorado version of Prop 209. The punchline is that Amendment 46 was defeated.

Next, Michal Kurlaender is going to speak. She is a professor of education policy, and she is a Chancellor's fellow here at UC Davis. Kurlaender is faculty director of policy analysis for California education and the lead researcher of Wheelhouse: The Center for Community College Leadership and Research. Kurlaender primarily investigates inequalities in access to and success in college, alignment of public K-to-12 and post-secondary systems of education, and alternative pathways to college and careers. I have had the great pleasure of being a faculty affiliate with Professor Kurlaender on our UC Davis Center for Poverty Research. It was very eye-opening for me to attend, several years ago, a conference that she put together for the Center for Poverty Research, where she brought together high-profile education scholars like Sean Reardon, who was mentioned on an earlier panel today, to talk about interventions that are helping low-income and first gen. students get access to and succeed in higher education.

Following Prof. Kurlaender will be Professor Katharine Bartlett, the A. Kenneth Pye Professor of Law at Duke University, where she was formerly Dean. Prof. Bartlett teaches family law, employment discrimination, gender and law, and contracts, and she publishes widely in several fields, including family law. She authors the leading case book with several other colleagues in the area of gender law. Prof. Bartlett served as a reporter for the American Law Institute's Principles of the Law of Family Dissolution in 2002. She happens to be the author of one of my favorite law review articles of all time, "Feminist Legal Methods," so I commend it to you.

And finally, we have Professor Russell Robinson,¹ who is the Faculty Director for the Center on Race, Sexuality and Culture and the Distinguished Haas Chair in LGBT Equity Professor of Law at the University of California, Berkeley. Prior to joining the law faculty at Berkeley, he was a Professor of Law at UCLA. He graduated with honors from Harvard Law School after receiving his B.A. from Hampton University. He clerked for Judge Dorothy Nelson of the Ninth Circuit, as well as for Justice Stephen Breyer of the U.S. Supreme Court. Without further ado, I bring you Justice Hart.

Justice Melissa Hart: Thank you very much. Thank you to the Law Review for including me in this. It's fun to be back in an academic setting, which is so different from how we talk about things at the court. One of the things that I have to keep in mind is that the canons of judicial conduct require me not to be partisan. I am allowed to say things that are controversial and political, but not partisan. So, I am just toeing that line. As is probably clear from the fact that I ran the campaign in 2008 against Colorado's version of the Ward Connerly anti-affirmative action initiative, I have really passionate feelings about affirmative action. I think it's essentially important and I am sad that, I think, it's got about a two-year time horizon. That is what I believe is the case and I think it's really sad.

What I want to talk about today is the tragedy that was the *Bakke* decision. I think Devon [Carbado] really effectively explained this morning the problems with the *Bakke* decision, so I hope all of you had a chance to hear that because I thought it was superb. I say that *Bakke* was a tragedy, not only as a strong supporter of affirmative action, but also as the very loving and respectful granddaughter of the lawyer who represented University of California, Davis before the Court and who fed Justice Powell the diversity rationale. If I had been old enough to be able to weigh in, I would have argued for something else. Both Archibald Cox, the lawyer who argued for Davis, and Lewis Powell received legal education at Harvard. Cox, as a JD, and Powell, as an LLM, and both really revered Harvard in a way that is sometimes hard to even understand. Perhaps then it's not surprising that both men found Harvard's approach to admissions almost necessarily laudable and that an appeal to those standards would hold weight for Powell. Therefore, Harvard's admissions practices would define affirmative action for the following forty years. It's ironic that

¹ Professor Robinson preferred not to include his remarks. The UC Davis Law Review deeply appreciates his participation. This transcript notes where his comments have been deleted.

Harvard's admissions practices are also almost certainly now going to end affirmative action.

One of the things that has been interesting for me over the years working at University of Colorado, which is defined as a "moderately selective" undergraduate institution, is that I am reminded always that most schools are not Harvard. Most schools that are selective at all are moderately selective. The problems that Harvard has in its admissions process and the lengths that Harvard goes to, to try to achieve diversity are really, really different from what happens at most institutions in the country. I think it's really unfortunate that most of the discussion around affirmative action ends up focusing on these highly, highly selective institutions, because I really do think it distorts the debate. I want to briefly mention one of the important ways that it distorts the debate. I did some writing on class and affirmative action looking at C.U.'s admissions policies. The University of Colorado admits about eighty-six percent of applicants. The way C.U. does its admissions does consider race but only as what it calls a secondary factor. Class, on the other hand, is a primary factor. There's nothing constitutionally suspect about considering class. Class is a heavy thumb on the scale for admissions at C.U., and because of that, and again, because eighty-six of applicants are admitted, consideration of class in admissions at C.U. as compared to race has been able to achieve about the same levels of racial diversity, to measurably increase racial diversity. That may not be true at highly selective institutions, indeed as other people said this morning, that's not generally going to be true because there are more poor white people than there are poor people of color. So at some institutions, considering class can make a difference in racial diversity, but not at Harvard, or almost certainly not at Harvard.

