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The Betrayal of *Brown v. Board of Education*: How *Brown*'s Promise is Unfulfilled and What it Says About the Continuing Problem of Race in Education

By

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Committee in Charge:

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## Abstract

The Betrayal of *Brown v. Board of Education*: How *Brown*'s Promise is Unfulfilled and What it Says About the Continuing Problem of Race in Education

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As we stand on the cusp of another Supreme Court opinion concerning the use of racial considerations in education from *Fisher v. University of Texas*, the Court's final verdict may potentially be another set back for affirmative action policies in education. However, the historical trajectory of the Court's approach to racial issues in and beyond education suggests a more critical assessment of legal moments such as *Fisher* is needed. That is, *Fisher* must be placed within a historical racial narrative carefully orchestrated by the Court. The Court's racial narrative adjudicates social cleavages on race in areas such as voting rights, employment law, criminal justice, and education. A comprehensive engagement of the Court's discursive trajectory on race is necessary in order to accurately understand the significance of *Fisher* in the aftermath of *Brown v. Board of Education*. Without an engagement of the Court's previous moments, our understanding of *Fisher*'s significance becomes limited and trapped within the mainstream colorblind racial narrative that all but dismisses the salience of racial subordination in society. This study will show that by engaging the Court's long and unfortunate history adjudicating racial issues, white privilege and whiteness has been protected and perpetuated by the Court's powerful authority. Furthermore, regardless of *Fisher*'s outcome, an engagement of how the Court has defined, protected, and perpetuated whiteness will fundamentally understand *Fisher* not only as a defeat or victory for racial considerations in education, but as an instantiation of the continuing problem of race in society. As a result, the persistence of racial subordination in the 'colorblind' era is anything but coincidental.

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## Chapter 1: Introduction

### INTRODUCTION

In 2008, Abigail Fisher (see *Fisher v. University of Texas*, 2012), a White student, brought suit against the University of Texas at Austin after she was denied admissions as an undergraduate student. Fisher blamed her rejection on the University's race positive holistic admissions program. UT Austin's holistic review takes into account racial considerations as one factor in a multitude of factors in its admissions process. Fisher claimed she had suffered racial discrimination due to the school's use of race positive considerations and therefore argued holistic admissions violated her constitutional equal protection rights. With much anticipation during the spring of 2013 for the Supreme Court's decision on *Fisher*, the Court's opinion was rather tame and anti-climatic. Rather than issue a verdict on whether or not the University of Texas' holistic admissions policy was constitutional, the Court instead punted and remanded the case back to the lower appeals court on procedural grounds. Perhaps the University of Texas and their proponents welcomed the decision because the Court did not affirmatively strike down its race positive admissions policy.

The Fifth Circuit Court of appeals reheard the case via a three-judge panel and sided with the University of Texas' usage of race positive admissions. Predictably, the *Fisher* case ends up at the Supreme Court (hearing to be held December 9, 2015) as Fisher's legal team, funded and supported by a plethora of conservative foundations and think tanks, have repeatedly stated that they will only accept the Supreme Court's opinion as the final say. The possible outcomes do not necessarily bode well for those who are pro-racial consideration in educational policy. At most, the Supreme Court may maintain the status quo of using racial considerations as one factor in a number of factors in higher education admissions. At worst, and this is a scenario that legal scholars increasingly predict (see Denniston, 2012; Parker 2012), the Court's five conservative justices will form a majority bloc and ultimately do away with the University of Texas' race positive admissions program.

For race positive advocates who campaign for racially conscious policies in education, government, employment, and other civil institutions, the Court's assault on race-positive considerations in public policy has been relentless. As this study will show, the Court's sixty-year history since *Brown* has produced a judicial history that has been at best hostile towards race-positive policies and at worst prolongs the racial disparity that many social and civil policies have attempted to address. As a result, a decision from the Court against the University of Texas and its proponents may seem like déjà vu and represents another blow to the project of affirmative action and race conscious policies. Although sixty years since *Brown* is a significant period, six decades is merely a fraction of the Court's long history adjudicating racial issues. Thus, equating a negative decision in *Fisher* against race positive holistic admissions as a defeat to affirmative action policy represents a short view that is limited to the sixty years since *Brown*. Important legal developments notwithstanding, this short view neglects the longer legacy of the Court's decisions concerning race. The Court's racial decisions for the past sixty years are built on the foundations of its racial decisions of at least the last two hundred years. Taking a longer view preceding the *Brown* case reveals a history that suggests a negative decision in *Fisher* is not just another blow to the project of affirmative action, but represents the latest maneuver in an ongoing retrenchment of whiteness and white privilege.

## ***Project Goals***

This dissertation study reviews the Supreme Court's colorblind jurisprudence since *Brown v. Board of Education* and argues that its uptake of racial issues is a refraction of American society's problematic 'colorblind' imagination of race and its general unwillingness to confront the material realities of racial stratification and subordination. More critically, colorblindness in the law represents a reactionary racial project intended to reinvent and reposition White racial privilege. The jurisprudential turn (more on this below) towards colorblindness following *Brown* and the Civil Rights Era occurred not simply because of individual conservative Supreme Court justices exercising an independent constitutional interpretation, but represents a broader social-civil uptake of the significance of race in policy. Furthermore, viewed as a vehicle for upward mobility, education is viewed as an institution that may either eliminate or reproduce social inequality. As a result, the Court's decisions on issues of race and education have a direct relationship in determining the democratic potential of public education.

Particularly as the law relates to educational policy, this study will show that the Court's racial ideology cannot be severed from its material manifestations and consequences, specifically in education. That is, the Court acts as more than just an umpire enforcing the rules of fair play in education when it comes to the usage of race in policy practices. Rather, with a careful analysis of its contemporary educational cases (e.g. *Bakke*, 1978; *Grutter*, 2003; *Parents Involved*, 2007; *Fisher* 2012), this study explores whether or not the Court's rulings help establish the normative, or commonsense, uptake of race in civil society. Finally, if education is inhibited from fulfilling its potential to democratize a racially stratified society, what then does education represent as a cornerstone of U.S. democratic promise? In addressing this last issue, this study will engage the emerging literature on race and whiteness studies in education (see Giroux, 1997, Gillborn, 2005, Leonardo, 2009, 2010) to open a process of inquiry that asks if an educational system that is unable to deal with the realities of race is itself an affirmative agent in the stratifying process, one that is given the sanction of law.

In Ian Haney López's seminal work *White by Law: The Legal Construction of Race* (2006), one of Lopez's main questions pertaining to the relationship between the law and race is whether or not law operates "as an ideological system, as a source of beliefs about what society does and must look like" (pg. 79.) Additionally, if the law in fact operates as an ideological system, Lopez asks how "this system influences or creates ideas about race" (*Ibid.*). *White by Law* is a critical examination into the processes, methods, and justifications utilized by federal and Supreme Courts in the construction of racial meanings in the early 20<sup>th</sup> Century. To Haney López, the Courts were more than just legal arbiters reflecting existing socio-racial practices. Rather, courts, justices and lawyers actively *constructed* racial meanings by using a combination of scientific evidence and commonsense knowledge, thereby actively shaping the nation's racial understanding. The bulk of Lopez's analysis focuses on cases from the first half of the 20<sup>th</sup> century.

Beginning with the latter half of the 20<sup>th</sup> century, a radical shift occurred in the way the Supreme Court adjudicated issues of race. Before *Brown*, in the first half of the century the Court vacillated between using scientific evidence or common sense in order to establish acceptable racial categories. For instance, in *Ozawa* (1922), the Court utilized a scientific anthropological understand of race to deny Takeo Ozawa the right of land ownership. At the time, land ownership was only legally permitted for Whites and Blacks. The Court was not

persuaded by *Ozawa*'s claim of White personhood because of his Japanese ancestry. Rather, the Court located whiteness to those belonging to the Caucasian race, geographically from the Caucasoid region. Thereby in *Ozawa*, the Court utilized a scientific geographical approach to determine whiteness. In response, Bhagat Thind sought to take advantage of the Court's ruling because of his ancestral ties to the Caucasoid region as an Indian Sikh (see *Thind* (1923)). In a case decided by the same Court with the same justices a few months after *Ozawa*, in *Thind* the Court abandoned its scientific definition of race by elevating a social practice definition of race. The court rejected Thind's claim of White personhood ruling that although he was from the region of the Caucasus mountains, he was not socially understood as White. The Court concluded that although Thind is Caucasian by virtue of geography, it did not necessarily make him White as a matter of common everyday understanding. Whereas the Court in *Ozawa* and *Thind* were unapologetic about taking up the issue of race, even contradictorily, the Court since *Brown* now shows either a disdain towards race (See *Grutter* (2003) or simply refuses to recognize the importance of race altogether (See *Parents Involved* (2007)).

### ***Purpose of The Study***

Post *Brown v. Board of Education* (1954) and the Civil Rights Act of 1964, U.S. society enters the 'colorblind' era of race relations (Bonilla-Silva, 2001; Haney López, 2006b; Leonardo, 2007). Much has been written about this colorblind era, a discussion this study will neither comprehensively address nor critique, but will engage as a constraint in legal jurisprudence regarding colorblindness' effects on race and education policy. Related to this era is the development of a colorblind jurisprudence by conservative (mostly) and centrist (a few) Supreme Court Justices since the landmark *Brown* decision (see Haney López, 2005). Therefore, I wish to appropriate Haney López's study by interrogating a particular ideological type of jurisprudence forwarded by his framework: the colorblind constitutional jurisprudence. In this investigation, I will map out the historical development of how the *idea* of a colorblind constitution became the *practice* of colorblind jurisprudence. Through this historical process, I aim to show that the development of a colorblind jurisprudence is fundamentally anchored and dependent on a purposeful misrecognition of race and racial history that culminated in the treatment of *Brown* and the Civil Rights Era as a *tabula rasa* absolving American society from its racial past. That is, colorblind jurisprudence effectively viewed *Brown* and the Civil Rights Act as ushering in a blank slate of meritocracy, where race is believed no longer to play a significant role in the organization of society.

By reviewing the emerging literature of whiteness studies, I argue that a constitutional colorblind jurisprudence amounts to an "act of whiteness," perhaps one that is more difficult to identify and address because of its elusive racial sensibilities. As a consequence, racial stratification and the manifestation of white privilege continue as social problems because judicial colorblindness refuses to recognize the salience of race or understands race as simple difference by reducing and stripping its institutional and material manifestations. From this perspective, the Supreme Court then becomes a theatre where the state insulates, protects, and legitimizes structures of white racial domination, particularly in education. A goal of this study is to advance the understanding of the synergy between whiteness and the law by looking at judicial colorblindness not primarily as a legal theory, but what Leonardo (2007) calls an "instantiation of whiteness" (p. 262).

Finally, the assault on racial considerations in public policy does not appear to be slowing down. Beyond educational policy, judicial colorblindness is also peeling back Civil Rights Era protections designed to prevent racial discrimination in voting, housing, and employment. The common ingredient in all of these assaults is the Court's colorblind definition of 'discrimination'. This study will attempt to show that since *Brown*, a majority of major race cases has showed the conservative learning Court has more often than not failed to grasp the nature of racial stratification and subordination. Its failures have proven tragic not only to the specific racial issues presented at the time, but casts a long antagonistic shadow of difficulty for future race related disputes. The Court continues to hear cases attacking racial considerations in and beyond education. Therefore, it is paramount to know the Court's historical trajectory where it carefully crafted a constricting and limiting definition of discrimination.

### *Clarifying Legal Terms and Concepts*

Before I proceed further with this introduction, two short explanations are in order. First, by jurisprudence I mean how the court views the constitution and adjudicates legal disputes based on this view. By implicating colorblind jurisprudence, I am critiquing one particular view, which critics (Haney López, 2006; Bell, 2004) and self-professing Justices (conservatives mostly) characterize as a fundamental belief in the declining significance of race (cf. Wilson, 1979). Although related, colorblind jurisprudence is not necessarily synonymous with what Bonilla-Silva (2001) has called the colorblind era in American civil society. But as this study will show, colorblind jurisprudence is a critical component in the *ascendancy* of colorblindness as the dominant U.S. racial discourse (see Leonardo and Tran, 2013). Supreme Court decisions have material significance in civil society, but in speaking of judicial jurisprudence, the investigation begins first and foremost with the Court's ideological methodology in hearing, determining, and settling constitutional disputes pertaining to issues of race, thereby constructing a clear albeit contradictory relationship between the law and race. That is, although the Court has routinely espoused so-called colorblind virtues and principles, its decisions striking down race positive policies are ultimately racial in that they prolong or intensify racial stratification, thereby presenting the paradox of 'color-conscious colorblindness' (See Leonardo's similar argument regarding NCLB, 2007). Additionally, the colorblind judicial approach is by no means representative of the entire court. Arising out of *Brown* and the Civil Rights Era, judicial colorblindness has been the philosophical approach adopted by all conservative justices and a few centrist justices. However, progressive justices commonly favor the interpretation of the constitution as a 'living document,' thus allowing, and at times favoring, race to enter into constitutional interpretation (e.g. Justice Sotomayor's dissent in *Schuette*, 2014).

Second, my collective references to terms related to the Court and judicial colorblindness recognize that nearly every major case on race conscious policies since *Brown* has resulted in a right leaning majority that consistently views racial classifications as insidious at best and unconstitutional at worst (see Haney López, 2007). As a result, references to 'the Court' and 'judicial colorblindness' are only directed toward the majority and its concurring opinions, not dissenting opinions often authored by progressive Justices who reject judicial colorblindness. Although they are important in airing their objections, dissenting opinions have absolutely no binding legal ramifications and at most represent a text of conciliatory comfort to those on the losing side of the Court's majority decision. Therefore, unless otherwise noted, utterances, references, and articulations of 'the Court' and 'judicial colorblindness' refer only to majority



and concurring opinions, representing the dominant framework that is indicative of the Court's judicial trajectory since *Brown*.

### WHAT IS JUDICIAL COLORBLINDNESS?

In tracing the decline of Jim Crow racism to the rise of laissez-faire racism, Bobo and Smith (1998) argue that the economic basis for Jim Crow had eroded, therefore racial attitudes changed with the structural conditions of group life. First, Bobo and Smith show that the civil rights movement systematically attacked the political underpinnings that were the cornerstones of Jim Crow racism. The *Brown* decision, the Civil Rights Act of 1964, the Voting Rights Act of 1965, and other political successes permanently altered the structural and economic basis for overt practices of racial subjugation such as segregation in educational. Furthermore, Bobo and Smith suggest, "if racial attitudes reflect the structural conditions of group life, then it is no surprise that Jim Crow attitudes in the public... would eventually and steadily ebb in popular acceptance" (p. 212). However, despite these monumental changes, Blacks and other people of color remained systematically segregated and economically disadvantaged well beyond *Brown* and the Civil Rights Era. These continuing social conditions must be differentiated from the economic and attitudinal underpinnings of the Jim Crow era. The decline in Jim Crow economics and attitudes signified the end of a *particular practice* of racial subjugation, *not* the end of racial subjugation itself. As numerous authors have pointed out (Bobo & Smith, 1998; Bonilla-Silva; 2001, Haney López, 2006; Leonardo 2007), segregation and economic inequality continue today under the banner of laissez-faire racism flanked by the discourse of colorblindness. Continuing Bobo and Smith's analysis, the ebb of Jim Crow racial attitudes in the public was replaced by the flow of colorblindness as the new mainstream racial discourse.

As Bobo and Smith (1998) point out, the continuing social conditions of racial inequality lead Whites to believe that they stand to lose something tangible if political and legislative efforts are made to improve the lives of people of color, such as affirmative action and other race based preferences in education. This belief is further solidified due to a colorblind sensibility in the post-Civil Rights Era. In a colorblind perspective, individuals are their own worst enemy if they experience any form of inequality because we live in a largely egalitarian and meritocratic society (see Thernstrom & Thernstrom, 1999). As a result, people of color and their 'culture of poverty' (see 1965 Department of Labor Moynihan report) are to blame for ongoing conditions of segregation and economic disparity. Laissez-faire racism in the era of colorblindness produces two related consequences. First is the individualized and free-market ideal that one receives what one works for. Second, because of the dogmatic belief that a colorblind society is largely fair, social policy and governance should not favor minorities over Whites; in fact, there are no racial groups, just a 'nation of minorities' (see Justice Powell's famous declaration in *Bakke*). Taken together, it is not a paradox for Whites to hold increasingly egalitarian racial principles while opposing strong forms of affirmative action intended to produce more racial equality. As Haney López (2006) argues, contemporary colorblindness is a set of understandings that dictates how people apprehend, make sense of, and act on race.

However, as Omi and Winant (1994) point out, the process of racialization is constantly contested and is neither smooth nor guaranteed. One important site for the ongoing contestation of racial meaning lies in the law and its interpretation in the courts. As colorblindness has become the dominant racial ethos, colorblind jurisprudence in the courts has played a commanding role in promoting a particular colorblind vision through public policy while

simultaneously invalidating various race positive policies. Together, colorblindness as a mainstream racial discourse in society and judicial colorblindness in the Courts has worked symbiotically to reinforce a particularly vicious civil and social order, one that makes it all but impossible for social and civic policy to effectively tackle racial stratification and subordination. In the Court's function as arbiter of social and civil disputes, adjudicating issues of race have the potential to drastically reshape society. In this way, the willingness of the Court as a whole to reject or accept the persistence of racial inequality becomes paramount.