I want to talk a little bit about why I think *Bakke* is directly responsible for the Asian American case at Harvard and sort of the core of the diversity argument, and another piece of Powell's decision in *Bakke* is why we're having the conversation we're having today about Harvard's policy. I think there are two quotes from *Bakke* that can summarize the tragedy of the case. The first is from Justice Powell, who wrote that, "there is a measure of inequity in forcing innocent persons in Respondent's position to bear the burden of addressing grievances not of their making." This framing accepted the perspective that had been developing but had not hardened yet at that point, that is very entrenched and hardened now, that admissions choices are a zero sum game with certain people who are entitled to admissions who will lose their spots to less meritorious people and that those

people who are entitled to admission are innocent, that harming them, disrupting their entitlement to admission, is punishing them for no crime. That's the first quote, that's where affirmative action went. But there also is a quote from the opinion of Justice Harry Blackmun that I think is one of the most important quotes about race written in the U.S. Reports. "In order to get beyond racism, we must first take account of race. There is no other way. In order to treat some persons equally, we must treat them differently. We cannot, we dare not, let the Equal Protection Clause perpetuate racial supremacy." That is not the view that won. That is not what *Bakke* stands for at all. That's what *Bakke* does not stand for and I think that that's an important thing to remember.

I think if *Bakke* had broken differently, if the Court had been willing to recognize the need to acknowledge that affirmative action is not about diversity, but about the need for a counterbalance to entrenched racism and racial inequality, the Harvard case would not be happening today. We just wouldn't be having the conversation that we're having. I think one of the things that's important is recognizing that part of the concern that motivated Powell's anxiety about taking that approach was that he was focused on a *history* of discrimination, that somehow it was a history of past discrimination that created the need for affirmative action, and that mindset, it can be anxiety-inducing. It raises the same question that Justice O'Connor raised in her opinions on affirmative action. Well, if it's about history, then there will be an endpoint, we can stop because we have fixed the historical problem. But it's not a history of racism that we're dealing with in this country, it is a current, either implicit, or more and more frequently, explicit, racism, that needs to be addressed in thinking about the importance of affirmative action.

I think there are a couple of things that are really important about to consider in thinking about the Harvard lawsuit. One of the really important things about it is that Edward Blum is the person who brought it. It wasn't brought for the purpose of ending discrimination against Asian Americans. There are legitimate concerns about discrimination against Asian students and I think it's a serious question that needs to be taken seriously. But this lawsuit is about ending affirmative action. We know that because it's brought by Edward Blum and this has been his project for decades. Because of that, if you follow the arguments that are going on in the trial court, although they try to hew to a "this is about discrimination against Asian Americans . . ." they keep drifting to expressions of dismay about the black and Latinx students they believe should not be at

Harvard. They began the trial talking about what is definitely true, which is that white students are the main beneficiaries of discrimination against Asian Americans. In fact, in order to be able to admit all of the donors' kids, and athletes, and faculty kids, and legacy kids that they need to be able to admit so that they can keep their balance sheets higher than those of many countries in the world, they have to discriminate against some number of Asian Americans. They do make that argument, but then they keep slipping into how absolutely shocking it is, from their perspective, some of these black and Latinx students who are getting in.

The plaintiff's lawyer can't help himself from going there because that's really what the suit is about. It's about those kids who aren't supposed to be there. I think one of the most revealing things about the case is that no individual plaintiffs are testifying. It's 100 percent a battle of economic experts. The big difference between the data sets of the two experts — the plaintiff's economic expert is looking at a data set that excludes everyone admitted as a legacy, a faculty kid, an athlete, or a donor. That entire pool of people is excluded. Black, white, Latinx, Asian, whatever they are. They are just taken out and they are only looking at the pool of people that are admitted who don't have those qualities. Why is that? What's going on there? If you're looking at whether there's discrimination, wouldn't you want to look at the entire pool of admits? But they know that that pool of people is really the problem, and so they want to take that out and just look at this other pool and the statistical disparities in this other pool look very different than if you put the entire pool together and look at what the statistical disparities are in the entire pool of applicants.

The last thing I want to say, is that I want to urge you to take a look at two articles that were a back and forth in the *Harvard Law Review [Forum]*, between Elise Boddie and Kimberly Jenkins Robinson. Really interesting perspective on affirmative action. They were published in the online law review on November 10, 2016. Given how long it takes to write a law review article, even a comment, I think they were written before November 7, 2016. They both present slightly different, but really exciting, visions for the future of affirmative action and what the Supreme Court should do. Kimberly Jenkins Robinson argues that the Court's decision in *Fisher II* is not that bad. It still holds onto affirmative action and we can build on it and keep that affirmative action idea. She says what we really need to look at is the beginnings of education and what the Court is going to need to do is overturn *San Antonio School District v. Rodriguez* because we really need to address the right to education and the economic inequities that create such an

imbalanced playing field from the get-go. Elise Boddie responds and says, let's acknowledge that *Fisher II* is bad, there is no way that we can get around *Fisher II*, it's not workable. She starts her piece by saying: "It is hard to remember a time in recent memory when the problems of racial injustice have been more visible and the need to promote opportunities for people of different racial and ethnic backgrounds has seemed more urgent." She goes on to argue that what the Court needs to do is go back and revisit the rationale for affirmative action and acknowledge that current racial injustice and current racism is the reason that we need to have affirmative action, and that's what the Court needs to do. Neither of their visions is going to happen because of the outcome of the 2016 election and the direction the Court has gone. I hope that other people will think about ways that, putting the courts to the side, we can look for the vision of racial equality that didn't win in *Bakke*, but should have.

Professor Michal Kurlaender: Good afternoon. Thank you for inviting me to the conference, organizers. I'm here as a social scientist, but in full disclosure spent a lot of time with lawyers — I was an original employee of the Harvard Civil Rights Project which came about in 1995, partly in response to the *Hopwood* decision where Christopher Edley, Jr., a lawyer on the faculty at Harvard at that time, and Gary Orfield, a political scientist, created an organization to try to bridge the divide between social scientists and lawyers to improve evidence. The idea was for greater collaboration on current social policy and legal issues, such as rollbacks in affirmative action, increasing development in school choice, and a number of other education reforms that were happening, and which civil rights groups and others saw as problematic for improving education opportunities, particularly for students of color in this country.

Today I'm going to try and talk about the legacy of *Bakke*, and I'm actually going to try and put a positive spin on what it's done for social science, where the decision led to major movement, from a space of intuition — that we had as educators about the value of diversity — to a generation of hard evidence about diversity's impacts. I'll also talk about the impacts of *Bakke* on admissions practices, and partly I'm thinking about not just selective admissions, but also more broad access institutions, to the prevalence of holistic review, and then of course, to race-neutral admissions criteria that we hope will generate diversity. The most critical piece of *Bakke*, which we see remains relevant today with the Harvard admissions case, is the role of student body diversity, particularly racial diversity, that is essential to

“pedagogical objectives in institutional admission.” I think educators have long-held these beliefs from the K-12 classroom to higher education, that diversity matters, but we had virtually no really hard evidence to show it. I think the *Hopwood* decision highlighted that, and then social scientists — myself included — got to work. Our research cited across many legal footnotes — I’ve learned to be proud of being cited in footnotes. These citations on the benefits of diversity come from across nearly every discipline of social science, and from many methodological approaches. We have research from close examination of classroom contexts to one of my favorites, which uses the randomization of roommates (where some students end up with roommates from different racial ethnic groups), and looks at impacts on attitudes on any number of social policy issues, such as affirmative action and criminal justice. So both a broad and deep evidence has identified that a diverse student body promotes understanding; reduces prejudice; leads to educational benefits such as improvements in cognitive abilities, critical thinking, self-confidence; promotes civic engagement and skills needed for participation and leadership in a variety of fields; and importantly, leads to educational benefits in classroom environments.

What do we still not know? I would say that the research has expanded, but also been limited in several ways that I want to articulate because I think they matter for fundamentally changing higher education in the coming years. We still don’t know about the importance of how diversity interacts with instructor characteristics, which connects to efforts to think about diversifying the academy more generally. We still don’t have as much evidence on the role of instructor and student relationships. And limited evidence on long-term outcomes of diversity, such as in employment settings or overall in the labor market. We have a lot of different amicus briefs from different professional organizations that say as much, but we have rarely expanded the research to look at whether diverse educational settings actually prepare students for the more complex work environments that they are going to face. That is really difficult to do analytically, but quite important. We still haven’t really answered this critical mass question, and maybe it’s not really relevant anymore. You all are the attorneys, so you’ll tell me if it’s not relevant. But it was relevant for a long time and I don’t think we nailed that in research at all. So what do we know about this question: we know that racial isolation is bad, that tokenism is bad in that it’s a threshold, which we don’t think is productive for students. And that creates lots of problems, everything from exacerbating stereotypes, to lower sense of

belonging. The best guess that we have in social science is that it's somewhere in the sort of fifteen to thirty percent range representation to reap the benefits of diversity, but of what groups? Underrepresented groups more generally? Asians, broadly? Not quite the same given the many subgroups. So, I think we still have a long way to go to sort of think about forms of diversity, what it looks like, and this critical mass question.