In general, there are two types of constitutional approaches. Progressive justices favor a 'living document' approach in interpreting the constitution. Justices favoring the 'living document' perspective argue for a 'spirit of the law' reading of the constitution. This approach allows freedoms, rights and ideals, believed foundational to framers of the constitution, to be rearticulated and interpreted according to the social norms of contemporary society. One justification for the 'living document' interpretation argues that an evolving society and its norms require a constitution to reflect its values. For instance, Thurgood Marshall (1987) has argued that the original framers of the constitution would in no way ever imagine for someone like himself, a Black jurist, to be Supreme Court justice despite the fact that he was hailed as the nation's first Black Supreme Court justice upon his nomination to the Court (NPR, 2007). Marshall's observation is rather astute, clearly showing the ideals of justice, freedom, and liberty evolved over time to allow what was once an inconceivable proposition to move into the realm of possibility and eventual reality. However, conservative justices tend to take a 'strict constructionist' (also known as 'originalism') and textual jurisprudential approach favoring above all else a 'letter of the law' interpretation. This perspective believes in first analyzing the literal text of the constitution. If the direct texts are not sufficient in answering a constitutional question, Justices then seek to interpret the intent of the framers of the constitution along with the common practices at the time of the law's adoption. 'Strict constructionists', or originalists, view the constitution as a document containing rights, freedoms, and values that are set in stone, not malleable to an evolving society. Originalists argue that there is a specific legislative process that must be followed in amending or adding constitution rights, freedoms, and values. Therefore, the legislative process requires two-thirds ratification by the states and thus belongs to the political process and legislative branch, not one located in the judicial branch or a responsibility of the Supreme Court.

However, the apparent uniformity of strict constructionists runs into difficulties when the Court deals with issues related to race. For instance, Gotanda (1991) shows that the Court has routinely held it unconstitutional for public universities to use racial classifications in admissions policies. But when Universities attempt to curb racial hate speech, these efforts have not survived constitutional review. Therefore, Gotanda points to the Court's curious distinction between public and private forms of racial discrimination. Whereas a university is not allowed to use racial considerations, private individuals and groups within a university are constitutionally protected to discriminate along racial lines. Thus, a strict constructionist interpretation of the constitution deals with race on a superficial level without a proper understanding of the nature of racial domination and subordination (see Crenshaw, 1988).

Judicial colorblindness is a relatively recent jurisprudential spawn of the 'strict constructionist' perspective (Tribe, 1986; Gotanda, 1991). The literal 'letter of the law' reading of the 'equal protection clause' of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 are foundational to judicial colorblindness. Section 1 of the Fourteenth Amendment, better known as the 'equal protection clause,' states, 'no state shall deny to any person within its

jurisdiction the equal protection of the laws' (14<sup>th</sup> Amendment, n.d.) Additionally, Title VI of the Civil Rights Act prohibits any institutions receiving federal financial assistance from implementing any programs or activities 'that discriminate on the ground of race, color, or national origin'. Therefore, a 'letter of the law' reading of these two pieces of law provides the theoretical foundation of judicial colorblindness. Here, colorblindness in the law does not literally mean the inability to see color (read: race). Courts see race, but refuse to acknowledge the structural and institutional harm of race, therefore absolving itself of any culpability in its inaction toward structural racism. In the eyes of colorblindness, race is any and all forms of differentiation with little regard to whether structural or material harms are attached to those differentiations. Or as Justice Roberts once said, "The way to stop discrimination based on race is to stop discriminating based on race" (*Parents Involved*, p. 41, 2007). As a result, justices who adopt a colorblind jurisprudence see no substantive difference between laws that enforce segregation, e.g., Jim Crow, and those that attempt to remedy segregation, e.g. race conscious school assignment programs and affirmative action policies.

This particular colorblind interpretation of Title VI and the equal protection clause is emblematic of the anti-classification principle of the modern equal protection tradition (Siegel, 2004). When *Brown* prohibited racial segregation in public education, Siegel argues that the decision inaugurated a great debate about equality and the possibilities, or limits, of equal protection. From this great equal protection debate, two principles emerged: anti-classification and anti-subordination (see Fiss, 1976; Balkin & Siegel, 2004). For many, the principle of anti-classification "embraces a particular conception of equality, one that is committed to individuals rather than to groups" (Siegel, 2004, p. 1472). This account of the anti-classification principle repudiates an alternative conception of equal protection, the anti-subordination principle. Advocates of the anti-subordination principle share "the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups" (Ibid, p. 1473). Anti-subordination, a legal scholarship tradition established by Fiss (1976) during the critical Civil Rights Era two decades after *Brown*, fundamentally recognizes the subordinate status of minority groups as a consequence of white domination and racial stratification. Here, it is important to differentiate between recognizing the inferior social and cultural statuses of racial minorities as a result of institutional racism, rather than enforcing some notion of inherent inferiority based on biology. As a result, Fiss argued that laws should not aggravate or perpetuate group subordination. Furthermore, anti-subordination proponents such as Bell (1987) and Mackinnon (1987) advocate that courts must review with great care the laws that *burden* minorities and adopt a model of equality that focuses on structural processes of domination instead of simplistic uptakes of difference.

### ***The Burden of Strict Scrutiny***

By establishing the jurisprudence of a colorblind constitution in a majority opinion (see *Bakke*), the Court paved a road where issues of race in educational inequality, such as *de facto* segregation and university admissions, would eventually be subject to the harsh constitutional standard of review called strict scrutiny. In reviewing statutes and government action against the potential violation of constitutional rights such as 'equal protection' or statutory rights under Title VII, the Court utilizes a hierarchy of standards. Strict scrutiny is the most stringent standard of review followed by intermediate scrutiny and rational basis review (see Killian, Costello, & Thomas, 2004, p. 1906-1910).

	Rational Basis Review	Intermediate Scrutiny	Strict Scrutiny
State Interest	Legitimate, can be merely conceivable—need not be actual.	Must be genuine and important	State interest must be compelling
Law’s relation to State Interest	Must be <i>rationaly</i> related, or non-arbitrary.	Must be Substantially related	Must be <i>necessary to achieve the purpose</i> , and discriminating policy is ‘narrowly tailored’

Rational basis review simply requires that the government must show that the law in question is ‘rationally’ related to state interests. The Court utilizes this lowest standard of review on benign classifications like prohibiting the sale of alcohol to minors. To illustrate further the lax requirement of rational basis review, a law’s relation to state interests only needs to be conceivable; whether or not the law is smart or sound policy is of little concern. To illustrate this point, Justice Marshall has said, “the constitution does not prohibit legislatures from enacting stupid laws” (*New York State*, 2008, p. 801).

However, strict scrutiny is a much more difficult standard of review. The Court has consistently ruled that all government classification of race requires strict scrutiny as the standard of review (see *Bakke*, 1978, *Richmond*, 1989, *Grutter*, 2003). Therefore, strict scrutiny renders all racial classifications constitutionally suspect. As a result of this difficult standard of review, proponents of race conscious educational policies fight a difficult legal battle just to get the Court to recognize that race matters. Major race cases in educational policy since *Brown* such as *Bakke* (1978), *Grutter* (2003), *Parents Involved* (2007), and *Fisher* (2013) have shown the difficulty posed by a colorblind jurisprudence in fulfilling *Brown*’s promise of equal educational opportunity, *which takes race into account*. Due to the requirement of strict scrutiny coupled with a colorblind jurisprudence from conservative Justices, proponents of race conscious polices are severely handicapped in the legal fight.

### ***Antisubordination & Anticlassification: A False Dichotomy?***

Balkin & Siegel (2004) suggest the standard story of the Court’s jurisprudence in the latter half of the twentieth century is that the views of Owen Fiss and other anti-subordination proponents, were soundly rejected by the Court in favor of an anti-classification principle. However, Balkin and Siegel argue that the Court initially embraced both anti-subordination and anti-classification equal protection principles depending on specific practices, shifts in trends over time, and social contestation and struggle. Today, anti-subordination principles are not embraced by contemporary conservative Supreme Court Justices. Conservative justices not only adopt the anti-classification principle, but a particular version grounded in colorblindness. Justice Thomas explained:

*Brown I* itself did not need to rely upon any psychological or social-science research in order to announce the simple, yet fundamental, truth that the government cannot discriminate among its citizens on the basis of race... At the

heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups (*Missouri*, 1995, Thomas, J., concurring, p. 120-121).

At the level of common sense, colorblind jurisprudence is seductive. The allure of colorblindness is spurned by the popular conception of blind justice, popularly depicted by the blindfolded statue of ‘lady justice’ holding a scale balancing truth and fairness. The appeal of blind justice is that any member of society, whether rich or poor, Black or White, young or old will get a ‘fair shake’ before the blind eyes of justice and will be treated according to a uniform application and enforcement of the law. Beyond this, the impression of blind justice gives the justice system a sense of authority and righteousness *because* it is perceived as fair and just.

But Justice Thomas’ belief that *Brown* did not need to rely on psychological or social-science arguments exposes the essence, and therefore fallacies, of judicial colorblindness. By sidestepping the psychological and social effects of institutionalized racism, judicial colorblindness foreclosed possibilities that the Court could fulfill an anti-subordination equal protection promise. That is, how can a colorblind Court address the effects of racism when it does not recognize the institutional and structural apparatuses of race? Although conservative Justices routinely cite *Brown* in striking down racial classification policies, Balkin and Siegel (2004) remind us that *Brown* animated both anti-subordination and anti-classification norms. Reflecting the anti-classification principle, the *Brown* Court ruled that ‘separate but equal’ was inherently unequal because members of society were separated based on racial classification (*Brown* (1954)). Additionally, the *Brown* Court recognized anti-subordination principles by holding that segregation has a detrimental effect upon minority children and would generate a feeling of inferiority unlikely ever to be undone (*Ibid*). The landmark *Brown* case represented a chance to end *de jure* racial classification **and** afford substantive equal protection to subordinated groups, thus incorporating both anti-classification and anti-subordination elements. However, a careful examination of the social and political battles over *Brown*’s enforcement mandate exposes *Brown* as a case that is today revered as a hallowed moment although it achieved little substantive changes. More accurately, *Brown* should also be remembered as a significant moment that led to the birth of judicial colorblindness for conservative justices for the next sixty years.

### ***Significance of The Study***

Why Does a Social & Cultural Analysis of Race & Law Matter?

Within the context of constitutional review and jurisprudence, it appears that Justice Harlan’s famous proclamation that ‘our constitution is colorblind’ (*Plessy*, 1896) has been the ideological vision championed by conservative justices in order methodologically to prohibit race-based, quota set-asides, and more generally speaking, affirmative action policies in and beyond the institution of education. In fact, notwithstanding the result of *Fisher*, only one race conscious governmental policy has survived (See *Grutter*, 2003). Having survived strict scrutiny, *Grutter* was filled with restrictive limitations on exactly how public policy could move forward in considering race. The Court in *Grutter* provided stringent criterion of procedural substance for all race positive state action, requiring it to be ‘narrowly tailored’ and ‘of last resort.’ However, even though it approved a permissible government practice of racial

consideration, the opinion contained a clear disdain and suspicion for the salience of race, with Justice Sandra Day O'Connor noting perhaps race positive policies will no longer be needed 25 years into the future (*Grutter*). If we take seriously Justice O'Connor's predictions, we are not far away from her predicted post-racial utopia. Although a colorblind reading of the constitution has been utilized to strike down almost every affirmative action-related policy, it would be a mistake to read the two as simply in opposition to each other. As Bonilla-Silva (2001, 2003) has asserted, we are currently in a colorblind era of racial understanding. It would be difficult to suggest that anyone is reasonably proclaiming that we are also in the affirmative action era. Colorblindness has achieved a common sense and ideological acceptance that shows no signs of slowing down; in fact, it seems to be speeding up. This social uptake has reached far beyond the confines of law. Rather, colorblindness is more than just how Supreme Court justices read the constitution. Colorblindness reflects a methodical politics of governance and represents an antagonistic ideology in direct opposition to the long struggle for racial redress in a society where racial stratification remains the dominant organizing principle (see Gotanda, 1991, Leonardo, 2007. Doane & Bonilla-Silva, 2003)

*Brown v. Board of Education* (1954) is rightly regarded today as a significance case, but Derrick Bell (1995) reminds us that *Brown* represents little more than a hollow symbolic victory rather than the substantive holy grail of racial justice that its stature conjures today. Specifically within the context of education, *Brown* represented the first official governmental recognition of the debilitating and oppressive inner-workings of racialization and segregation. In *Dred Scott* (1857), the unequal treatment of Blacks and Whites in the law was justified as a simple reflection of the supposed inherent superiority and inferiority among the races. Having to take account of the newly passed Fourteenth Amendment guaranteeing equal protection, the *Plessy* Court (1896) continued white supremacy and privilege by suggesting that if enforced separation of the two races creates a badge of inferiority for Blacks, it is a construction solely created by Blacks and not the government. Perhaps more than anything, *Brown* (1954) is a landmark case to the extent that it was the first Supreme Court case to confront directly the constitutionality of 'separate but equal'. In previous cases (see *Sweatt*, 1950), the court accepted 'separate but equal' as constitutional and its method of review focused on enforcing *Plessy's* mandate, as opposed to adjudicating whether or not the doctrine of 'separate but equal' was in fact constitutional. Of course, *Brown* famously ruled that segregation is in fact inherently unequal and therefore cannot be made equal. Unequivocal as these words are, the language of enforcement requiring desegregation spelled out in *Brown* (1955) (popularly known as *Brown II*) was everything but exact, clear, and decisive (Bell, 1987). Thus, although *Brown* (1954) was the first state recognition of the stratifying role of race in civil society, the resulting political push-back against desegregation by segregationists, coupled with the Court's increasing colorblind tendencies, has turned *Brown* into the final state recognition of the stratifying role of race in civil society. Effectively, *Brown* is now the standard cite of the birth of colorblindness by ushering in a new era of strictly anti-classification adjudication by the Court.

This brief history is necessary to understand the contemporary rejection of affirmative action policies in favor of a colorblind reading of the constitution, specifically, and a colorblind vision of society, more generally. Keeping in mind the presence of racial stigma codified in *Dred Scott*, which continued in *Plessy* and *Brown* (I will have more to say about this in Chapter 2), adherents of colorblindness today argue that affirmative action policies create racial stigmas for racial minorities via race conscious policies that affirmatively account for race (See *Bakke*, (1978) *Grutter*, (2003) *Parents Involved*, (2007). An extension of this conversation would

suggest colorblindness as emblematic of a post-racial society, only to be pulled back into the ugly and distasteful racialized social organizations via affirmative action policies. However, equating colorblindness with a post-racial society is only possible if one sees *Brown* and the civil rights era as representing the end of the continuing significance of race in society. One needs only to look at the current Court's oral arguments in *Fisher* to confirm West's (1993) sentiment that race still matters.

Conservative Justices on the Court during oral arguments for *Fisher* (2012) showed skepticism toward the University of Texas' (henceforth UT) holistic admissions that used race as one of its 'Achievement Index' criteria. However, the UT only used the achievement index for 8% of its admitted students during the 2008 admission cycle in question. The other 92% of admissions came from the state of Texas' 'Top Ten' program that guarantees admissions to any UT campus for students who qualify. Thus the Top Ten program is allegedly strictly empirical and race-neutral. Amicus Briefs, Abigail Fisher's legal team, and the conservative court questioned why the University would need to use a constitutionally suspect racial classification when it can just default to its Top Ten percent, which would survive constitutional review and apparently produce the desired critical mass of diversity. This racial sleight-of-hand typifies the tendency of colorblindness. Texas' Top Ten percent admission program only produces the desired diversity because Texas high schools are severely racially segregated. Therefore, the top ten percent from a majority-minority school would produce a strong representation of minority students eligible for automatic admission to the UT. Nevertheless, the Court's disfavoring of Texas' holistic admissions for the Top Ten percent does not prove the declining significance of race, but further underscores the stratifying importance of race. This colorblind manipulation shows that colorblindness is in fact not emblematic of a post-racial society, but rather the latest manifestation of an ideological and political practice of racial governance that prolongs, reinforces, constructs, and perpetuates white superiority (Leonardo, 2007).

It is short sighted and betrays racial history to read colorblindness in the law as simply and only a constitutional jurisprudence, or one that is used to strike down affirmative action and race conscious policies. More broadly, colorblindness is cut from the same cloth of overt racism and assumed white superiority since *Dred Scott*, 'separate but equal' in *Plessy*, and *Brown's* unenforceable 'in all deliberate speed' desegregation mandate. Colorblindness operates with the effectiveness of political maneuvers of the past in guaranteeing and sustaining the privileges of Whites over people of color. As civil society stands on the cusp of the latest edict on race and law from *Fisher*, it would be a mistake to read a decision against UT and race-positive holistic admissions as a move signifying the end to the significance of race in U.S. society. It would more accurately represent the latest moment in the conservative Court's trajectory in solidifying racial stratification and subordination in society by turning a blind eye to the significance of race. Irrespective of its animosity toward usages of race in public policy, the conservative Court clearly recognizes race still matters, apparent from its championing of Texas' Top Ten program as the favored mechanism to produce diversity. Echoing Justice Blackmun (*Bakke*, 1978), the only way to get beyond race is to first take account of it; there is no other way. Because race still matters, colorblindness as a political ideology of governance becomes the latest act of whiteness *par excellence*. As an ideology of difference, colorblindness cannot be severed from its roots in slavery, Jim Crow, 'separate but equal', and racial segregation.

## Chapter 2: Literature Review

### INTRODUCTION

The project to combine CRT in legal studies and CRT/whiteness studies in education is an endeavor that is informed by the established scholarship from both schools of thought. The sites of each school of thought are surely different. Legal studies focuses on the case law, courtrooms, and legislative debates and constructions. In education, the sources of inquiry stem from policy, curriculum, and social/cultural foundations that shape the educational environment inside and outside of the formal brick and mortar classroom. Nevertheless, although legal studies and race analysis in education draw from different sources to engage and critique their respective domains, their shared genesis in CRT means that ultimately both schools of thought work at exposing the same dynamic: the ideology of whiteness and white domination. In particular, both lenses are engaged in the ways school and law perpetuates and reproduces racial ideologies that shape practices within the interaction between law and education. These racial ideologies are not only about naming, locating, and identifying the racial experiences of minorities, but most critically exposing the racial privileges of Whites as beneficiaries. In this way, the disciplinary division between law and education is not as critical to the project of exposing whiteness. Rather, a symbiotic engagement of law and education is needed in order to locate white racial privileges in the law and schooling.