I now want to turn to the evolution of admissions policies. From where I sit, not as an attorney, but as a researcher of higher education, I am cognizant of the fact that the courts are no longer open to the remedial justification for affirmative action, however, I am also deeply aware how much that goes against our evidence base on educational inequality. From the perspective of education researchers and educators on the ground, we've known all along that that problem of educational inequality — in opportunity and in outcomes — has not been solved. So, we've been bound by the legal bind that we are in to provide evidence on the diversity rationale, but we have mounds and mounds of evidence on gaps in educational opportunities in this country, from early childhood, from birth, through K-12 schooling, higher education, and really, up through professional and labor market outcomes, every part of the pathway remains unequal for different groups in our society. Producing evidence to answer to that justification is, from a social science perspective, easy. We have that. And, if we're thinking of affirmative action narrowly, just in higher education, then our colleges and universities may not be responsible for some of the many disparities that they see in the admissions files that lead to the disparities that we see between different socioeconomic and racial groups when they arrive in admissions, but they certainly have a decision, especially at public institutions, (perhaps also in private), about how much to weigh those disadvantages that have existed all through childhood. Again, higher education can turn a blind eye to what came before, which may seem preferable given the complexity, but rarely do they, especially in the public sphere; most higher education institutions feel some responsibility to address the deep inequities that result in the kinds of admissions profiles that they see. I think Harvard, in some ways, is the case in point, despite the fact that you see, it can admit the number of spaces for freshman many times over just based just on perfect SAT scores. The reality is Harvard students don't all have perfect SAT scores, in one part because a perfect SAT score doesn't predict any more so than the ninetieth percentile SAT scores, but also because Harvard actually accounts — to some degree — for the uneven

opportunities students have had in their prior educational experiences.

One of the ways we've gotten around the restriction of race-conscious admission policies, and the inclusion of diversity and other factors, is through a holistic process. It's what the applicant can contribute to the campus community, student's character, we're trying to measure personal traits, talents, extracurricular activities, etc. And here there's this clear tension. On the one hand, there's the opportunity to look beyond test scores, which we have lots of research that shows disadvantages particular groups. But on the other hand, those other measures that we include, people are inherently suspicious of. They seem less standardized and appear less objective in the eyes of the public. Why?

There's an interesting study that came out several years ago from a sociologist, Frank Samson, who was surveying white adults in California about what should be privileged in college admissions decisions. When asked generically, white adults say test scores and grades. But if you ask a similar group of white adults, but preface the question with the fact that Asian American students are overrepresented in UC admissions, the same white Americans will say, we should count more than just test scores and grades in admissions. So, even our sense of what's objective has a relevance to the context in which we hear it. The Harvard case, as mentioned, is a disagreement about what is included in these additional measures and how they are used, and it is inherently hard to document such characteristics and traits.

Our statistical models are only as good as the measures that we put in them. And we often don't have the best measures, or we think of them as truth, as if including them on the right hand side of the equation somehow controls, makes it go away. But the reality is there is so much that is not included that lead to that measure in the first place. Even if you could control for things that overlap with race, SES or other things, that doesn't make the race effect go away, it just means that the race effect is in fact a complex one that interacts or is associated with a whole bunch of other predictors in that model. These non-academic factors are harder to quantify. In particular, the overall context of each candidate's application matters.

So we look to California. California has been restricted on the use of race but cares about increasing opportunity in higher education, so UC in particular has had to be quite creative in thinking about how we keep that commitment to opportunity when we are not able to use race as a factor. We often look at the context in which that student is coming from; for example, the quality of the applicant's high school,

the applicant's socioeconomic circumstances, the resources and opportunities available to the applicant as a result of that community and those high schools, neighborhood, family background. This is particularly important for holistic review, not just at Harvard, but also at public institutions such as UC. This is of course a much more laborious and involved process given the massive numbers of applicants involved. A lot has been written about places like Texas that have used a different race-neutral formula to obtain a racially diverse class: guaranteeing admission to the elite flagship campus for the top ten percent graduating from every public high school. California has opted for related but less weighty approaches, which has also lessened the disparity impacts of the initial end to affirmative action in places like California and Texas, but it has not been a replacement (in terms of diversity) for race-conscious affirmative action. What we do know from a variety of research that I and others have done is that these race-neutral alternatives, for example socioeconomic-based factors, may matter in their own right. In other words, we may care about socioeconomic diversity for all the same reasons about producing a class and educational environment that's rich in diversity in lots of ways. But that race-neutral policies do not replace race.

Professor Katharine Bartlett: I want to add my thanks to the conference organizers. We have all been to a lot of conferences and I think we can agree that this one has been a particularly well-oiled machine, so thank you very much. I'm honored to be included.

For my remarks, I want to pick up on a part of Justice Powell's opinion that has had less attention today, which is the rationale he gave for preferring the diversity rationale for race-based affirmative action in the context of college and university admissions. Justice Powell thought that the diversity rationale was preferable to either a color-blindness approach or a focus on racial subordination because, unlike those other approaches, this rationale would support affirmative action while reducing racial discord and mitigating the deep resentment to affirmative action felt by "innocent persons." The idea was that diversity would reduce the salience of race and thus lower the temperature in debates about affirmative action, making it more likely that people would find it acceptable.

As a gender scholar, one of the things that interests me about this rationale is its absence in debates about affirmative action for women. The goal of reducing controversy does not seem to come up in discussions of affirmative action for women, probably because

affirmative action for women is less controversial. There are fewer challenges to sex-based affirmative action programs and, for some of the same reasons that make those programs less controversial, courts apply a more lenient standard of review than they do in challenges to race-conscious programs. Under that standard, courts show no fear of fanning the flames of the gender wars, and they do not flail around for an alternative rationale that won't rile people up. Instead, they find that significant numerical disparities are sufficient to indicate the presence of past discrimination, and thus to justify sex-based affirmative action, even though such disparities are never enough to justify race-conscious programs. Based on such findings, courts have upheld virtually all sex-based affirmative action plans that have been challenged.

The studies vary, but show a gap in support for race-conscious versus sex-conscious affirmative action of somewhere between ten and twenty percent. That gap is growing, more because of increasing resistance to race-based affirmative action than because of any changes in attitudes toward sex-conscious affirmative action. The gap is probably understated in that all the polls I've seen ask whether the respondent supports race-based affirmative action first, which — given the resistance to race-based affirmative action — primes a negative response to the question about sex-based affirmative action.

Why this disparity? There are some reasoned arguments that people give against affirmative action, which come down to the importance of seeing people as individuals rather than as members of a group. But you would expect that this concern would apply equally to race and gender, so that rationale doesn't seem to explain the gap. Another explanation could relate to the comparative emotional valence of race and sex; if people hold more animus against racial minorities than they do against women, they would be expected to resist measures that help racial minorities more than they resist measures that help women. This may explain some of the gap, but it begs the question of why there is more hate when it comes to race.

The social science literature offers three other factors that might go farther in explaining the gap. The first is self-interest, or whether one stands to lose or to gain by affirmative action. The second is a set of beliefs people have related to the justness of the world and the psychological predispositions they have toward justifying the existing hierarchies. These are sometimes referred to as system-justification beliefs. The third factor is stereotyping.

As for self-interest, the data are pretty clear. Minorities and women have more to gain from affirmative action and thus — no surprise —

support affirmative action more than white men. They support it for their own in-group, in much higher numbers than white men. They also tend to support it for other disadvantaged groups, based on what social scientists call cooperative self-interest. If affirmative action is fair for me, then it is also fair for you; if you support it for me, I'll support it for you.

In line with the self-interest factor, I first assumed that the reason more people supported affirmative action for women is the fact of their sheer numbers. Women are half the population. Moreover, many men have wives and daughters, and it is in their self-interest, at least indirectly, to improve those women's opportunities. Therein lies a big difference between sex and race. Men and women share an in-group. They live, play, fall in love, and often have children with each other — most often across the sex barrier. Men and women cross the gender barrier more often than people of different races cross the race barrier. The more mutually dependent men and women are, the more we would expect men to be supportive of sex-based affirmative action and — to the extent that there is less mutuality of interest across race lines — that this support would be greater than support for race-based affirmative action.

The data do not fully support this explanation. First, marriage, rather than increasing support for sex-based affirmative action, seems to lessen it. Second, having daughters does not necessarily increase support by fathers for affirmative action. Chief Justice Rehnquist may have decided to uphold the FMLA when he had a daughter and realized how many problems she had working while having children. But one large study found that having daughters and no sons magnifies support for sex-based affirmative action only among mothers; it actually diminishes support for affirmative action among fathers.

Self-interest is important, but probably not as important as other factors in explaining the gap in support between race-conscious and sex-conscious affirmative action plans. Some social scientists believe that beliefs and stereotypes are more important than self-interest in explaining differences in race and gender attitudes. Indeed, the beliefs that cause people to oppose affirmative action often do not align with their economic or material self-interest. People who have system-justifying beliefs that lead them to want to defend the existing societal distribution of power and institutions come to these beliefs, more often, because they are taught these beliefs, or because they have psychological anxieties, are insecure over losing their status, or feel their sense of order threatened.

People who have system-justifying beliefs see inequality not as a

collective or systemic failing, but as the produce of conscious and deliberate individual decisions. This is the case whether they are at the top or the bottom of the economic pyramid and, either way, their attitudes feed into their view of affirmative action. Those at the top see their power and opportunities as deserved. They make good choices and earn the rewards they have received. Affirmative action threatens that view of their own deservedness. This makes sense. If you have succeeded under the system, you want to think of the system as justified because if the system is unfair, then you don't deserve what you have, which is a pretty frightening proposition. To justify their power, people at the top of the pyramid may even think of reasons why inequality is a good thing, such as the reason that the existence of hierarchies gives people more incentives to work hard play by the existing rules.

Those at the other end of the socioeconomic spectrum may have even stronger system-justifying beliefs. Those beliefs do not allow them to blame the people at the top, so instead they blame those they think have benefited from government programs, including affirmative action, for getting more than they deserve at the expense of people like themselves.