### THE LAW AND RACIAL SUBORDINATION

Before *Brown* and the Civil Rights legislation, the law and Supreme Court played a clear and unabashed role in subordinating people of color while affirming the alleged superiority of whites. The Court's history of legal racial subordination can be organized into three epochs: slavery, Jim Crow 'separate but equal', and the 'colorblind' era marked by a stream of anti-affirmative action decisions. To grasp the colorblind era, understanding the Court's discursive approach on racial issues during slavery and Jim Crow reveals the ongoing conversation of racial stigma conducted by the Court. The conversation of racial stigma in the law reflected the larger social understanding of race during each historical period. During slavery, alleged racial inferiority and superiority between Blacks and Whites were understood as biologically determined. The fixed understanding of racial difference was reflected in the Court's decisions. Due to the reconstruction amendments following the Civil War that banned slavery, granted citizenship status to former slaves, and guaranteed equal protection under the law, the Court shifted its racial biologism toward a community and social practice understanding.

#### *Slavery*

*Dred Scott v. Sandford* (1857) is perhaps one of the most famous (and infamous) Supreme Court cases in American judicial history, perhaps rivaled only by *Brown v. Board of Education* (1954). The memorable historical significance of the case is that the decision denied slaves the possibility of citizenship under the constitution. However, the case also represents an intriguing backwards-looking window toward a fascinating era of race relations in American history. That is, the Court's approach to race is one of minimalism and judicial restraint because racial understanding was understood as fixed and biologically determined (Winant, 2000).



Hence, the Court did not need to do much to establish and reproduce alleged racial inferiority and superiority; it merely needed to give its stamp of approval on racial differences. In this regard, *Dred Scott* is important as an iconic representation of the pervasiveness of racial stratification and subordination during this period of race relations. Furthermore, the case shows how easily racial ideologies could be institutionalized via the judicial system. *Dred Scott* represents the institutionalized nature of racial practice during the slave era and how the Court positioned itself as a minimalist perpetrator in relation to racial subordination.

The legal and political question in *Dred Scott* (1857) was whether or not southern slave owning White citizens would be allowed to continue to practice slavery in the new western territories of the Louisiana Purchase. First, the implication of the dispute calls into question the constitutionality of the Missouri Compromise. The Union was concerned with the spread of slavery into the new territories because permitting its spread would effectively allow the Confederacy to expand its economic power against the northern states. In a rather straightforward decision, the Court relied on the Constitution's Fifth Amendment, ruling that Congress' Missouri Compromise effectively deprived slave owners of their property without due process (pg. 451-452). In other words, if a southern slave owner moved into any area of the newly acquired western territories that banned slavery, the slave owner would no longer be able to exercise the use of his 'property' because slavery was deemed unlawful. As a result, the Court argued the matter was rather simple. The entire Missouri Compromise was invalidated under the straightforward constitutional principle of property rights enumerated in the Bill of Rights.

Rightly so, *Dred Scott* continues to be remembered as an infamous Supreme Court decision because the Court affirmed the status of slaves as property (Hall, 1999; Finkelman, 2007). Beyond the Court's verdict invalidating the Missouri Compromise, the case did not depend on any statutory language or constitutional amendments to find that slaves were property. It simply went without saying. The Court did not go about inventing any new traits or constructions of blackness, it merely *affirmed* what it viewed as the fixed and inherent racial inferiority of slaves (*Dred Scott*, pp. 407-410). As a consequence, the Court viewed slavery not as an aberration of race relations, but a natural function and reflection of black inferiority. It then follows that the inherent inferiority of black persons, whether old, young, or future offspring, is fixed whether a slave or free. In the Court's decisions, the question of whether Black persons are free in the new territories or continued to be slaves from slave owning states is simply a moot question. The fundamental issue was whether or not Black persons were property. This question was neither answered with an inventive maneuvering of judicial review nor was it an exercise of judicial activism requiring the Court to find some new constitutional doctrine. Because black persons were believed to be inherently inferior, the Court's approach to the nature of black persons resembled a methodological 'consistency'. That is, the alleged inferiority of black persons was not necessarily found in the constitution because the Court was only drawing on dominant social belief and established practices of their racial inferiority. Therefore, the Court's opinion constitutionalizes the dominant cultural belief that race was biologically determined and fixed. The takeaway of racial stigma in *Dred Scott* is that racial inferiority was neither enhanced nor impeded by the Court, but only affirmed as a function of the 'natural' inferiority and superiority between the black and white races.

*Jim Crow & Plessy's 'Separate but Equal'*

If there is a sense of ideological consistency apparent in *Dred Scott*, there is an inconsistency in *Plessy v. Ferguson* (1896). This is not to say that the *Dred Scott* Court should in some way be applauded for its consistency and the *Plessy* Court scorned. But the *Plessy* court maneuvered in an especially disingenuous way to reach the same result as *Dred Scott*: upholding racial inferiority and subordination of blacks. When Homer Plessy challenged Louisiana's Separate Car Act (Segregated Railway Cars), the Supreme Court was faced with a new challenge: the reconstruction amendments. Passed during a five year span (1865-1870) immediately after the Civil War, the reconstruction amendments:

- 13<sup>th</sup>: Banned Slavery, though allowed convict leasing, essentially ushering in a neo-slave practice.
- 14<sup>th</sup>: Guaranteed Due Process and Equal Protection Clause, with the later containing the famous words
  - “NO state shall make or enforce any law which shall...deny to any person within its jurisdiction the equal protection of the laws.”
- 15<sup>th</sup>: Grants voting rights to citizens regardless of “race, color, or previous condition of servitude (*Read: Slavery*)”, however, excluded women until the 19<sup>th</sup> amendment in 1920.

Together, the reconstruction amendments presented the court with a prima facie simple case. One could argue that equal protection in the 14<sup>th</sup> amendment would simply be read as equal treatment in the eyes of the law. Although a possible straightforward reading of the reconstruction amendments and “equal protection” would have invalidated Louisiana's separate car act as unconstitutional, the Court's ruling rejecting Plessy's argument signified an equal protection jurisprudence that was only concerned with equality in the letter of the law without concern for substantive equality. The difference in these two distinctions is important because *Plessy* gave birth to the legal doctrine of “separate but equal”. Rather than reading the totality of the reconstruction amendments as addressing the violence and debasement of slavery as a product of racism, the Court used a technical definition of slavery, which relies literally on the act of physical extraction and forced servitude. In doing so, the majority court strips the full power of the 13<sup>th</sup> amendment banning slavery. The crucial element to the institution of slavery was the construction of inferiority serving as the ideological justification for decades of violence and oppression. This sense of ‘natural’ white supremacy and black inferiority was evident in *Dred Scott* (1857). By reducing the discourse of racism to include only slavery, the Court's 13<sup>th</sup> amendment interpretation and technical definition relegate the violence of slavery to past acts of physical extraction, the slave trade, and an illegal commerce. In doing so, the Court is able to sever the fundamental characteristics of racial subordination from group and economic exploitation resulting from slavery, thereby allowing it to read the dispute in *Plessy* not as an evolved practice of racial stratification, but simply as a reflection of society's new “separate but equal” racial understanding.

Importantly, *Plessy* continues the conversation of racial stigma in the law that began with *Dred Scott*. The *Dred Scott* Court clearly recognized the alleged “inherent” differences of the races, which the Court had no problem in legitimizing in law thereby constitutionalizing a determinant undertaking of assumed biological differences. However, having to deal with the newly passed reconstruction amendments, the *Plessy* Court found itself in a tricky situation of having to rectify the persistence of racial subordination in the face of an “equal protection” constitutional mandate. The *Plessy* court addresses this problem directly:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it (p. 551).

With one fell swoop, the *Plessy* Court absolves the legal institution from any responsibility in perpetuating racial stratification and subordination, neatly blaming Blacks as the culprit for their own racial subordination, a self-imposed racial stigma. In doing so, "separate but equal" is constitutional as long as it is equal in the letter of the law, meaning: separate but equal is equal because the law says it is. Mills (1997) has astutely observed that it is oxymoronic to think of Blacks as equal to Whites. That is, the internal logic and self-consistency of white supremacy is maintained by the inherent contradiction of equality between Whites and Blacks.

### CRITICAL RACE THEORY, WHITENESS, & EDUCATION

*Brown v. Board of Education* (1954) famously ended segregation in public education. Notwithstanding the significant unanimous decision of *Brown*, the Warren Court did not immediately order schools to desegregate. The legislative battle across many districts, states, and municipalities seeking to ensure equitable educational opportunities for students of color lasted well into the 70's. Coupled with the existence of anti-miscegenation laws still operating in Virginia for an additional thirteen years after *Brown* (see *Loving v. Virginia* (1967)), one conclusion was obviously clear: racial subordination and stratification continued despite significant legislative and political developments since the end of official slavery. Thurgood Marshall, lead attorney in *Brown* and future Supreme Court Justice, foreshadowed the durability of racial subordination immediately after the *Brown* decision (Bell, 2004). Amidst understandable euphoria, Marshall warned celebrating colleagues at the NAACP that *Brown* was only the beginning, not the end, in the battle for racial equality. Marshall's prophetic words fundamentally capture the complexities and difficulties related to issues of racial stratification, practice, and privilege. That is, despite *Brown* and *Loving* ending particular practices of racial subordination, white racial privilege continued under new and evolved practices. In short, these cases ended *particular* expressions of racism and their institutional forms, not the end of racism itself (see Leonardo, 2007). Scholars and activists who shared Marshall's conviction of meaningful racial progress identified the need for a responsive narrative that would capture the continuing existence of racial inequality. Critical Race Theory (CRT) was born within this historical conjuncture of racial progress *and* retrenchment. Inspired by Du Bois' (1903) proclamation that the problem of the 20<sup>th</sup> Century was the "problem of the color line", CRT and its influential methodology revealed the core problem of whiteness. Through the methodological lens of CRT and whiteness studies, the institution of education has been revealed as a leading contemporary site where racial subordination and white privilege persist.

#### *Race*

Representing the height (or lowest point?) of racial biologism, social Darwinism and the eugenics movement of the late 19<sup>th</sup> Century used scientific measurements of crania, nose, jawbones, ears, and head size to calculate racial differences. Moving beyond the alleged

‘natural’ superiority and inferiority of racial subjects produced by the bio-racial frame, works of W.E.B. Du Bois (1903) and the Chicago School of sociology (Park & Burgess, 1926; Park, 1928; Wirth, 1941) focused on the myriad social problems experienced by people of color. Most significantly, Winant (2000) suggests that sociological approach “broke definitively with the racial biologism that had characterized earlier treatments, asserting with increasing clarity the position that race was a socially constructed, not naturally given, phenomenon” (p. 176).

The development that race is socially constructed rather than biologically fixed produced Omi & Winant’s (1996) influential racial formation theory. Winant (2000) summarizes the racial formation approach as:

1. It views the meaning of race and the content of racial identities as unstable and politically contested.
2. It understands racial formation as the intersection/conflict or racial ‘projects’ that combine representational/discursive elements with structural/institutional ones.
3. It sees these intersections as iterative sequences of interpretations (articulations) of the meaning of race that are open to many types of agency, from the individual to the organizational, from the local to the global. (p. 182)
- 4.

Drawing heavily on Gramsci’s (1971) theory of hegemony and Wallerstein’s (1975) class formation theory as applied to advanced capitalist societies, racial formation analysis argued against any essentialist or transcendental uptakes of race. Rather, racial meanings and discursive practices were inherently unstable and needing constant (re)articulations in order to maintain a racially stratified society.

Although racial formation theory illuminated the nebulous nature of racial meanings, it also provided a sobering realization that the old racial order was not entirely gone. Quite the opposite. Instead, the old racial covenant supporting white supremacy exemplified by slavery and Jim Crow reinvented itself in a contemporary colorblind form that continued white racial privilege, albeit in a more cloaked form. Understood via its traditional manifestations, white supremacy was best personified by racist institutions like segregated schools, Jim Crow Laws, the eugenics movement, or the assumption of white racial superiority. In the evolving history of race relations, it became no longer fashionable and acceptable in the mainstream to spout the wisdoms of David Duke or the KKK, but as a sign of a continued white domination, it became acceptable to reframe racial difference in terms of standards (see Hirsch, 1987), nationalism (see Schlesinger, 1998), measurable intelligence through standardized tests like the SAT (see Herrnstein & Murray, 1994), arguments of cultural deficit (see Bobo, 2001), or altogether dismiss the significance of race (see Wilson, 1980). Or as Leonardo (2015) describes, “Tracking and SAT scores are acceptable because measuring cranium sizes would be too creepy” (p. 92). The upshot is that white supremacy continues largely uninterrupted in its 500-year course through non-white ideological conditioning and white signatories of the racial contract (Mills, 1997).

### *Critical Race Theory*

In law, early Critical Race Theorists such as Derrick Bell (1987), Patricia Williams (1991), Matsuda (1993), Crenshaw (1995), and Richard Delgado (2001) were frustrated at the incredibly

slow pace of racial progress following the Civil Rights Era. They believed that the traditional approaches to legal change and social activism no longer produced the amount of progress that was initially thought possible with the emergence of the Civil Rights Era. CRT began directly to challenge the traditional methodology of legal scholarship that focused on doctrinal and policy analysis, which many CRT scholars thought were limited and ultimately insufficient in addressing ongoing racial stratification and subordination. As an analytic lens, Matsuda (1991) views CRT as:

...the work of progressive legal scholars of color who are attempting to develop a jurisprudence that accounts for the role of racism in American law and that work toward the elimination of racism as part of a larger goal of eliminating all forms of subordination. (p. 1331)

The law and legal processes were the initial targets of CRT criticism, but its methodology has been adopted as an analytical framework in other disciplines. Early CRT legal scholarship exemplified four central methodological characteristics (Ladson-Billings & Tate, 1995):

1. Racism is normal, as opposed to aberrant, in American Society.
2. CRT employs story telling as a source of experiential knowledge.
3. Critiques liberalism and rejects its approach for incremental change as a painstakingly slow process but instead argues that racism requires sweeping change.
4. The Civil Rights laws have benefited whites more than people of color, thereby leading Bell (1980) to observe what he calls 'interests convergence', a historical circumstance where the interests of people of color are advanced only when whites share and will benefit from the same interests.

By positioning racism as a normal, as opposed to an aberrant, feature of American society, CRT recognizes the endemic presence and permanence of racism. Therefore, by rejecting the position that racism is a marginal phenomenon in American society, CRT also fundamentally rejects dominant ideologies (i.e. meritocracy, colorblindness, race neutrality) that work to mask the continuing persistence of racial power, privilege, and self interests of Whites in the U.S. (Solorzano, 1997).

Even in its early days as a developing critical legal approach, CRT was an interdisciplinary methodology because it centers experiential knowledge via methods of storytelling, personal and communal histories, and creative, imagined scenarios. The use of storytelling is a direct counter to dominant ideologies, or majoritarian narratives that claim to portray the existence of a meritocratic society absent of race or describe the supposed declining significance of race in objective, neutral language. Because CRT believes in the persistence of racism, dominant and majoritarian narratives that do not recognize the centrality of racial subordination tend to 'naturalize' privilege and disadvantage. Therefore, anti-majoritarian storytelling serves as a powerful methodological tool in exposing the fallacy of so-called race neutral or meritocratic narratives about society and social groups.

Perhaps the most striking element of CRT is the assertion that despite *Brown* and the contentious passage of Civil Rights legislation, their implementation nevertheless benefited Whites. In *Brown* (1954), a memorable line from the unanimous Warren Court regarding Black students stated:

...to separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone (p. 494).

Surely attending under-resourced and dilapidated schools had a detrimental effect on children of color, but nowhere in the *Brown* decision is there mention of what attending well resourced schools did for white students. Segregation not only derogated black children, it also provided the structural foundation for white superiority. By placing the Civil Rights legislation within the context of cold war geopolitics, Bell (2004) argued that the racial advances of Blacks were only made possible within the context of white self-interest. Furthermore, by evaluating the political and social difficulties facing racial remedies, Bell concluded that Whites would never support civil rights policies that threaten their social status unless their group interests converge with racial redress (Bell, 1980). CRT in legal studies and its methodological framework laid bare a rather paradoxical reality: the persistence of racial hierarchies and protection of white privilege in the era of colorblindness.

### *Whiteness Studies*

‘whiteness’ is a racial discourse, whereas the category ‘white people’ represents a socially constructed identity, usually based on skin color. (Leonardo, 2002, p. 31)

...whiteness is not a culture, but a social concept. (Leonardo, 2002, p. 32)

The study of whiteness and white privilege marked a paradigmatic shift in rejecting the assumption that a study of race meant analyzing the racial experiences of people of color (Giroux, 1997). To name a few early scholars, Peggy McIntosh (1990), Noel Ignatiev (1997), David Roediger (1994), Ruth Frankenberg (1993), and George Lipsitz (1998) centered the construction of whiteness in a position that is radically different from its usual comfortable status as an unnamed and universal moral center. This radical difference is significant not because racial difference is talked about in a different manner, but the study of whiteness calls into question the entire racial edifice. The study of whiteness reframes all the foundational questions associated with race by henceforth naming whiteness as the problem of race relations.

When Ignatiev (1997) provocatively challenged scholars to name any redeeming characteristic of whiteness, the question fully grasps the constructed nature of race as an ideology that oppresses people of color and produces white privilege. Only several decades old (est. 1988), the study of white privilege and whiteness as a racial discourse has altered the general understanding of race. Whereas Whites were once the anonymous center of the moral, social, political, and cultural universe, whiteness studies favors a critical analysis of the white racial formation (see Gallagher, 1997). In McIntosh’ *Invisible Knapsack* article (1988), privileges experienced by Whites are uncovered as unacknowledged and protected. By identifying everyday white privileges, such as ‘having neighbors who are pleasant or neutral’, or ‘being able to go shopping without being harassed’, McIntosh spotlights the unremarkable nature of white advantage that is both normative and neutral. Frankenberg’s (1993) interview of white women also speaks to the taken-for-granted characteristics of white privilege. By showing how race and whiteness shape white women’s lives, despite their *prima facie* denial of racism or

having anything to do with the racial order, Frankenberg documents white women's assertion of expertise in the very issues of which they had claimed previously to have little knowledge. Furthermore, Frankenberg argues that Whites have never been conceived as the problem, a point reflected by McIntosh's essay when she writes that "whites are taught to think of their lives as morally neutral...ideal, so that when we work to benefit others, this is seen as work that will allow 'them' to be more like 'us'" (McIntosh, 1998, p. 1). Thus, we are again guided by a transformation of Du Bois' (1903) ironic question for Blacks ("How does it feel to be a problem?") to a literal one for Whites ("How does it feel to be *the* problem?") (see Leonardo, 2002). Recognizing that Whites have never been conceived as the problem, David Roediger (1994) and Noel Ignatiev (1997) have called for the abolition of whiteness (understood as a racial ideology) and its concomitant identity of white people. To many ears, this sounds like a strange proposition. Let me explain.

Appropriating James Baldwin's comment, 'as long as you think you're white, there's no hope for you', Roediger (1994) suggests that since "neither whiteness nor blackness is a scientific (or natural) racial category, the former is infinitely more false and precisely because of that falsity, more dangerous, than the latter" (p. 12). Roediger argues that there is no white culture. Although there are Irish songs, Italian neighborhoods, Slavic traditions, or German villages, whiteness is "empty and therefore a terrifying attempt to build an identity based on what one isn't and on whom one can hold back" (p. 13). To Roediger, any movement of anti-racism, class-consciousness, or solidarity with African Americans must arise not only because of a rejection of racial oppression but of whiteness itself. Therefore in elaborating on the myth of whiteness, Roediger (1994) decides, "it is not merely that whiteness is oppressive and false; it is that whiteness is *nothing but* oppressive and false" (p. 13; italics in original).

Ignatiev (1997) advances Roediger's take on whiteness by denouncing the reinterpretation of whiteness without working toward its abolition. Admittedly, Ignatiev concedes that white abolitionists do not know exactly how to abolish the white race although he offers certain strategies for "race traitors," an ironic appropriation that describes anti-white Whites. Despite that, he argues that the history of America's original abolitionists can be instructive. By invoking the history of Massachusetts as a sanctuary state for escaped slaves, Ignatiev points out that Wendell Phillips sought to break up the consensus that supported slavery. In an attempt to provide a free zone adjacent to slave states, the original abolitionists argued that it was necessary to break up the union. To Ignatiev, although northern states did not practice slavery, they were nevertheless co-conspirators in the institution of slavery by honoring fugitive slave laws. Phillips rightly believed that in order to end slavery, northern states needed to become sanctuary destinations alongside slave territories. That is, northern territories cannot just be non-slave states: they had to be anti-slave. Drawing from the same essential framework, Ignatiev calls on Whites to reject their whiteness in a move to break up the union of whiteness. Similar to northern territories acting as sanctuary states in rejecting the institution of slavery, Ignatiev argued for Whites to commit race treason by rejecting whiteness, a form of racial sedition. In doing so, Ignatiev believes the abolitionist task is not to win over more people to become anti-racist, but rather to commit suicide as a 'White person' and be born again in building a human community *sans* race.

Not all undertakings of whiteness call for its abolition. Giroux (1997) has argued for media representations of race, such as movies, to serve as discursive spaces where Whites and students of color can critically examine oppressive representations and how they continue to shape contemporary racial conditions. Here, Giroux calls for a critical engagement of whiteness

rather than its dismissal. That is, opposite to white abolitionism, Giroux calls for a reconstruction of whiteness. In doing so, Giroux favors a pedagogical approach “that offers students a possibility of rearticulating whiteness, rather than either simply accepting its dominant normative assumptions or rejecting it as a racist form of identity” (1997, p. 293). He suggests that whiteness is not intrinsically the problem, but rather how whiteness positions itself within the discourse and practice of race. As a result, whiteness can be rearticulated without the taken-for-granted assumptions and racial privilege of ‘whiteness,’ working toward an anti-racist whiteness. Whether or not a call for the rearticulation of whiteness may seem sexy for white anti-racists, or its total abolition too unrealistic, an overlooked aspect of whiteness is that as much as whiteness is ultimately false and oppressive, whiteness also maintains historical structures of domination. The material manifestations of White domination leads Zeus Leonardo (2004, 2009) to argue for an analysis of the conditions of White supremacy, which he explains are the necessary conditions that make ‘white privilege’ possible (cf. McIntosh, 1989). As a result, before whiteness is rearticulated or abolished, its modes of existence in producing material manifestations of white domination must be fleshed out.

### *CRT & Whiteness Studies in Education*

Ladson-Billings and Tate’s (1995) piece “Toward a critical race theory of education” marked an important moment where the framework of Critical Race Theory (CRT) in law was introduced to educational scholarship. By introducing CRT’s methodological framework to educational inquiry, Ladson-Billings and Tate base their discussion of educational inequity on three central understandings:

1. Race continues to be a significant factor in determining inequity in the United States.
2. U.S. Society is based on property rights, rather than justice or human rights.
3. The intersection of race and property creates an analytic tool through which we can understand social (and, consequently, school) inequality. (p. 48)

The authors first propose that race continues to be a significant factor in determining inequality in the U.S., which is easily apparent in statistical and demographic data. The most jarring documentation is Kozol’s (1991) graphic description of the divergent educational experiences between white students in comparison to their black and Latino peers. Second, in locating property rights as the foundation of U.S. society, the authors critically identify *the* central problematic preventing the Civil Rights movement from fulfilling the promise of justice and human rights. Too often, they argue, issues of justice and human rights are conflated with democracy and discussed as coterminous with each other. Doing so ignores the history of the democratic process producing results and realities that are antithetical to justice and human rights. Bell (1980a) points to the inherent tension that created the Constitution, a document that is roundly considered a great democratic achievement. However, Bell argued that the possibility of individual rights unconnected to property rights was a completely foreign concept to the founding fathers. Thus, Ladson-Billings and Tate conclude that in regards to the issue of democracy in U.S. society, the interests of property rights trumped issues of individual rights and justice.

Taken together, the first two propositions inform the third proposition that the intersection between race and property becomes a powerful analytic tool in understanding educational inequality. A Jim Crow era interpretation of educational opportunities as a literal form of property is not difficult to see. White-only schools represented for Whites not only the



privilege of better educational opportunities, but also the ‘right’ to exclude Blacks. In the post-*Brown* period, a property analysis of educational inequality locates white flight, vouchers, tracking and ‘gifted programs’ as the contemporary manifestation of property rights to Whites. Finally, the authors argue that in order to address educational inequality, a critical race perspective must be *the* educational paradigm because CRT offers a new methodological approach that centralizes justice and offers the possibility of radical change from the current order. The application of a critical race methodology and a whiteness studies analytic in education exposes a litany of racially stratifying and subordinating features of education. From teacher work force, to policy, and delivery of instruction, CRT and whiteness locates the entire edifice of education as the site of necessary radical change (see Sleeter, 1993; Ladson-Billings, 1997; Leonardo, 2007).

The problem of whiteness as the normalized moral center is evident in education. In *We Can’t Teach What We Don’t Know*, Gary Howard (1999) stresses the importance of a multicultural education for an ever-increasing diverse student body. Howard shares his own journey of white identity formation. Reflecting on the legacy of white dominance and locating his own racial identity development as a white person, Howard uses anecdotal stories and accompanying analysis in a project aimed at personal and professional transformation. In response to the reality of a predominantly White teacher workforce serving multiracial schools, Howard calls for the need to have more people of color in the teaching ranks along with policies that encourage dialogue about whiteness and dominance. Howard hopes that a collective transformation can occur that will lead us to *la terra transformativa* (land of hope) where race inequality can be healed collectively between whites and nonwhites. Interestingly, Howard does not assign blame, only locating the enemy in dominance, ignorance, and racism. Howard’s analysis does not particularly focus on White people per se, but more importantly on the transformative aspects of knowing and speaking of racism and dominance within a multicultural approach to education.

Christine Sleeter (1993) and Alice McIntyre (1997) go where Howard does not, focusing their analysis on a predominantly White teacher workforce. In doing so, Sleeter critically argues that we cannot just address racism and inequality by educating white teachers because teachers bring to the profession their own perspective of what race means. Therefore, these white teacher perspectives are not simply informed by their education, but more crucially by their own racial experiences and vested interests. In Sleeter’s analysis, the focus on white teacher identity development is needed because the goal of education is more than just addressing racism, but to avoid reproducing it.

Perhaps the importance of focusing on white identity is exemplified clearly by McIntyre’s participatory action research with thirteen white undergraduate female students. McIntyre maps racial attitudes, beliefs, and how teachers make meaning of whiteness within their relationship to multicultural education. The focus is not on models of development with the goal of a healthy racial identity, or even to mapping the various types of white people exemplified in McIntyre’s study. Rather, McIntyre conceptualizes whiteness as a social activity that is “constantly being created and recreated in situations” (p. 18). Her research revealed that female White participants found themselves occupying the spatial moral center characterized as Eurocentric. Furthermore, the students believed that they could fix and ameliorate issues of racial domination by accessing their own problematic racial inventories. In various ways, McIntyre, Sleeter, and Howard’s work shifted studies of race toward an analysis of white racial practice, participation, and consumption.

Similarly in the educational policy, Leonardo (2007) suggests the federal No Child Left Behind Act (NCLB) is an instantiation of whiteness. Here, Leonardo argues that NCLB reproduces the ‘white polity’ within the larger context of education as a project of nation creation. In locating U.S. society as one firmly steeped in a racial discourse of colorblindness, Leonardo argues a fundamental characteristic of the colorblind discourse is its ability to downplay institutional relations and the racialized social system. Therefore, “NCLB’s inability to locate educational disparities within the larger relations of power does not just betray its colorblind ideology, but its *reinforcement of whiteness*” (pg. 270; italics in original). In other words, Leonardo suggests an educational policy that is purposeful in neglecting racial issues makes the reproduction of inequality and racism neither aberrant nor accidental, but rather becomes a fundamental characteristic of the system. Sadly, it may come as little surprise to Leonardo that NCLB diagnoses structural problems often faced by families of color such as health care, housing, and job discrimination by prescribing fundamentalist approaches such as market solutions, sanctions, and standards that do little to address racial problems, or worse, exacerbates them.

## THE STATE, EDUCATION, & CIVIL INSTITUTIONS

Omi and Winant’s influential racial formations theory further illuminates the lasting importance of Gramsci’s theory of hegemony. Taken from the fragmented and unfinished writings of Gramsci while imprisoned by Italian fascists, Gramsci’s (1971) prison notebooks reflected on the existence of long lasting, deeply rooted bourgeois democracies that were vibrant in many western European countries. Anderson’s (1976) seminal essay “The antinomies of Antonio Gramsci” went about synthesizing and framing the many disjointed pages of Gramsci’s *Prison Notebooks*. Via Anderson’s interpretation, Gramsci updates the Marxist tradition to speak for West European countries. It is important to keep in mind Gramsci’s contribution while undertaking a CRT approach to the law and education because racial subordination in education does not happen independently from other social institutions. As such, a careful analysis of Gramsci’s theory of hegemony informs our critical race methodological approach so we can fully grasp the nature of racial stratification and subordination beyond the institution of education and into civil society more broadly.

### *Gramsci & Theory of Hegemony*

Analyzing the nature of influence, the state, and state exercise of power in capitalist societies, Gramsci contrasts between the West and East. Gramsci identified the East as the Soviet and other Eastern European states. The state in the East, as a body of government, was brittle because it was less integrated with civil networks in society, thus leaving its methods of influence and control limited to forms of physical force and repression. In short, in a czarist nation like Russia, the state was everything. In the West, or more advanced capitalist societies, Gramsci observed that civil society was much more developed, complex, and wide-ranging in its relationship with the state. As a result of this contrast in structures of power, Gramsci observed that advanced states in the West practice power and influence differently than those of the East.

In the West, Gramsci observed that the ability of the state to manufacture consent via its integration with civil society was paramount, as opposed to coercion with the threat of physical force and repression that he viewed standard in the East. Using the concept of hegemony,

Gramsci viewed the political apparatus of western democracies to resemble a strategy of a 'war of positions', of 'cultural hegemony', as opposed to a 'war of maneuver' with sweeping acts of "taking the state" more common in the East during revolutionary times. Gramsci noted that power and influence in the East were practiced swiftly and at times with great violence due to the constant threat and use of state sponsored military force as a form of civil and social control. Not so in the West. Developing the Marxist analysis of the bourgeoisie and proletariat, Gramsci saw that bourgeois power in advanced western nations rests upon its ability to win consent from the multiple classes via civil institutions, what Gramsci sees as the many different positions that contribute to a collective political manipulation of the masses. It follows then that within the hegemonic process of the west, coercion and consent are not exclusive but rather governed through consent during times of peace, buttressed by a civic sense of political self-determination due to the masses' participation in the state's many civil institutions. But Gramsci importantly argues that despite this sense of autonomy, the varied civil institutions are still operated by and under the controlling influence of the state.

Additionally, Anderson is careful to note that although the state manifests itself differently between East and West, it is important to remember the state, as a formal governmental body in the West, still maintains its characteristics just like the state in the East. That is, although the use of violence and coercion are less likely in the West because of democratic institutions, Anderson argues that the presence of civil societies as the main method of the state winning consent from the masses neither eliminates nor diminishes the state's ability to use violence through its parliamentary forces in order to quell counter-revolutions and rebellions. Anderson argues that a common mistake of understanding the state in the West is to suggest that the emergence of civil society replaces or diminishes the power of the state. That is, the state can no longer be understood according to its manifestations in the East but must be replaced by a modern understanding of civil society in the West. To Anderson, this would be a grave mistake. Anderson admits that in Gramsci's writings, there are some grey areas because Gramsci makes no formal comparison or differentiation between hegemony through the state or hegemony through civil society. As a result, Anderson acknowledges a common drift is to think of the two as exclusive of each other, with the state resting in the East and well-developed civil society characteristic of the West.

Despite the easy temptation to read into the grey areas as a differentiation between the state and civil society, Anderson reminds his readers that the coercive power of the state is ever present (p. 26). He speaks of the critical role of the state's core function, of 'armed bodies of men' maintaining a stranglehold monopoly over legitimate violence (see Weber). Anderson points out that it is within the state's ability to exercise legitimate violence whenever it wants that serves as the lynchpin for its ability to produce consent. Therefore, in the West, civil society does not replace the state, but perhaps more accurately compliments it with a less aggressive function. As a result of this new understanding of advanced capitalist societies, the state and civil society may be read together or separately, depending on how one wants to identify power, influence, coercion, and consent. Nevertheless, the state is ever-present as a fundamental threat of coercive force and its ability to utilize violence is never diminished. More importantly, Anderson suggests that the modes of bourgeois power in the West do not entirely lie in civil society. Additionally, the modes of bourgeois domination can often times neither be classified as coercive nor entirely by consent. Rather, as a consequence of the formal state's shifting position due to its integration within civil society, the conjuncture between coercion and consent

represents two modalities on a continuum of influence exerted by the state through force or democratic engagement within historically specific conditions.

Finally, although Gramsci was not the first to use the concept of hegemony (Lenin used it to describe the leadership necessary from the proletariat in order to establish a socialist state), his pioneering contribution to the theory of hegemony identified influence and power in the West as a form of leadership, not domination. That is, hegemony is in fact *not* a study or statement of domination, but the common sense of leadership through its multi-faceted influence over civic life. Gramsci observes that discourses of domination, which emphasize coercion, are limited in their reach. In terms of leadership, influence and power, hegemony is long lasting due to its ability to manufacture consent, and the inherent ability of taking into account or incorporating subordinate interest through direct political participation. In this regard, power and influence in the West could no longer be accurately described as coercive and emanating from a bourgeois class precisely because the multifaceted institutions that participate in the hegemonic process are no longer centralized within the control of the ruling elite, redescribed by Gramsci more accurately as the “ruling bloc,” or the bourgeois class’ ability to win the consent of non-bourgeois elements of society, including aspects of the working class. Gramsci therefore abandons naming the hegemonic process as orchestrated by a specific ruling class, but a product of an alliance of a ‘bloc’, comprised of, using Marxist terms, a diverse social composition from the ruling class to the peasantry.

#### *Race, Law, Education, and the Hegemonic Process*

Gramsci’s theory of hegemony and Anderson’s interpretive review of the *Prison Notebooks* is needed to analyze law, whiteness, and education. In many ways, education writ broadly represents one of the most significant civil institutions where the state can manufacture and win consent. However, the institution of education does not act independently of other civil and political institutions. In Althusserian (1971) analysis, education is one in an array of institutions that form a wide range of controlling ideologies. Along with education, Althusser argues there are religious, cultural, and family institutions that are united under a broader controlling ideology propagated by various Ideological State Apparatuses (ISAs). Similar to Gramsci’s differentiation of the state and civil society, Althusser distinguishes the ISAs from the Repressive State Apparatus (RSA) in that the RSA is primarily a controlling and suppressing apparatus propagated by police, army, and governments. That is, the RSA represses through fear of prosecution or violence, whereas the ISAs submit people out of fear from social ridicule. Specific to education, Althusser believes that the school has replaced religion as the most crucial ISA in sustaining a ruling class ideology against the interests of the working class. Whereas Althusserian and Gramscian analyses are class based following a Marxist tradition, we can also extend the analysis of a ruling class ideology to a ruling racial ideology (see Leonardo, 2015). By locating the interaction between education and the legal institution, this relationship reveals itself to reinforce the dominant racial ideology of colorblindness that benefits Whites.