The studies show that system-justifying beliefs have a greater and more negative effect on attitudes toward affirmative action for minorities than on affirmative action for women. This is largely because of the third factor I want to explore — stereotypes.

There are many differences in stereotyping between race and sex. First, virtually all stereotypes about Blacks are negative. You can think of some exceptions but, for purposes of this discussion, the high prevalence of negative stereotypes about Blacks supports a single narrative that Blacks get what they deserve. If they are disproportionately poor, unemployed, undereducated, and imprisoned, it is because they are lazy, irresponsible, and not very smart. This script is not a very good one for building favorable attitudes towards affirmative action.

Stereotyping works a little different with respect to sex. Unlike race stereotypes, some stereotypes about women sound positive, making those holding them perceive that they are positive and generous toward women. This doesn't mean that the effects of these stereotypes are all positive. We all know about the damage of "benevolent" sex stereotypes, which includes disparities in pay and advancement that are justified (by system justifiers) by the fact that women are different. They have different interests. They have different talents. They make choices to work in less lucrative employment and to take primary

responsibility for their children. System justifiers believe that these are simply the choices women make. Because these beliefs are based on “benevolent” or generous attitudes about women, people are not embarrassed about holding them. If they are called out on their stereotyped thinking, the fact that they perceive their views toward women as positive allows them to believe that any mistake they have made is, at worse, an honest one, rather than something to be ashamed of, the way people are ashamed of being caught being racist.

Because people who engage in sex stereotypes don’t generally feel the same sense of guilt or shame or threat as those who engage in race stereotypes, they are less defensive or resentful of sex-conscious affirmative action programs that are premised on the existence of past discrimination, since they don’t feel themselves a part of that past discrimination. The failure to trigger defense mechanisms is reason alone why people are less resistant to sex-based affirmative action.

The other significant difference between sex and race stereotypes is in their specific content. An important part of the standard package of sex stereotypes is that women need a helping hand and that it is man’s role to give them that hand. So, while race stereotypes provide reason to oppose affirmative action for racial minorities — it’s their own fault that they don’t succeed — the paternalism of sex stereotypes provides a reason for favoring sex-based affirmative action.

All these factors — self-interest, system-justifying beliefs, stereotypes — help to explain the gap in support between race and gender affirmative action programs.

I want to return, now, to Justice Powell’s diversity rationale for affirmative action. The emphasis on diversity may, indeed, help to reduce racial tension. Experimental research shows that the diversity rationale does not trigger as much threat or defensiveness as a racial justice rationale, which makes people more open to consider supporting affirmative action. The problem is that it does so only by reinforcing a sense of innocence. Mario [Barnes] and several other people have talked about this today. In absolving “innocent persons” from guilt, the diversity rationale emphasizes to potential adversaries of affirmative action that they are not the “real problem.” This sense of innocence is reinforced by the fact that race-based affirmative action in college and university admissions is legitimate only if it improves the institutions — i.e., only if the innocent themselves are better off.

Some social science data suggests that the guilt-free path is not costless. This data indicate that it is not ignorance that reduces discrimination, but awareness that discrimination is real, systemic and for the benefit of the privileged. Keeping people ignorant about their

place in the system strengthens their tendencies to justify the system that privileges them. Conversely, race awareness is strongly associated with a decline in system-justifying beliefs. When people are able to concede the existence of systemic discrimination and their role in it, there is more reason to hope for a decline in system-justifying beliefs.

Sex poses a different problem. The thing that reduces opposition to affirmative action is benevolent stereotyping. But the stereotyping that supports affirmative action for women does so by keeping the focus where it continues to do the most harm — on the perceived differences between men and women. Ironically if sexism was understood less as a matter of honest mistake and more as a matter of pervasive invisible and systemic system of subordination, as race critics understand race discrimination to be, then measures like affirmative action to combat it might actually generate more threat and more resistance and more opposition. Instead, ignorance of stereotyping leads to more support for affirmative action, while it maintains the feedback loop in which gender stereotypes are continually reinforced.

The nature of opposition to race-based and sex-based affirmative action is different, and the legal standards reflect these differences. But there is an important commonality. With respect to both race- and sex-based affirmative action, the elements that appear to reduce opposition to affirmative action — ignorance and the failure to confront race privileges on one hand, paternalistic sex stereotypes on the other hand — also help to sustain the inequality that gave rise to the need for such programs in the first place. One of the difficulties of affirmative action is the opposition it engenders. That's where Powell started; he wanted to reduce opposition to race-based affirmative action. Yet, reducing opposition may have negative effects on the larger mission of reducing gender and race discrimination. This should make us suspicious about whether Justice Powell's goal of reducing opposition to affirmative action is, after all, the right goal.