The institution of education offers varied possibilities of civic participation for the public. From PTA meetings (see Lareau, 2000) to one’s ability to vote for members constituting a local school board, the institution of education represents an arena where heavy civic participation is a built-in feature central to its existence and legitimacy. Due to its promotion of heavy participation across the multitudinal processes of education, the state’s ability to win consent is relatively easy. In other words, the state’s exercise of power in administering the public service

of education is publically accepted so long as a majority of the mass is ideologically conditioned to believe they are satisfied with its delivery. Thereby the educational ISA invokes a common sense among the mass that inherently contradictory. That is, because there is wide-spread discontent with public U.S. education, satisfaction with schooling is in fact dissatisfying. Regarding the law, there is a different level of civic participation and engagement.

One can argue the public's participation in elections contributes to the appointment of Supreme Court justices. Through the political process, public participation in elections plays an affirmative role in electing political representatives (e.g., Congress) and sitting Presidents who appoint and review justices to the bench of the Supreme Court. Because of this, a case can be made that the Court's power of constitutional and statutory review is also a product of heavy civic participation. Nevertheless, this position stretches too far the definition of civic participation. The form of civic participation offered in education is much more interactive and results driven. To many proponents of neoliberalism, schools are a product to be bought and consumed (See Friedman & Friedman, 1980, Sowell, 1989, Chub & Moe, 2011). For the privileged, schools that do not satisfy the 'customer' (read: students and their families) are discarded for 'better' schools (read: a better product). This consumerist model of education is perhaps the ultimate model of civic participation in contemporary America, which encourages not only interaction but also results.

The law and the Supreme Court do not function in this way. Significant change on the Court occurs at an agonizingly slow pace, taking at times entire generations to see any substantive difference because seats on the Supreme Court are lifetime appointments abdicated only through retirement or death. For example, during the eight years that George W. Bush was president, he made two appointments to the Court replacing Sandra Day O'Connor and William Rehnquist. Similarly, President Barack Obama, to date, has similarly made two appointments, replacing David Souter and John Paul Stevens. If President Obama does not make any more appointments before the end of his presidency in 2016, and it does not look like he will, bar an unforeseen retirement or death, we will collectively see four appointments in a sixteen-year span between presidents Obama and Bush.

It may appear that a changeover of four justices out of a total of nine in a sixteen-year period is not too slow and can represent some affirmation that voters are responsible for electing presidents and their respective choices for Supreme Court nomination. On the surface level, this is absolutely true. But significant turnover on the Court is not necessarily measured by how many sitting justices abdicate the bench, but *whether incoming justices change the overall ideological balance of the Court*. If we measure Supreme Court turnover in this way, then our measurement of four justices in sixteen years becomes zero justices in nearly two decades (possibly even longer) because both Presidents Bush and Obama have replaced outgoing Supreme Court justices with incoming justices who espouse essentially the same constitutional ideology and voting record of the ones they replaced. Therefore as a substantive net effect, the Court's ideological balance has remained the same for the last sixteen years. Court observers have suggested (Liptak, 2010), that the Court has indeed shifted more conservatively with the replacement of swing vote Sandra Day O'Connor with conservative stalwart Justice Samuel Alito. But at the very most, the move is slight and subtle. This subtlety in ideological change is representative of the nature of the Court and indicative of what Hall (2006) calls a "tendential balance" as opposed to outright domination.

Baring the unforeseen circumstance of a sudden death, justices will strategically schedule their retirements at a time when an ideologically similar President fills the office (Fuller, 2014).

This is to ensure that the sitting president has the opportunity to fulfill the vacant seat with an ideologically similar jurist in order to avoid drastically changing the ideological balance of the Court in favor of the political opposition. Looking at the four justices who were nominated and confirmed by the senate to the Supreme Court by Presidents Bush and Obama, the Senate confirmation vote in favor and against were as follows:

- 58-42 Samuel Alito: Replacing Sandra Day O'Connor
- 63-37 Elena Kagan: Replacing John Paul Stevens
- 68-31 Sonia Sotomayor: Replacing David Souter
- 78-22 John Roberts: Replacing William Rhenquist

Of the Four incoming Justices, the contentious nature of Samuel Alito's confirmation process is not at all surprising. Believed to be a strict constructionist and stalwart conservative, Justice Alito replaced a justice whose voting record was considered to be that of a swing vote on many crucial political and social issues. The nature and structure of the Court leads to two prevailing observations: first, the manner in which the Court is constituted is completely political; second, the time it takes for meaningful shifts in the Court's ideological balance lends itself to the impression that it is in fact *apolitical* because it takes so long for substantive change to happen.

The nature of the Court and its interaction with the institution of education lends itself to a bit of a paradox. That is, education at the community, school, family, and individual level is very interactive and encourages multiple forms of participation. However, education is also regulated by laws, the clear examples of which are the canonical Supreme Court cases that have shaped education as an institution. As a result, the relationship between law and education and its subsequent interaction fall within Gramsci's theory of hegemony. Hall (2006) further illustrates the importance of focusing on the specific complexities of *inter*-relationships within specific manifestations between state and civil society, notably in areas such as the law and education. On the power and influence of the modern state and its hegemonic process, Hall argues:

The modern state exercises moral and educative leadership – it 'plans, urges, incites, solicits, punishes.' It is where the bloc of social forces which dominates over it not only justifies and maintains its domination but wins by leadership and authority the active consent of those over whom it rules...it becomes not a *thing* to be seized, overthrown or "smashed" with a single blow, but a complex *formation* in modern societies which must become the focus of a number of different strategies and struggles because it is an arena of different social contestations. (p. 429; italics in original)

Hall's emphasis on the complex formation in modern society as the source of power and influence suggests the formative relationship between the law and education cannot be ignored. Furthermore, Hall has argued that Gramsci is needed to study the prevalence of race and racism in our contemporary era. Hall writes that although there are general features of racism that can be identified across specific historical epochs, their differences may in fact outnumber their similarities. Importantly, the study of race and racism must pay attention to the ways in which the common general features of racial practices are "modified and transformed by the historical specificity of the contexts and environments in which they become active" (Hall, 1996, p. 23).

In this way, we must not simply identify a connection between educational practice and the law in order to identify racial practices, but more critically how the relationship is practiced during varying historical moments. This variance is what this dissertation attempts to document. It leads Hall to focus not on racism in general, but *racisms* on a historically specific, concrete level. Finally, Hall believes the importance of Gramsci to racial studies lies in its ability to interrupt the common sense understanding of racism. That is, because racism is understood as destructive, anti-social and anti-humanitarian, there is a false belief that racism is the same everywhere it is practiced, either everywhere in place or everywhere in time. To Hall, this is a misunderstanding of racism as a historically specific practice that may manifest in different forms and manners from one historical period to the next. Therefore, Gramsci is important in our ability to identify specific historical practices of racism, as opposed to abstractions of race.

## MOVING FORWARD

These important theoretical and analytical points of departure frame the fundamental optics of this study. It establishes a cornerstone position rejecting the notion that the law is in anyway above social and cultural reproach. That is, the law in general, and the Supreme Court specifically, are products of cultural and racial politics. Additionally, guided by the important contributions of Gramscian hegemony theory and Omi and Winant as well as Leonardo's racial formations analysis, I argue that legal and educational institutions are inextricably linked. Although different in form, nature, and structure, both institutions operate constitutively within a specific historical conjuncture apprehended by Gramsci's analysis of the state and civil society. Racial formations theory and whiteness studies further lend themselves to the analysis that power and influence via the inter-action of social institutions is not just a process that ensures class privilege, but also white racial privilege.

As Gramsci, Anderson, and Hall were all careful to note, the state and civil society are neither distinct entities nor are they one and the same. Their peculiarities and similarities rest within specific historical junctures that are shaped by contemporary political movements. Similarly, racial privilege cannot be confused simplistically as a footnote, or reflux, form of class privilege within the orthodox Marxist understanding of the bourgeoisie and proletariat (Leonardo, 2009). Racial privilege within the context of the institutional interactions of law and education must likewise be studied under the careful methodologies and optics of Gramscian hegemony theory, Hall's prescription that hegemony theory elucidates studies of racism, and Omi & Winant's racial formations framework emphasizing the iterative nature of racial meanings and practices.

There is an ongoing crisis in education, marked by continuing and increasing segregation (Orfield & Frankenberg, 2014) at a historical conjuncture six decades removed from *Brown v. Board of Education*. However, the crisis is not created by and limited to education. The law is but one institution in a multitude of political and civic apparatuses that contribute to increasing segregation in education. In the colorblind era, the law no longer acts as an enforcer of segregation as it did during Jim Crow segregation, but as a barrier against efforts to diversify and desegregate schools. In this way, the law must be made accountable for its roll in furthering segregation and racial privilege in education. Ultimately, this study is not about proving the fact of racial segregation in education as there are other more capable studies to this effect (e.g. Kozol, 1991, Solorzano & Yosso, 2001, Orfield & Frankenberg, 2013). But central to this study is an attempt to map out the historical trajectory of the Court and its racial rulings. In doing so,

the Court's racial practice will be revealed as one that has adapted and changed over time, but nevertheless continues to reinforce white privilege and whiteness. Because of this, racial segregation and white privilege in education exists virtually in perpetuity (cf. Bell, 1992, on permanence of racism). As education has been the focus of many important race related Supreme Court cases, a new analytical framework that centralizes the role of the Court in perpetuating and producing new forms of racial privilege in education is needed.



## Chapter 3: Methodological Commitments

### INTRODUCTION

Buttressed in part by the Supreme Court, we are currently in the colorblind era (Bonilla-Silva, 2003; Gotanda, 1991; Haney-Lopez, 2006b). Colorblind ideology dismisses the centrality of race as a source of social conflict and as a worthwhile concept for the Court to consider in adjudicating social problems. In an updated version to their seminal racial formations book, Omi & Winant (2014) argue that contemporary manifestations of colorblind ideology in politics, policy, and education have hijacked the dream of colorblindness from Martin Luther King Jr. and other Civil Rights activist. We can include the founding fathers of Critical Race Theory in the category of Civil Rights activist. Colorblind ideology today represents the exact opposite of the race-centric methodological commitment of CRT. It is not by happenstance or accident of history that colorblindness has become our hegemonic racial discourse despite the continuing persistence of racial stratification and subordination in society. In areas such as housing (Massey & Denton, 1993), the criminal justice system (Alexander, 2010), and education (Leonardo, 2009)), the persistence of racial stratification and subordination are well documented. Despite the overwhelming evidence of racial problems, the Court continues, at best, to approach racial issues with ambivalence, and at worst, completely to reject racial problems as worthwhile problems in which to intervene. Understanding the genesis and epistemology of this apparent paradox is the methodology of this study.

This chapter examines the methodological and interpretative commitments necessary to approach the paradox of colorblindness. First, the leading section provides a contemporary judicial example where colorblind jurisprudence by the Supreme Court has all but eliminated the importance of racial considerations in legal disputes. The example is meant to represent the paradoxical nature of the Court's colorblind jurisprudence in relation to the racially significant nature of social problems that come before the Court. The second section discusses hermeneutics, or the science of interpretation, as a methodological tool in order to take up the Court's colorblind arc. That is, in proceeding to take up the Court's colorblind ideology, its ideology must be understood as what Leonardo (2003) would call "interpreting the problem of domination." Therefore, Ricoeur's work on hermeneutics and Leonardo's discussion of critical hermeneutics guide our study of the Court's ideology by locating it as a problematic site of legal interpretation. Finally, the third section discusses how we can go about utilizing critical legal hermeneutics under the methodological commitments of Critical Race Theory. The working definition of hermeneutics as a 'conflict of interpretation' will be utilized as an instructive force in CRT's methodology of counter story telling, scenarios, narratives, testimonies, and chronicles. The method of counter-storytelling is particularly important as it provides an alternative narrative to explain the Court's ongoing unwillingness to confront race related disputes.

### THE CONSEQUENCE OF JUDICIAL COLORBLINDNESS

In *Parents Involved* (2007), the Supreme Court ruled as unconstitutional Seattle School District's usage of a racial tie-breaker in its school assignment policy. Before the Court's final ruling, the National Academy of Education (Linn & Welner, 2007) commissioned a committee to review all *Amicus Curiae* filings with the Supreme Court, which supported either petitioners or respondents. *Amicus Curiae*, also known as 'friend of the court' briefs, are briefs or reports

that interested third party groups, individuals, and organizations can submit to the Court in support of petitioners or respondents. Out of sixty-four reports, the committee found at least twenty-seven to include substantial discussions of social science research. The committee identified five key questions addressed by the research, three of which were:

1. Is racial diversity in a school environment associated with improved academic achievement?
2. Is racial diversity in a school environment associated with intergroup relations?
3. Is racial diversity in a school environment associated with improved long-term effects?

The committee found the totality of reviewed research data answered all three questions in the affirmative. However, conclusions in social science research are always measured and cautioned against sweeping generalizations. For example, in reviewing the question of racial diversity and its association with academic achievement, the committee cautioned “one important implication of the different analytic approaches is that the estimates of the impact of school racial composition on student achievement are likely to be very different across studies” (p. 15).

When opposing *Amicus* briefs do not disagree over methodology, they disagree over conclusions. In support of race conscious student policies, the AERA, APA, and American Council on Education cited “research that concludes that African American students who attended desegregated elementary and secondary schools are more likely to attend predominantly white colleges” (2007, p. 31). In response, opponents of race conscious policies acknowledge the same likelihood, but argue “that the available research does not justify a conclusion that the long-term benefits of desegregation are greater than the short-term benefits such as test scores” (*Ibid.*). Given the diverging opinions apparent in *Amicus* briefs on research methodology and conclusions, Justice Thomas (*Parents Involved*, 2007, J Thomas, concurring opinion) concludes that the inconclusive social science research cannot plausibly support integration interests, let alone enough to satisfy the Court’s standard of strict scrutiny to allow the usage of race as a “discriminatory factor” in public policy. As a result, whereas proponents of race conscious policies must apparently present incontrovertible research evidence to prove “compelling interests”, opponents need only question research methodology or undermine conclusions. Here, the Court’s standard of strict scrutiny is an ally for opponents of race conscious public policies.

This striking circumstance of opposing *Amicus Briefs* from *Parents Involved* perhaps reveals the ultimate goals of each respective side. Whereas groups and foundations (e.g., the AERA) provided substantial academic research speaking to the positive educational outcomes of a diverse educational environment, their opponents simply poked holes in the social science research. As a result, a methodological approach studying educational diversity was defeated and undermined by a method of obstruction. As the ruling from *Parents Involved* shows, obstruction won thanks to the rigid and almost impossible framework of strict scrutiny that leaves little room at the table for social science research within the context of education, law, and colorblind jurisprudence.

## HERMENEUTICS AND INTERPRETATION

In order to comprehend the Court’s colorblind position on issues of race, the role of hermeneutics must be a central concern. Hermeneutics, or the science of interpretation, can be

understood for the purpose of this study as the site to locate the conflict of interpretations (Ricoeur, 1976; Leonardo, 2003). In the context of the colorblind court and current educational issues, the hermeneutical process is needed to fill the incredible gap that exists between the Courts' colorblind language and the racially significant material life it allegedly describes. In studying the Court's historical decisions on race related issues in the colorblind era, its colorblind language *must* be judged against the force and influence of material history. In other words, when conservative justices continually dismiss the salience of racial subordination in favor of colorblind and race-neutral solutions, their language should be made to answer for the ongoing persistence of racial stratification in society. Therefore, a hermeneutics of the Court's colorblind jurisprudence requires that we both understand the Court's decisions, but also go beyond the Court's colorblind language to understand its larger impact in society.

Ricoeur's hermeneutics framework stresses the important distinction between language and discourse. To Ricoeur, discourse surpasses language because it is within a discourse that language finds its meaning. Without a discursive context, such as a historical conjuncture in the colorblind era, language can be lost in meaning and become an abstraction without specificity, referent, and substance. We often witness this phenomenon within constitutional originalism and colorblind jurisprudence. For instance, conservative Justice Clarence Thomas has routinely stated that he sees no difference between *de jure* practices of racial discrimination (e.g. Jim Crow Laws) and affirmative action policies. Concerning an affirmative action practice ensuring minority participation in construction contracts, Justice Thomas stated:

There is a moral and constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality... In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice (*Adarand*, 1995, Thomas, J., concurring, p.1)

Justice Thomas' moral and constitutional equivalence is only made possible because the language of discrimination has been institutionalized via colorblind jurisprudence and has simply become a linguistic exercise removed from its historical context. If the language of discrimination were in fact tied to material history, there is absolutely no equivalence in comparing a Jim Crow system of methodical racial exclusion with an affirmative action system that promotes inclusion. As a result, Leonardo (2003) argues, "history is the primordial soup of ontological understanding" (p. 332). Ricoeur emphasizes the importance of history in providing the discursive context that gives language meaning:

...research does not escape historical consciousness of those who live and make history. Historical knowledge cannot free itself from the historical condition. It follows that the project of science free from prejudices is impossible. (Ricoeur, 1981, pg. 76)

Underlining Ricoeur's point, Leonardo (2003) stresses that because the force and influence of history is common to all subjects, it is interpretive understanding that becomes malleable as a result of the conflict of interpretation. Therefore, we can conclude that in the context of Justice Thomas' alleged moral and constitutional equivalence, the force and influence of Jim Crow

racial subordination is ever present as is any perceived historical significance of affirmative action. However, it is Justice Thomas' selective interpretation of these historical conditions that allows him to equivocate the two as one and the same.

Leonardo argues as a methodological tool, a critical hermeneutics is needed in order to allow social actors to critique meaning systems that construct illusions out of history. That is, as a form of ideology critique, critical hermeneutics complicates the everyday, the taken-for-granted, and the "common sense" assumptions that explain social problems as "natural". Often times the constructed illusions of colorblindness do little to portray accurately the material basis of history, but they nevertheless are instrumental in shaping future history. This is a common occurrence in the Right's anti-affirmative action language. Despite the lack of empirical evidence, anti-affirmative action positions routinely cite the tried and true mantra that Whites are rejected from positions in school and labor industry *because* of affirmative action, or even more falsely, because of their whiteness. In Gramscian (1971) theory, the ideological hegemony of the anti-affirmative action mantra has in fact been utilized to shape legal history concerning race positive considerations in employment and public education.

As a response to the hegemony of colorblindness, a critical hermeneutics is necessary not only to describe the formation of judicial colorblindness, but also to change it. Leonardo (2003) argues:

An important purpose of critical hermeneutics is to expose myths or unquestioned assumptions that have long been held as self-evident: myths like rugged individualism, history's facticity, and science's objectivity. (p. 348)

Leonardo's point echoes the important tenet central to hermeneutics: interpretations are never neutral. Therefore, along with the myths of rugged individualism, history's facticity, and science's objectivity, the Court's colorblind trajectory should similarly be exposed. In this way, the Court's colorblindness is not just simplistically a constitutional jurisprudence, but an interpretive discourse that buttresses racial domination.

## CRITICAL HERMENEUTICS, CRT, AND STORYTELLING

Perhaps the most foundational commitment that informs the pedagogical, methodological, and basic insight of CRT is the centrality of race and racism in society. Specifically with regards to the law, Russell (1992) describes race and racism as endemic, permanent, and "a central rather than marginal factor in defining and explaining individual experiences of the law" (pp. 762-763). In order to expose and lay bare the centrality of racism, CRT scholars have adopted the methodological practice of presenting stories, parables, histories, and scenarios in order to underline the legitimacy of experiential knowledge from the perspective of people of color. Additionally, the importance of CRT's method of storytelling is to present a counter-narrative, or what Solorzano and Yosso (2002) call an anti-majoritarian story. Here is where critical hermeneutics and a critical race method of storytelling come together. An anti-majoritarian story not only centralizes the experiential knowledge of the marginalized, it also exposes the taken for granted and alleged 'naturalness' of master narratives. In other words, critical hermeneutics locates the production of master narratives as a site to analyze the conflict of interpretation. Specifically, critical hermeneutics reveals the politics behind the Court's systematic suppression of race positive narratives in favor of colorblind sensibilities. By

coupling material history with the Court's canonical race cases, we can construct anti-majoritarian stories on law and racial subordination that the conservative Court refuses to acknowledge.

### *CRT and Anti-Majoritarian Storytelling*

Behind a steady and consistent stream of anti-affirmative action decisions, the conservative Court since *Brown* has constructed a master narrative treating the importance of racial subordination in society as a marginal and declining phenomenon. This of course has two immediate consequences. First and most obvious is the denial of judicial remedy for communities of color. Secondly, Tatum (1997) argues despite the heated rhetoric about affirmative action and reverse-racism in these cases, the denial of judicial remedy for communities of color also affirms the persistent advantages for Whites. Tatum's example to further emphasize this point is worth repeating:

In very concrete terms, it (white privilege) means if a person of color is the victim of housing discrimination, the apartment that would otherwise have been rented to that person of color is still available for a white person. (p. 9)

Not only does the existence of master narratives prevent minority-centric perspectives to exist, it also normalizes the persistence of racism and white privilege. In other words, majoritarian stories act like a double-edged sword. First, majoritarian stories silence minority accounts that are incongruent with its colorblind sensibilities. Secondly, it denies the existence of racial subordination and as a result, upholds the 'excellence' of Whites while painting minority struggles as a consequence of a culture of poverty (Herrnstein & Murray, 1996).

Solorzano and Yosso (2002) point out that Whites are not the only ones who tell majoritarian stories, people of color also tell them. In his *Fisher* (2012) dissent, African American Justice Clarence Thomas cited Sander and Taylor's (2012) 'mismatch theory', arguing that minority students are harmed when 'under-qualified' students are accepted to competitive elite schools because of admissions that consider students beyond "strict academic standards". Similarly, African American economist Thomas Sowell (1981) claimed, "the goals and values of Mexican Americans have never centered on education" (pg. 266). Missing from Thomas and Sowell's prescriptions are any historical and material consideration that prevents minorities from enjoying the same educational experiences as Whites.

Here is where counter-stories, or anti-majoritarian narratives are needed. Solorzano and Yosso (2002) define the counter-story "as a method of telling stories of those people whose experiences are not often told (i.e. those on the margins of society)" (p. 32). Additionally, "the counter story is also a tool for exposing, analyzing, and challenging the majoritarian stories of racial privilege" (*ibid*). Importantly, Solorzano and Yosso argue that anti-majoritarian stories need not only be created and told as a direct response to majoritarian ones. That is, if the existence of counter narratives is only in response to master narratives, we let master narratives dominate the discourse under the guise of universality. The authors identify three types of counter-narratives and/or stories: personal stories or narratives, other people's stories or narratives, and composite stories or narratives. Particularly, Solorzano and Yosso describe composite stories or narratives as:

Composite stories and narratives draw on various forms of “data” to recount the racialized, sexualized, and classes experiences of people of color. Such counter-stories may offer both biographical and autobiographical analyses because the authors create composite characters and place them in social, historical, and political situations to discuss racism, sexism, classism, and other forms of subordination. (p. 33)

In order to craft a counter-narrative, it is important for the researcher to unearth sources of data. In the same way that colorblind justices ignore the significance of data on racial subordination, counter narratives must show a “theoretical sensitivity” and “cultural intuition” within the process of collecting data to tell a story. Drawing on the work of Strauss and Corbin (1990), Solorzano and Yosso (2002) emphasize that a theoretical sensitivity “refers to the attribute of having insight, the ability to give meaning to data, the capacity to understand, and capability to separate the pertinent from that which isn’t” (p. 33). Furthermore, cultural intuition allows our own personal experiences to extend outward in the collection and analysis of data (Delgado Bernal, 1998). Together, the construction of counter narratives require data from multiple sources without consideration as to whether primary sources are more valued than secondary or individual and personal stories. Critically, critical race methodology such as story telling connects the institutional manifestation of racist policy with its material consequences. Anti-majoritarian narratives align with Calmore’s (1997) contention that discussions of race require a substantive discussion of racism.

CRT’s methodology of using narratives and storytelling does not come without its detractors. Although scholars have criticized CRT on a number of grounds, the most common critique alleges that CRT abandons western traditions of rational and empirical inquiry by forswearing analysis for personal narratives or subjective storytelling. The prolific legal scholar and Seventh Circuit Court of Appeals judge Richard Posner (1997) argues:

Rather than marshal logical arguments and empirical data, critical race theorist tell stories – fictional, science-fictional, quasi-fictional, autobiographical, anecdotal – designed to expose the pervasive and debilitating racism of America today. By repudiating reasoned argumentation, the storytellers reinforce stereotypes about the intellectual capacities of nonwhites. (p. 41)

Additionally, Kozinski (1997) suggests that with CRT’s storytelling methodology, insuperable barriers are raised that has the effect of preventing mutual understanding. For instance, Kozinski cites Bell’s (1993) “The Space Traders” allegorical tale from *Faces at the Bottom of the Well* where Bell argues White America would overwhelmingly vote to trade all Black Americans in exchange for untold treasure. Kozinski suggests that Bell’s thesis is untestable and therefore one reaches the dead end of either having to completely agree or disagree with the merits of Bell’s allegorical tale. Farber and Sherry (1997), self professed traditional liberals, call CRT folks ‘radical multiculturalists’ who are waging open warfare on all that is valuable in western society. They allege that enlightenment concepts such as merit, truth, equality, freedom, and responsibility have all been given the axe and civil academic dialogue has been the unfortunate victim of CRT’s emergence. A common theme arises from these critiques in that they all accuse CRT methodology, and storytelling specifically, of forsaking western traditions of rationalism and destroying traditional liberal values.

This debate is not one that will be settled here. However, the back and forth of CRT's methodology and its criticisms is reminiscent of Leonardo and Porter's (2010) criticism for the need of 'safety' in race dialogue. That is, similar to the need of Whites' for safety before engaging in critical race dialogues, it appears traditional scholars are likewise advocating for a safe methodological frame of criticism and reason in order to do what they regard as 'proper' intellectual work in eradicating social problems. At the very least, it appears Kozinski, Posner, et al. are mistaking the *modus operandi* of CRT for its end game. CRT's goals are not to supplant western traditions and methodology with story telling and counter narratives. CRT utilizes these 'untraditional' methodologies as a means to eradicate debasement and subordination based on race. Rather than accuse CRT of forswearing rational analysis, perhaps critics should question whether rational analysis is doing enough to eradicate racism. The answer seems self-evident, which promulgates the search for a different methodology.

### *The Formation of Counter Narratives*

The influence of law is felt beyond the personal experience of any one individual. For instance, not only do educational laws influence the experience of individuals and families, it shapes the formation of entire communities and its relationship with other social institutions. In this way, composite stories are needed to construct a counter narrative to majoritarian stories of colorblind meritocracy and race-neutrality. Necessary in this construction is a hermeneutical process of identifying power, influence, and modes of oppression. Most important, critical hermeneutics demands that we not only tell counter narratives as a response to dominant stories, but counter narratives are an attempt to shift substantially dominant stories. In perhaps the most powerful example of counter story telling in regards to the legacy of *Brown v. Board of Education*, Bell (2004) provides a reconceived version of *Brown*. Bell's powerful counter narrative offers an insightful reframing of the substantive issues that faced Black students in light of the shortcomings from the real *Brown* decision.

Bell offers his reconceived version of *Brown* in the manner of a pseudo United States Supreme Court opinion. In explaining why he feels *Brown* must be reconceived, Bell argues, "*Brown* has become a legal landmark, an American icon embraced as a symbol of the nation's ability to condemn racial segregation and put the unhappy past behind us" (p. 130). It is precisely the illusion that racial problems are somehow behind us that makes *Brown* so troubling. In offering a reconceived version of *Brown*, Bell identifies the discursive histories that mainstream-celebratory memories of the real *Brown* systematically ignore. Provocatively, Bell's reconceived *Brown* would **uphold** *Plessy v. Ferguson*'s "separate but equal" constitutional mandate. That is, Bell would reverse the principal feature that makes the *Brown* case so famous: the end of "separate but equal". In doing so, Bell does not abandon his commitment to racial equality, but locates the measure of racial equality as one that must have substantive results, not idealism *sans* material history. Bell comments on his reconceived version of *Brown*:

More important than striking down *Plessy v. Ferguson* is the need to reveal its hypocritical underpinnings by requiring its full endorsement for all children, white as well as black...Realistic rather than symbolic relief for segregated schools will require a specific, judicially monitored plan designed primarily to provide the educational equity long denied under the separate but equal rhetoric.  
(p. 24)

It must be pointed out that scores of books and articles have been written about *Brown* since its passage, and Bell's reconceived alternative version is by no means the only attempt to revisit the original decision. However, many works (see Orfield & Eaton, 1996; Balkin, 2001; Patterson, 2001) criticize the opinion for its weakness, ineffectiveness, and ambivalent desegregation language. Although I think these approaches are spot on with their critique, they are categorically different from Bell's reconceived version of *Brown*. The approaches of these scholars differ from Bell in the sense that they continue to celebrate the *Brown* Court's overturning of *Plessy*'s "separate but equal" doctrine. It follows then that their critique of *Brown* stems from a fundamental belief in the feasibility of society rejecting "separate but equal" and instituting social and political policies that would produce substantive results indicative of an anti-"separate but equal" position. These scholars critique the Court's prescribed methods (or lack there of) toward educational equality but accept in the abstract the promise of *Brown*.

Bell's approach to the situation is completely different. The principle aim of his alternative decision is not to tackle *Plessy*'s "separate but equal" doctrine, but to find ways that would better provide black children with quality educational opportunities. Bell understood critically that the "edifice of segregation was built not simply on a troubling judicial precedent, but on an unspoken covenant committing the nation to guaranteeing whites a superior status to blacks" (p. 21). In reinforcing "separate but equal" in his reconceived opinion of *Brown*, Bell does not abandon his desegregationist commitment, but merely recognizes that his desegregationist commitment is not for its own sake, but a means to ensure substantive racial equality. Thus, as much as the reconceived opinion reads as a forward-looking opinion affirming *Plessy*, it is written as a backwards-looking reflection that fully considers the judicial retrenchment and political pushback against desegregation that followed the real *Brown* decision. Bell critically understands America's racial problem as a broadly shared cultural condition that cannot simplistically be fixed by "reworking the rhetoric of equality" (pg. 27). That is, complexities and multi-dimensional practices of racism cannot be engaged just because the Court has "substituted one mantra for another: where "separate" was once equal, "separate" would be now categorically unequal" (Ibid). Here lies the crux of why Bell would uphold *Plessy*. Bell would force the Court to implement its "separate but equal" doctrine so that Black children would enjoy the same educational opportunities as their white peers, even if they attended separate schools.

### *The Role of Critical Hermeneutics*

If hermeneutics is the site to study the conflict of interpretations, and critical hermeneutics is a methodological tool to counter and change majoritarian stories, then Bell's reconceived version is a quintessential example of countering and changing the hegemonic narrative of *Brown*. Bell's reconceived version of *Brown* is remarkable not only in its audacity to reject fundamentally a hallowed Court decision, but because it recognizes that racial stratification and subordination are material conditions. Bell captures a more accurate discursive history of the original *Brown* by electing to focus on its failures without being blindly enamored by its promise. This reconceived version of *Brown* is a direct counter narrative to the broadly shared opinion that the *Brown* "decision was the finest hour of American Law" (pg. 2). In juxtaposing the celebratory and hallowed nature of *Brown* with the fact that the case accomplished so little, Bell engages in a hermeneutical practice of drawing from a material racial



history that is available to both narratives. In other words, Bell centralizes the material consequences of retrenchment and political pushback that were direct responses to the original decision. These material realities are surely forgotten or brushed aside in sanguinary representations of *Brown*.

Critical hermeneutics is useful in questioning the hegemonic and institutionalized memory of *Brown*, which Bell argues as akin to a “holy grail” of American legal decisions. Using Leonardo’s (2003) analysis, it problematizes the interpretative process of how we came to know *Brown* according to its celebrated stature. More broadly, critical hermeneutics, CRT’s methodology of composite counter narrative story telling, and Bell’s powerful reconceived example, provide the methodological assemblage necessary to tackle our current majoritarian narrative of judicial and cultural colorblindness. In every contemporary affirmative action case since *Brown*, conservatives on the Court routinely cite the anti-classification nature of the decision forbidding racial distinctions. Equally striking is the absence of attention paid to processes of racial subordination that similarly accompanied *Brown*’s anti-classification language. Guided by critical hermeneutics and utilizing CRT’s methodology of composite story telling, critiques of contemporary colorblindness can be made to answer for the substantive racial history of subordination that it refuses to remember. In this way, the combination of critical hermeneutics and CRT’s methodology of counter narrative story telling can strike a blow to colorblindness in the same manner that Bell accomplishes in tackling the mythology of *Brown* as the hallowed finest hour of American law.

Moving forward, this study takes up methodology as a matter of how we proceed with social science research and about the questions that can be asked or not asked (see Leonardo & Allen, 2008). Leonardo and Allen argue that methodology is more than just “getting meaning right”, but about “addressing the ideological struggles over meaning and research” (p. 417). Furthermore, the authors suggest that our meanings “are neither transparent nor fixed; rather, they are sites of contestation for representations of history and social life” (*Ibid.*). When applied to race related cases that are foundational to the arc of colorblindness, I proceed with careful attention to both the legal language that describes racial problems as well as the racial problems that legal language obscures. My aim is not only to provide an anti-majoritarian story utilizing case law, but to construct a narrative responsive to racial stratification and subordination. In this way, a counter narrative against the hegemony of colorblindness expands the hermeneutical horizon where interpretations of the Court and equal protection do not collide with justice and equality, but instead compliment it.

## DISCUSSION

This project attempts to tackle the majoritarian narrative of colorblindness and “raceless” meritocratic doctrine. Understood broadly, colorblindness is not only a judicial approach by the Supreme Court but an ideology that has material consequences in and beyond the institution of education. Specifically, the Supreme Court’s arc of judicial colorblindness increasingly makes it more difficult for social activists to achieve the promises of the Civil Rights movement. The rhetorical ‘truths’ of colorblindness have been adopted by Whites to beat back any and all attempts to enact racially responsive public policies. Furthermore, Solorzano and Yosso (2002) are correct in highlighting the danger of minority voices adopting majoritarian narratives. As of this study, two more federal complaints have been filed against holistic admissions that utilize race as a component of college considerations. Brought by the Project for Fair Representation,

the same group behind the *Fisher* case, the new “equal protection” complaints allege race positive holistic admissions discriminate against Asian Americans. To establish a class of alleged ‘victims’, the foundation has set up an advocacy group encouraging Asian American students to voice their displeasure against race positive holistic admissions. No doubt, the foundation will find its fair share of Asian American students who will be sympathetic with Abigail Fisher’s anxiety believing that they too were rejected because of their race. A counter anti-majoritarian narrative is needed to tackle the juggernaut of colorblindness. Colorblind narratives of alleged reverse-racism are built upon a smoke and mirrors regime of mystification and lies. For instance, Asian Americans are now being recruited as white allies against affirmative action. However, little attention is given to the discriminatory history Asian Americans faced in other areas of American civic participation, thereby making education being one of the only avenues of success. Therefore, a CRT inspired methodology of counter narrative story telling will go about filling in the discursive histories purposely forgotten by colorblind stories.

## Chapter 4: *Brown* Revisited - Trouble From the Start

### INTRODUCTION

*Brown v. Board of Education* (1954) is a significant historical moment in the formation of our current colorblind era. Along with the passage of the Civil Rights legislation, *Brown* sparked the modern Civil Rights movement. Although the case continues to be revered as one of the most important Supreme Court decisions in American legal history, there is an incongruent relationship between our reverence and memory over it. That is, the less that is actually known about *Brown*, the more famous and hallowed it is received. 2014 marked the 60<sup>th</sup> Anniversary of *Brown*. To mark the anniversary, groups and institutions such as The White House, national newspapers, and Universities commemorated *Brown* by celebrating the decision while throwing caution to the wind regarding the continuing difficulties that public education faced on the issue of segregation. The fact that *Brown* is so celebrated juxtaposed with the somber tone of its 60<sup>th</sup> anniversary celebration is a quintessential feature of Civil Rights ‘accomplishments’ in the colorblind era. In other words, *Brown* showed promise but its delivery was sorely lacking. Sixty years after *Brown*, the quest for equality and desegregation in education remain elusive. We often come to this conclusion by looking at the current state of segregation in education (see Orfield & Frankenberg, 2014). In reality, the writing was already on the wall sixty years ago. We need only to remember the opinion and the aftermath of *Brown I* & *Brown II* to see that what has transpired over the last sixty years was compatible with the resulting outcome.