[Deleted]

Professor Lisa Pruitt: While people are thinking about the brilliant questions they wish to ask, I have a thought about Professor Bartlett's talk. It reminded me of two books I recently ordered that take up the matter of this need to tiptoe around Whites so as not to invoke their guilt. We feel the need to spare them guilt and discomfort about our nation's racial history and its consequences — or at least they want to be spared that discomfort. So, one book is "White Fragility" [Robin

DiAngelo] which is maybe being published in the next month or so. And the other is “Backlash” by George Yancy. If you all didn’t read Yancy’s absolutely amazing Op-Ed in the New York Times a few years ago, it was “Dear White America” and basically, what he said was here’s how I came to see my role in gender discrimination and now what if all the white people in America could kind of go through this process to understand their role in race discrimination. And apparently, he has titled the book “Backlash” because there was such enormous backlash to that New York Times piece. Personally, I thought it was amazing and I always assign it in my seminars. To scholars — I think Yancy is a philosopher — who are taking up this issue of what’s up with this widespread inability or unwillingness among Whites to grapple with our racial history?

Professor Katharine Bartlett: I haven’t read either of these books but it’s a fascinating subject to think about whether you try to bring Whites around by the tiptoe approach and really, the diversity approach is to say it is actually in your interest, your University of Michigan Law School will be stronger as a result of diversity. That’s the reference point that we ought to be most interested in versus what sounds to me like getting to somebody by actually deeply educating them and then reach the “aha” moment. You know, I think about this a little bit in the context of the domestic violence parallel. I think the first of the diversity approach, the tiptoe approach, would be like trying to persuade a perpetrator of domestic violence that it’s really in his interest not to kill his wife. As if that is what matters, that it’s in your interest. And that is sort of what diversity, with the law of diversity casting a pretty negative light and there is a more positive side to it. When we turned it around to make the argument be what’s in your interest, it just feels like we’ve given away the show. So, I’m interested in following up with that.

Professor Lisa Pruitt: Other questions?

Professor Devon Carbado: Justice Hart, I was going to ask whether you mean what you say when you suggest that in two years affirmative action is over. Is there another scenario in which the Court takes another slice at affirmative action but does not actually kill the policy? I wonder if you could speak to that and Kate [Professor Katharine Bartlett], I was thinking about white women’s relationship to affirmative action. One could say that it is racially mediated in two directions. It’s not just about their daughters. It’s about their husbands

and their sons. The notion roughly is that white women might perceive that they have an interest in white men's upward mobility possibilities. If white women think that affirmative action undermines that upward mobility, they would position themselves against the policy. In this respect, white women are not thinking only about their daughters. They are thinking about their sons and husbands as well.

Professor Katharine Bartlett: So, in fact, that is the biggest reason. There is a study for that, that does show that a very significant portion of the opposition by women to affirmative action is that they're nurturers after all and that they are thinking of their sons and husbands. And that in fact, for women, if you look at self-interest as being either my own personal gain or the gain of those I know and love, that for men, that personal side will trump the more collaborative cooperative side and for women, it doesn't.

Justice Hart: I do mean what I say. I don't think there is a stop along the way. I think that it's clear that the four conservatives who have been on the Court and were in *Fisher II*, they have made it clear where they are. And then I think not only Kavanaugh but also Justice Gorsuch, will almost certainly take a *Parents Involved*, the way to stop discrimination on the basis of race is to stop discriminating on the basis of race, view. Neither of them when they were on the Courts of Appeal wrote anything specifically about that, but given their approaches to other areas of law, I guess I would be shocked if as soon as they have an affirmative action case, they don't end affirmative action. I think that if it's not the Harvard case, it'll be the North Carolina case. I think there might be a couple of others that have been filed, but I think this is what Edward Blum wants to do, and I think he'll fast track it through.

Professor Devon Carbado: So, this is a quick follow up. Russell [Robinson] made a point about that migrating centrists. Could that include Roberts as migrating minimally to the center because he fashions himself as a minimalist and is concerned about Supreme Court legitimacy, et cetera? Reading Justice Roberts in this way would also lead to the conclusion that we will see a slice at rather than a obliteration of the policy.

Justice Hart: So, I guess my view on that is race is one of John Roberts' passionate areas so although I think the integrity of the Court and perceived integrity of the Court is going to matter to him in a lot of

areas, not this one. I think for him, the concept of colorblindness is such an ideal. I'm curious if others agree or disagree.

Professor Devon Carbado: By the way, I'm there too. I'm reaching for hope.

[Deleted]

Professor Katharine Bartlett: *Obergefell* is going to be very hard to take down. Lots of people are married. That's a tough one to unravel unlike these others which are easier.

[Deleted]

Justice Hart: It'll be *Masterpiece Cakeshop*.

[Deleted]

Yuvraj Joshi: Following up on that point, it's also possible to kill affirmative action by a thousand cuts. While they may not overrule *Bakke*, *Grutter*, or *Fisher*, it might be that by demanding greater transparency of how programs operate, which is something Justice Ginsburg has talked about and all the conservative Justices have talked about, just render programs so transparent they cannot work. Might that be a possibility?