In this chapter, the politics of the *Brown* decision is revisited. In the first section, Chief Justice Warren’s opinion is dissected to lay bare the necessary maneuvers and compromises required to secure a unanimous decision. Warren understood the severity of the constitutional issue of enforced segregation and believed a united Court was necessary to end segregation in education. As a result of Warren’s astute recognition of the seriousness of racial segregation, the Chief Justice’s politicking to secure a unanimous decision also watered down the severity of racial segregation as a form of structural racism. In the second section, the opinion’s pivot from emphasizing structural harm in favor of individual harm as a consequence of segregation is analyzed. In the spirit of not inflaming the South and to avoid further social cleavages, the decision’s focus on individual harm lets Whites off the hook as the perpetrators or agents of enforced segregation. The third section surveys the varied responses to *Brown I* & *Brown II*. The difficulty Blacks experienced trying to attend white schools during this period was a direct result of the politics, appeasement, and compromising nature of Warren’s opinions. Finally, I argue that despite the shortcomings of *Brown* over the last 60 years, its legacy is ever more important for combating contemporary colorblindness. *Brown*’s continuing importance is marked by a need to remember accurately its language, appeasement, compromise, and at times violent struggle.

### THE POLITICS OF *BROWN*

*Brown* has been discussed extensively as a canonical case (see Ogletree, 2004; Patterson, 2001; Bell, 2004). Its most significant legal achievement is ending *Plessy*’s ‘separate but equal’ constitutional doctrine in the field of public education. Additionally, in the words of Bell (2004), the case has achieved a sort of Holy Grail status in the popular imagination as a shining example of the goodness of American democracy and equality. In this way, its commemoration

as a significant historical event has been embroiled in political controversy precisely because its stature in historical memory represents a significant achievement in American society. I do not quarrel with the fact that it was a landmark decision; this fact seems plain enough. However, in all of this celebration, specifics have been lost concerning the political climate and maneuvers that Chief Justice Earl Warren had to enact for the decision to come to fruition. This establishes the peculiar status of *Brown* being celebrated and remembered today for something that it did not really do (meaningfully desegregate school) and revered as a seminal racial moment even though it racially accomplished so little (pp. 1-2). Because of this, the specific politics of *Brown* is important and should not be forgotten. Here, an important distinction should be made. Much has been discussed and written about the politics of *Brown* after the decision. However, in referring to the politics of *Brown*, I am invoking processes of contestation and appeasement that Warren navigated in order to reach *Brown's* unanimous decision. Less attention has been paid to this aspect in the literature (see Sarat, 1997; Patterson, 2001).

In this discussion, 'the politics of *Brown*' is centrally about the political climate that NAACP lawyer Thurgood Marshall, Chief Justice Earl Warren, and the other 8 Justices on the Court considered, participated in, and were a part of hearing and deciding the case. Furthermore, the text of *Brown* and what it signifies represent an incredibly rich source of historical significance emblematic of the difficult racial climate the Court and the country face. Collectively, 'the politics of *Brown*' is an exercise in identifying the contemporary political climate of *Brown* as a racial moment in history that is focused principally on 1954 and before. In this analysis, the Court, its Justices, the lawyers and activist involved are part of a political polity constructing a conversation on race as it relates to segregation in public education. In this way, *Brown* can be brought down from its perch as a hallowed civil rights case so that it can be studied and analyzed not as a significant historical moment, but whether or not *Brown* deserves its historical significance.

What's in a name: *Brown* or *Briggs*?

*Brown* was a consolidation of four related desegregation cases from around the country and one from the District of Columbia (*Bolling v. Sharpe*, 1954). Because *Bolling* originated from D.C., it was subject to a Fifth Amendment "due process" claim as opposed to an "equal protection" claim, which applies only to states. Nevertheless, the Court consolidated *Bolling* with the other four cases because it similarly hinged on the constitutionality of segregation in public education. As should be obvious, *Brown's* namesake, *Brown v. Board of Education of Topeka Kansas*, hailed from Kansas. The other state cases, including *Brown*, were:

1. *Briggs v. Elliot* (1952): Summerton, South Carolina
2. *Brown v. Board of Education* (1954): Topeka, Kansas
3. *Davis v. County School Board of Prince Edward County* (1952): Prince Edward County, Virginia
4. *Gebhart v. Belton* (1952): Claymont, Delaware

The Supreme Court is an institution steeped in history and tradition. If a case like *Plessy v. Ferguson* (1896) represents the conflict of one person against one government official or representative of a government body, then the case is simply called *Plessy v. Ferguson*. However, when consolidated cases present a multitude of appellants, petitioners, and government

actors, the court has an established procedure that it follows in terms of naming and publishing for public records. For consolidated cases, the Court refers to the entire consolidated action via the case that comes first alphabetically<sup>1</sup>. The four-state consolidated cases above is listed alphabetically. Therefore, the canonical case that we have come to know as *Brown v. Board of Education* should instead have been called *Briggs v. Elliot* from Summerton, South Carolina. But as Ian Haney López (2013) has argued, the fact that we now refer to these consolidated cases as *Brown* rather than *Briggs* is not due simply to an innocent procedural mistake, but a purposeful maneuver by Chief Justice Earl Warren to appease southern justices on the bench and to avoid making the case about southern racism. That is, if case-naming tradition was followed, the verdict would have been called *Briggs v. Elliot* and would locate the Court's unanimous ruling right in the heart of the south: Summerton, South Carolina. Haney López argues it was at Earl Warren's doing that the consolidated cases were referred to as *Brown* instead of *Briggs* because Warren did not want the case to be an indictment of Southern racism that would further inflame the South's hostility. Only Earl Warren knows his true intentions for this slight-change, but this procedural maneuver was one of a number of important concessions.

Compelling as the suggestion from Haney López is, it is still an unverified claim that speaks to the motivation of Warren to appease Southern Justices and not turn the *Brown* case into an indictment of Southern racism. However, the case's name change was not the only peculiar detail of *Brown* that suggests the Chief Justice, and by extension the entire court, was well aware of the special nature of the case. Delivering the opinion of the Court in *Brown*, Chief Justice Warren was also the opinion's author. Although Warren was able to persuade the other 8 justices on the unconstitutionality of segregation in education, they must also agree with his legal reasoning in order to sign onto a unanimous decision. This is an aspect of the Court's procedure that often gets overlooked. For instance, if a case is handled with justices voting 9-0, the decision may be unanimous in the outcome, but not unanimous in reasoning. In these circumstances, it is not uncommon for 9 justices to agree on the final outcome only then to write their own opinions expressing their own individual (or plural) justifications. In the unanimous *Brown* verdict, there were no concurring opinions. All 9 justices on the Court signed onto Warren's opinion. Therefore, all the justices agreed to both the outcome and the reasoning of the opinion.

### *Outcome over Reason?*

*Brown's* (1954) specific reasons and justifications to end segregation in public education deserve as much focus as its overall outcome. The constitutional question that Thurgood Marshall carefully crafted for the court was:

[D]oes segregation in public education, even with tangible equality in resources and other aspects, violate the equal protection clause of the fourteenth amendment? (p. 493)

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<sup>1</sup> For Instance, in the case that established the requirement of "Miranda Rights" *Miranda v. State of Arizona* (1966), three other cases were consolidated with *Miranda* (*State of California v. Stewart*, *Vignera v. State of New York*, & *Westover v. United States*). The consolidated action was ultimately called *Miranda v. State of Arizona*, and hence the birth of "Miranda Rights", because *Miranda* was first alphabetically.

Procedurally, the Court follows specific steps of established practices in settling constitutional disputes, especially when it deals with aspects related to constitutional amendments. Some of these initial steps are:

1. Text
2. Original Intent
3. Established local practices (Stern, Gressman, Shapiro, et. al., 2002)

Of the five sections in the Fourteenth Amendment, section one has become the most scrutinized and has served as the basis for some of the most famous landmark decisions in the Country's history (e.g. *Plessy*, *Brown*, *Roe v. Wade*, *Bush v. Gore*). In its entirety, section one of the Fourteenth Amendment reads:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

First, to answer the constitutionality of educational segregation, the Court looks at the text of the amendment to see if it provides any guidance. It does not. The text of section one says nothing remotely related to education or segregation. Second, if the text provides no illuminating answers, the Justices will investigate the original intent of the framers of the Fourteenth Amendment. The Justices would ask: did the authors of the Fourteenth Amendment intend for the "equal protection clause" to outlaw segregation in public education? By any stretch of imagination, at the time of the amendment's adoption, education was mostly a local or regional practice. Finally, the Court looks at the established local practices during the time of the amendment's ratification. Although many local municipalities had not embarked on the project to provide comprehensive public education, many families, black and white, sent their kids to local parochial and private schools (Foner, 1988). These schools were located in segregated black and white churches and single building schoolhouses. Particularly in Washington D.C., many of the those who participated in passing the Fourteenth Amendment sent their own kids to White-only schools (Goldstone, 2011). Collectively, all three prescribed steps of initial constitutional procedure (text, intent, and established practices) answered the constitutional question of whether or not educational segregation violated the Fourteenth Amendment's equal protection clause with a clear "no." Collectively, the Fourteenth Amendment said nothing about education or segregation, the authors of the amendment surely did not intend for education to be desegregated when they sent their own kids to White-only schools, and established practices at the time did not have a robust public education system.

Warren had a clear answer from text, intent, and established local practices from the Fourteenth Amendment. If Warren's opinion stayed consistent with the procedural history of the Court, he would have had to uphold *Plessy's* constitutional doctrine of "separate but equal" preserving racially segregated schools. The late Chief Justice William Rhenquist agreed with this position writing in a memo during *Brown* in 1952 as a Supreme Court law clerk.

Rhenquist's memo was written to Justice Jackson, a member of the *Brown* court. Rhenquist stated:

I realize this is an unpopular and unhumanitarian position for which I have been excoriated by 'liberal' colleagues, but I think *Plessy v. Ferguson* was right and should be re-affirmed. (Liptak, 2005)

Chief Justice Warren signaled a shift away from the established traditions and customs of the Court. Warren was deftly strategic in his opinion on the one hand, to acknowledge the historical procedure of the court, while on the other hand, not allowing the substance of his decision to be completely bound by its procedure. That is, the Chief Justice did not step out and directly say his opinion deviated from hundreds of years of established constitutional procedural practice. Nevertheless, he did just that by declaring in the opinion that in looking at the text, intent, and established practices, "these circumstances provided were at best inconclusive" (*Brown*, p. 489). Here is where Warren's veering from the Court's tradition is obvious. The text, intent, and established practices of and around the Fourteenth Amendment were clear and conclusive that the equal protection clause was neither written nor intended to apply to segregation in public education.

Chief Justice Warren knew that discarding more than a century's tradition of constitutional jurisprudence in order to avoid the unsavory result of upholding separate but equal would dramatically affect the legitimacy and standing of the Court (Patterson, 2001). Therefore he had to acknowledge the Court's traditions in style but neglect it in substance. Compared to Supreme Court decisions today (e.g., *Parents Involved* was 45 pages, not including dissents), the length of *Brown* is relatively short with only 13 pages. Warren spent nearly the first 8 pages discussing the text, intent, and established practice history of the equal protection clause of the Fourteenth Amendment. Doing so signified that the Court continued to engage in the same constitutional process it had in previous cases. Despite paying careful attention to its traditional process, Warren nevertheless neglected it in order to avoid the obvious conclusion that the Fourteenth Amendment did not address segregation in education. These steps allowed Warren's court to move away from the traditional textual originalism of constitutional jurisprudence that would have all but spelled doom for Marshall and the NAACP. As an alternative, the court utilized what is now commonly called a 'living document' approach in its interpretation. In other words, the Court utilized the spirit of equal protection from the adoption of the Fourteenth, but applied it to a contemporary problem (i.e., segregation in education) that did not exist in kind when equal protection was incepted. Today, the ideological cleavages between liberal and conservative justices rest on whether justices take a living document or originalist approach to constitutional jurisprudence. But as the *Brown* case shows, one of, if not the most, celebrated case in Supreme Court history was not decided on the doctrine of originalism. Rather, *Brown* required the Warren Court to adopt a living document approach precisely because originalism would demand the upholding of *Plessy's* "separate but equal" constitutional doctrine.

## STRUCTURAL VERSUS INDIVIDUAL HARM

By liberating equal protection from the strict constraints of originalism, the Court was able to apply the spirit of equal protection to public education. Although equal protection was originally about citizenship rights for former slaves and their children, freeing equal protection

from these original parameters allowed the Fourteenth Amendment to reach across multiple social and civil institutions. With more than half of *Brown*'s decision dedicated to addressing procedural matters, the Court carefully positioned itself in order to utilize equal protection in order to overturn *Plessy*. Warren presented the question clearly:

[D]oes segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does... Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system. (*Brown*, pp. 493-494)

These famous lines from *Brown* continue to be referenced by academic research and the Court some 60 years after the decision. In specifically studying these famous words, one aspect becomes increasingly clear. The decision focused the harm of segregation on *individual* minority children.

### *The Absence of Structural Harm*

Specific lines such as "the children of the minority group" or "affects the motivation of a child to learn," focus the affects of segregation entirely on individual children of color. Although the court did acknowledge that "separating the races is usually interpreted as denoting the inferiority of the negro group", a reference to group harm, its focus on harm was almost exclusively on individual harm, with the famous inclusion of the Kenneth Clark doll study (Clark, Chein, & Cook, 1954). Even if individual harm of segregation is important as represented by the Clark doll study, the Court did not need to advance this argument. The Court's understanding that "separating the races is usually interpreted as denoting the inferiority of the Negro group" is more than enough justification to overturn *Plessy*'s separate but equal mandate. This approach would have captured the essence of equal protection. Recalling that the Fourteenth Amendment was originally about protecting the citizenship status of slaves and their children (i.e., a group), expressing the position that segregation thus denotes inferiority of the "negro group" would likewise confirm the importance of group harm that the Fourteenth Amendment originally sought to protect. However, the Court's opinion neglected the conversation of group harm and instead focused on individual harm.

Although I am highlighting the critical focus of the Court's emphasis on individual harm, I am not suggesting that these individual harms do not represent real harms. In fact, they may be understated. The Court even went so far as to pose the hypothetical of equal physical facilities and other 'tangible' factors" to illustrate individual psychological harm. But surely the Court knew that these facilities were neither physically nor tangibly equal, therefore the individual harm for segregated children of color were in fact much more than the Court's rhetoric cared to explicate. However, a shift in focus occurs when the Court highlights individual over group



harm. By focusing on the individual, it is easy to sympathize with a specific person. When the Court underscores the psychological harm (e.g., Clark Doll test) suffered by an individual, segregation is understood as idiosyncratic. By failing to understand the harm of segregation as suffered by an entire group, the Court fails to understand racism in general, and segregation specifically, as a structural force that affects an entire group, not just individuals. We need to look no further than the specific text the court utilized to overturn “separate but equal”:

We conclude that, in the field of public education, the doctrine of "separate but equal" has no place. (*Brown*, p. 495)

A common misconception of *Brown* is that it ended “separate but equal” in all social and civic institutions. This is simply not true. The Court was careful to minimize the ruling as limited only to “the field of public education”. As a result, not all forms of separation based on race were outlawed. For instance, anti-miscegenation laws were still legal an additional thirteen years after *Brown* (see *Loving v. Virginia*, 1967).

By focusing the harm of educational segregation on individuals, the Court absolves itself from having to discuss the ramifications of group harm. That is, if one group or race is subordinated and harmed, would the Court not have to identify the group that is inflicting the harm? Warren avoids this predicament. He ends educational segregation without indicting any groups for said harm. The Court indicates that children of color suffer irreparable harm and “segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children.” (*Brown*, p. 494) However, no text can be found that speaks to how White-only schools build positive development of white children. Finally, if segregation generates feelings of inferiority of the ‘Negro group’, does it likewise generate feelings of superiority for White groups? Obvious in the opinion’s text, the Court avoids answering all these questions altogether because its language only focuses on children of color, with a specific emphasis on individual harm so that Whites are absolved of any critical focus as the perpetrators *and* benefactors of racial segregation.

### *The Short, Sweet, and Great Submission*

Thurgood Marshall requested that if the Court ruled in favor of the NAACP against segregation, the Court should order for the immediate desegregation of all public schools. Perhaps this was the most straightforward form of relief for a ruling that clearly stated “separate but equal has no place in public education”. However, after the Court’s famous words overturning *Plessy*, it ruled that due to the varied nature of local conditions affected by the ruling, it would grant local municipalities involved in the case one year to study their options and report back with information as to the most appropriate approaches to achieve desegregation (pp. 495-496). Perhaps knowing the ominous path of the Court, Marshall chastised jubilant colleagues at the NAACP office knowing that although the Court had favorably ruled against educational segregation, its opinion did not signify an immediate end to educational segregation, thus warning his colleagues: the fight had only begun (Bell, 2004).

The Court’s decision not immediately to order public schools to desegregate is a perplexing result in spite of its powerful language highlighting psychological harm. Although it is regrettable that the Court avoided discussing structural and group subordinating aspects of educational segregation, it nevertheless was correct in asserting the individual harm of racial

segregation, underscored by the influential Clark doll experiment. However, in spite of highlighting individual psychological harms, the Court nevertheless accepted allowing these harms at least to continue for another year affecting millions of children of color. Furthermore, the Court asked those who had rejected desegregation to fashion approaches toward integration. That is, local municipalities named in the consolidated case by the NAACP had vehemently appealed that segregation did not violate equal protection based on constitutional arguments of originalism (i.e. text, intent, established practices). The Court entrusted these same segregationists to inform the Court of the difficulties, challenges, and logistical circumstances that, in their opinion, could make for a complicated process of desegregation under local control. In effect, the Court gave segregationists one year to come up with a plan effectively to slow the process of desegregation as much as possible, or at the very least, present their circumstances as complicated and difficult so that each individual school district could handle its own process of desegregation.