Professor Katharine Bartlett: Well, that puts legacies in a tough spot too.

Yuvraj Joshi: But of course, transparency selectively applied. Do you think that overruling *Bakke* is the only way?

Justice Hart: I don't know that it's the only way, I think that's what they'll do. I actually think *Fisher II* killed affirmative action. We pretend it's still there, but I think the way the Court set up the test in *Fisher II*, I don't know how anyone challenged in litigation could meet the test that they set up. So, the only reason it hasn't happened yet is because nobody has brought the lawsuit yet. I sort of think people were waiting for Justice Kennedy to go away and now they'll come up and they'll say, all right meet this test that we set up in *Fisher II*. You show that you need to meet a critical mass of a number. Oh! You can't use a number, you're out. You either used the number or didn't use

the number, so therefore, the program is out, that's what I think will happen.

Professor Lisa Pruitt: So, I see three questions. Let's start with Professor Harris.

Professor Cheryl Harris: I guess what I was just going to say that the trend of this conversation suggests that maybe we should cancel the last panel for now. I think that it's inevitable that these things really are interconnected. I guess I just wanted to react to the idea, Lisa [Professor Pruitt], you brought up a book about white fragility, and I thought Katharine [Professor Bartlett], your paper was very fascinating in terms of thinking about the different reactions to social inclusion measures based on race versus those based on gender. I wanted to interrogate about how we might think about the sort of dead-ends, to some extent, that diversity has brought, in terms of the ability to bring with it the important history and experience that actually would make a remedial approach more "acceptable." And I wonder about the question of audience, because so many times, I feel like both the literature itself and the way in which we frame our discussions, we think about all this in terms of persuadable Whites. That is the imagined audience to whom we're talking and just in terms of thinking about my own conversations with my students or even to people generally, I find that the ways in which the legal discourse has dumbed down the discussion actually flows over to the people who have affinity for the project but have no idea how to defend it or think about it or argue for it.

So, I wonder if we shifted our lens a little bit and this is my statement, not so much as a question, but my comment is, shifting the lens a little bit to think more about the audience not so much in terms of the persuadable Whites or the Trump voter. This [the Trump voter] is the endless trope that has now been created that we're supposed to focus our attention on, even though empirically and ideologically it is problematic because it lets off a lot of other white people who are not economically disadvantaged who voted for Trump. You know what I'm saying, there is a kind of victimization of that person. I shouldn't say victimization, but that person is demonized as the cause of the political catastrophe which we are now living.

So, I think that all I'm trying to ask is whether or not that shift in terms of who we're talking to actually might allow for some space beyond the bifurcation. And implicit in that, is my sense about what it might mean to take an intersectional approach seriously in this

context. To some extent, I think Russell [Professor Russell Robinson], your comments made me think about this, which is, the way in which the taxonomy of equal protection reproduces this notion that people only exist in this one or the other category, and therefore don't have a stake because, to me, the trend of your comments suggests we need to take the entire taxonomy down. And so, if that's where we are, then maybe our audience has to start with us in terms of talking to ourselves is supposed to be a bad thing, we're supposed to talk outside, and I'm not suggesting that we don't, but I'm actually saying I don't think we've had enough practice yet in thinking outside of the limited terms in which we've been given.

Professor Lisa Pruitt: Would it be okay if I take the other two questions quickly since we're running out of time?

Audience: Actually, you helped me with my question I think. It seems to me to me that given the Court we have in front of us for a long, long time, I looked up all their ages the other day and it's kind of extraordinary. Anyway, given that is what we have, and given that we have the cases in the situations that they are, and given the expectations and the negative expectations that you all are anticipating will occur, would it be smart and is there a mindset to go back, back, back, back to the policy at the university, figuring out some new way to make this happen? Some way to present this so that it appears more fair to everyone? Doesn't use the terms that we're used to hearing that set people off. I mean, is there a mindset, is there a thought process going on, about how to go back to that grassroots policy level so that we start over and maybe do it better.

Audience: Professor Bartlett, I was just curious, I don't know if I heard you correctly, but I think you said that you thought Powell was wanting to reduce opposition to affirmative action? Did I hear you correctly? Could you talk about that a little bit? It surprised me.

Professor Katharine Bartlett: He talks explicitly about reducing racial discourse. And I take that to mean reducing opposition, to making affirmative action more palatable by making it less threatening. That's how I'm understanding his opinion. On Cheryl [Professor Harris]'s point, I just want to say really quickly, I love your point and I want to continue to think about it. My point really went to whether or not we should be trying to persuade anybody. I think maybe there has been too much focus on deciding affirmative action cases in a way that

takes account of everybody's feelings, or takes account of a certain audience's feelings, when really we might be better off just deciding cases. The law has been distorted by that effort to persuade.

Professor Lisa Pruitt: Alright, thank you all so much.