If there were a glimmer of hope despite the great submission by the Court not immediately to desegregate public schools, *Brown II* (1955) essentially eliminated all hope that public schools would systematically be desegregated. *Brown I* established these important facts: racial segregation was unconstitutional, segregation inflicts individual psychological harm, and segregation with the stamp of the law generates feelings of inferiority. The chief focus on *Brown II* was to determine the means necessary to implement the principles announced in *Brown I*. In a similar 9-0 unanimous vote detailing the task of desegregation, the Court answered the two essential enforcement issue of either fast or slow and federal or local with a nod to local courts and school authorities over federal courts and government. The NAACP argued for the immediate desegregation of schools monitored by the federal government with the enforcement by federal courts. The NAACP did not get its way. The Court unanimously believed that given the diverse nature of racial discrimination in public schools and the diversity through which segregation was practiced across the country, a one size fits all desegregation mandate would not work. As a result, although the Court found that segregation violated the constitution, its *Brown II* opinion understood the constitutional violation as a multifaceted problem that required a variety of local, not federal, solutions. Therefore, the Court conferred desegregation responsibilities and enforcement mechanisms on local school authorities and the lower courts. The ironies were obvious if we keep in mind that Whites controlled local governance.

The specific language of desegregation mandated of local school authorities and lower courts were anything but specific. The overall sense of *Brown II* was:

1. Follow the constitutional principles announced in *Brown I*
2. Local School officials and Courts are *urged* (emphasis mine) to act on the constitutional principles in a prompt manner and move toward full compliance with principles in ‘all deliberate speed’.

Much has been written about the Court’s ambiguous language (Bell, 2004; Ogletree, 2004), but they nevertheless require brief discussion here. The language of ‘All deliberate speed’ and requirement that local authorities move in a ‘prompt manner’ definitely sound as if the process of desegregation should be swift. But the Court provided no enforcement mechanisms or metric to determine what would be satisfactory. The Court did not err in noting the varied nature of discrimination and desegregation practiced by local authorities throughout the country. But in prescribing an ambiguous desegregation mandate, the Court furthered, not impeded, the varied

nature of racial discrimination by allowing desegregationists to find refuge in its ambiguous language.

The result of *Brown II* was absolutely tragic. If prolonging all the harms the Court had compellingly identified in *Brown I* was not enough, *Brown II* perpetuated racial harms indefinitely, as many local school districts interpreted *Brown II*'s ambiguity as legal justification to resist, delay, avoid, and in some cases, altogether reject integration years after 1955. Intended or unintended, the fact remains: in appeasing local school authorities by not issuing an immediate desegregation mandate, the Court built the legal foundations where substantive change to inequality and segregation would be left up to local choice. That is, cities or counties would only see desegregated schools when local officials wanted integration. In some Southern states, segregation continued for years following *Brown II*. In one instance, Prince Edward County in Virginia closed its schools for five years from 1959-1964 to avoid desegregating them.

### *BROWN'S REACTION*

The only possible way for the Court to integrate schools in a meaningful and uniform fashion was to order the immediate desegregation of schools. The Court could have achieved these goals by requiring the immediate desegregation of schools monitored by federal courts. In the circumstances of local school authorities, federal enforcement arms such as the National Guard (who were eventually used in Mississippi) could serve as the monitoring force for the Court's mandate. Instead, the Court fostered an environment of indifference, disdain, and lukewarm attitudes toward the process of desegregation. Although *Brown I*'s proclamation is powerful and memorable, it lacked any authority in terms of enforcement and oversight toward a desegregated public school system. Perhaps controversially, Bell (2004) is accurate with his observation that *Brown* is now nothing more than a hollow victory. Despite the fact that its reference and memory conjure great pride, the case should be judged for what it accomplished, not only for its promise. UCLA's Civil Rights Project/Proyecto Derechos Civiles (Orfield & Frankenberg, 2014) commemorated the 60<sup>th</sup> anniversary of *Brown* by issuing a comprehensive report on the current state of segregation in American schools. The report summarized that despite promising progress in the 70's and 80's, the last twenty years have seen a reversal of desegregation and American public schools are now re-segregating.

Showing data collected nation-wide, the racial numbers are unmistakable in underscoring the pervasiveness of segregation. However, we do not need racial data today to know that *Brown* did little to end educational segregation. The issue is not whether we *still* face educational segregation today, but whether segregation ever went away since *Brown*. It is rather a question of what kind or degree of segregation schools suffer today. The issue is steeped in a historical and contextual understanding of *Brown I & II* from a perspective of substantive achievement, not simplistically remembered as a canonical case. We only need to look at what local school districts accomplished in terms of desegregation immediately after 1955 to witness *Brown*'s failure to tackle segregation.

### *The Good & the Bad*

Topeka, Kansas was the lead name in the consolidated cases. Zelma Henderson, an original plaintiff represented by the NAACP in the Kansas case, recalled in 2004 that Topeka schools desegregated in a peaceful manner with no demonstrations. Answering whether or not

Ms. Henderson remembered any significant social unrest after the *Brown* decision, she recalled “they accepted it...it wasn’t too long until they integrated the teachers and principals” (Adamson, 2003). However, the reception of *Brown*’s desegregation mandate was not as smooth in other areas of the country, particularly the South. In Arkansas two years after *Brown II*, Governor Orval Faubus ordered his state’s National Guard to block nine African American students (Little Rock Nine) from attending Little Rock Central High School (Kirk, 2007). The plan was to allow only nine Black students to attend Little Rock Central High School. Little Rock’s superintendent initially drafted a plan to integrate Little Rock Schools at a much faster pace across all grade levels, but this initial plan was forsaken in favor of the State Attorney General’s more modest proposal. The new plan called for the integration of only *one* school, Little Rock Central High. Additionally, no other school would integrate until 1960 when a few junior high or middle schools would similarly admit a limited number of Black students. Finally, the last phase of the desegregation plan would involve integration of a few elementary schools at an unspecified time.

In response to the State Attorney General’s plan to allow the Little Rock Nine to attend Little Rock Central, Governor Faubus summoned his state’s national guard to block the nine Black students from entering Little Rock Central High. In scenes that captivated and divided the nation, National Guard members physically lined up in front of the schoolhouse doors preventing the Black students from entering (Jacoway, 2007). In addition to National Guardsmen physically blocking school doors, segregationist groups and protestors verbally abused, assaulted, and spat on the students. Together, the combination of National Guardsmen coupled with the mob mentality of Arkansas segregationists constructed a picture in contrast to *Brown*’s racial triumphalism two years prior. The situation was so egregious that President Eisenhower deployed the 101<sup>st</sup> Airborne Division of the U.S. Army to protect the students. In addition, Eisenhower federalized the entire ten thousand-strong member of the Arkansas National Guard, rendering Governor Faubus powerless against Little Rock Central High’ effort to integrate nine Black students (Smith, 2012).

The examples of governors and schools resisting *Brown*’s constitutional mandate are numerous and far reaching. In Texas, attorney General John Ben Sheppard created a campaign to establish as many legal obstacles as possible for desegregation implementations to fail (Ross, 1990). In Mississippi at the collegiate level, the most famous example is James Meredith’s attempt to attend the University of Mississippi (Ole Miss). Despite being a highly qualified student, Meredith was denied admissions to Ole Miss two consecutive years before petitioning to the Supreme Court on the grounds that he was being denied admissions solely because he was Black (Meredith, 1966). The Court agreed and ordered that he be admitted (*U.S. v. Barnett*, 1964). Reacting to the Court’s verdict, Governor Ross Barnett maneuvered to have the state legislature pass a law that was facially race neutral, but directed principally at Meredith. The newly passed law prohibited any person convicted of a state crime from admission to a state school. The law was intended to keep Meredith out of Ole Miss because he was convicted of falsifying his voter registration in an attempt to circumvent the state’s racist voter registration rules that disenfranchised Black voters. Similar to President Eisenhower’s move to bring in the Army to protect nine Black students in Little Rock Arkansas, U.S. Attorney General Robert F. Kennedy called in 500 U.S. Marshalls flanked by the Army Engineer Combat Battalion from Kentucky to ensure Meredith’s safety. In scenes reminiscent of an active military war zone, tents, kitchens, and military vehicles were set up on the Ole Miss campus.

## *The Ugly*

Although these examples show the extreme nature of resistance from segregationists to keep their schools White-only, none was as extreme and aggressive as the Virginia Prince Edward County School closures from 1959-1964. Following *Brown*, the Byrd Organization led by U.S. Senator Harry F. Byrd, organized a ‘Massive Resistance’ plan systematically to avoid compliance with the Court’s desegregation mandate with the help from a network of local politicians, courts, and state lawmakers. Many legal strategies were deployed in order to avoid desegregation under a general course of action known as the Stanley Plan (Ely, 1976). One strategy in particular established a “tuition grant” for students to attend private schools, thus establishing *de facto* private pro-segregation academies. Because *Brown* only applied to public schools, many southern cities began establishing private schools for Whites in order to avoid integration. As a consequence, what were once black and white schools in the public sector became a racial divide through Whites’ strategic use of the private sector. Although White flight to the private academies prevented integrated public schools, the possibility remained that, at the very least, Black students in Edward County could attend better schools left empty by their white colleagues. This was not so. After draining its funding coffers by offering tuition grants to white students to attend private schools, the county refused to appropriate any monies to run its public schools, effectively closing all public schools in Prince Edward County. From 1959, the closures lasted five years. During this time, white students exclusively attended private schools established by the “Prince Edward Foundation”, funded and underwritten by public monies.

During this period of public school closures, white students continued their education in *de facto* segregated schools while black students were systematically neglected. Many black students went outside their districts to attend schools with relatives and family, some attended schools set up in basements and offices of local churches, while others were unable to attend school altogether for parts or the entire period of public school closures. Only during May of 1964, a full ten years after *Brown I*, did the Supreme Court unanimously order public schools to open in Prince Edward county, an immediate ruling that had escaped the Court in *Brown (Griffin v. County school board of Prince Edward County)*. Due to the specific and unequivocal nature of the Court’s ruling, state supervisors and local school officials complied by opening its public schools rather than risk prosecution and possible imprisonment. However, the damage was already done. The Court in *Brown* relied on the Clark experiment to highlight individual psychological harm due to educational segregation, but what type of harm results from not having *any* school for 1-5 years? Some have called black students victimized by Virginia’s massive resistance as the “Lost Generation” due to the lack of adequate education for five years (Stiff-Williams & Sturtz, 2012). School closures in Prince Edward County serve as a reminder that resistance to *Brown* was in some instances much more severe and drastic than its harms pre-desegregation.

## DISCUSSION

It is no wonder that Derrick Bell and other prominent civil rights activist have a lukewarm and disappointing memory of *Brown*. We are now 60 years removed from the decision and increasingly its historical reference in civil society is severed from the actual text and resulting political push back from segregationists who mobilized to keep their schools segregated. In a moment when education continues to struggle with racial segregation (Orfield

& Frankenberg, 2014), a significant historical moment such as *Brown* must be understood accurately for it to provide any power to improve our current educational problems. There are at least two practical reasons for this. First, the currently constituted conservative Court perpetually cites *Brown* as a legal precedent in striking down nearly all race positive educational policies from grade school (*Parents Involved*), undergraduate education (*Gratz & Fisher*), and graduate school (*Bakke*). Secondly, more and more, *Brown* is revered in civil society and public discourse as a landmark decision, celebrated for what it apparently ended, but never remembered for what it failed to do (Bell, 2004).

First, although the conservative Court is correct in referencing *Brown* as an important legal precedent, it does so without discussing or considering its nature of white appeasement as an opinion that produced troubling results. For instance, Justice Clarence Thomas routinely cites *Brown* while adding his own statement accompanying his citation. Justice Thomas has routinely stated, often signed on by other conservative Justices, that:

Indeed, *Brown I* itself did not need to rely upon any psychological or social-science research in order to announce the simple, yet fundamental truth that the Government cannot discriminate among its citizens on the basis of race. . . . Segregation was not unconstitutional because it might have caused psychological feelings of inferiority. Public school systems that separated blacks and provided them with superior educational resources making blacks "feel" superior to whites sent to lesser schools—would violate the Fourteenth Amendment, whether or not the white students felt stigmatized, just as do school systems in which the positions of the races are reversed. Psychological injury or benefit is irrelevant . . . (Missouri v Jenkins, 1995)

According to Justice Thomas, all *Brown* needed to say was that governmental discrimination based on classification is inherently unconstitutional, regardless of any apparent psychological harm. But Justice Thomas commits a fatal revisionist error. Although it would have been significant if *Brown* were decided in accordance with Justice Thomas' rejection of straight-forward racial classifications, the fact of the matter is that it was not. *Brown* was not written with a clear directive that any racial classification amounts to discrimination. Warren's opinion only applied to the field of public education, leaving miscegenation laws and other forms of subordination legal for years after *Brown*. Additionally, the decision itself was incredibly ambiguous as a purposeful appeasement in order to secure a unanimous decision. This ambiguity led to an incredible amount of political and social upheaval that in some instances presented a worse educational reality for Blacks.

When Justice Thomas states that *Brown* did not need to rely on psychological evidence, it signals his inability (purposeful?) to grasp the simple yet undeniable truth that race is not just simple classification, but a form of subordination and oppression based on classification. Today, *Brown* is held aloft severed from its contextual and political history. It is remembered with little historical accuracy either as a legal struggle, compromise, and appeasement or as the beginning of a contentious period in American racial history *after* its decision. When the conservative court references the binding precedent of *Brown*, it does so by writing whatever history and meaning it wants to project onto the case. This is what Justice Thomas accomplishes by neglecting the substantive history of *Brown* by grafting his own anti-classification belief onto its doctrine. This revisionist history has little to do with *Brown* but instead reflects what colorblind conservatives want *Brown* to represent today.

This leads us to the second troubling aspect if *Brown* is not remembered accurately. *Brown's* Holy Grail status is based off a colorblind revisionist fiction while its failure to meaningfully desegregate schools is forgotten. This is troubling in that colorblindness is bolstered by a pivotal moment in American history with limited results. Thus, any critique of colorblindness is seen as an attack on a watershed historical moment that is unfathomably questioned. This is the genius of colorblindness hijacking and rewriting the history of *Brown*. It enjoys the historical capital of *Brown's* legacy while not having to politically own up to it. Rather than challenge the historical revisionist of colorblindness in regards to *Brown*, the colorblind era sees *Brown* as a singular moment ushering in a meritocratic blank slate do-over that absolves our historical racial sins. Troubling facts such as segregation academies, closed schools, National Guard blockades, and a Governor's declaration of "segregation today, segregation tomorrow, segregation forever" (Wallace, 1963) are lost products of a cruel racist past, retold by a colorblind revisionist history. The possible response is not to give up on *Brown*. As the colorblind Court continues to cite *Brown* according to its revisionist memory, accurately reclaiming *Brown* both legally and historically presents an opportunity to begin the process to undo the damage of colorblindness. If we remember *Brown* as a constitutional doctrine and historical legacy accurately, colorblindness reveals itself not as a solution, but as a symptom of racism.

## INTRODUCTION

In the context of local school authorities, districts, Courts, and governments pushing back against *Brown's* mandate, there were also examples of social and political movements that continued the Civil Rights struggle for integration and equality. From small to large movements, social activists participated in teach-ins, protests marches, political campaigns, and other activities in order to advance the integration goals of *Brown*. For example, after the Supreme Court ordered Prince Edward County to immediately reopen its public schools following a five-year closure, a group of students from Queens College in New York organized the "Student Help Project" designed to teach, tutor, and prepare Black students for the start of the school year (Konzal, 2015). Perhaps the largest and most significant social and political movement immediately after *Brown* was the Civil Rights Movement that culminated in passage of the historic Civil Rights Act of 1964. The Civil Rights Act was a landmark piece of legislation that outlawed discrimination based on race, color, sex, religion, or national origin (see Whalen & Whalen, 1985, for an extensive discussion on the legislative debate of the Civil Rights Act). In terms of voting rights, the Civil Rights Act ended the unequal application of voter registration requirements that were historically used to disenfranchise Blacks after the reconstruction amendments. In addition, the Act ended racial segregation not only in schools, but also in the workplace and places of 'public accommodation' that served the general public. Beyond the social and political movements that either worked to stunt or advance the integrative promise of *Brown* and the Civil Rights Act, the Supreme Court continued to play a critical role.

The Court's participation in adjudicating racial disputes was not limited to the field of education. Beyond *Brown*, the court has since adjudicated racial practices in areas of marriage (*Loving v. Virginia*, 1967), voting and political representation (*United Jewish Organization*, 1977), criminal sentencing (*McCleskey*, 1987) and issues of employment discrimination from hiring (*Griggs v. Duke Power Co.*, 1971; & *Washington v. Davis*, 1976) to the awarding of employment contracts (*Adarand*, 1995; & *Richmond v. Croson*, 1989). Through these disputes, the Court was never consistent as to whether or not it favored or rejected racial considerations. In some instances, the Court allowed social and political policies to use race toward the goals of integration and inclusion. In contrast, the Court also struck down integrative attempts it deemed "discriminatory" while also refusing to use its authority to stop policies that produced disparate impacts on minority racial groups. That said, the Court's vacillation was not equal. More often than not, the Court struck down affirmative action policies in favor of protecting the racial status quo.

The decade long resistance to *Brown* effectively stripped the decision of any enforcement authority to secure widespread integration in public education. The Civil Rights Act similarly faced intense opposition. *Brown's* language was notoriously vague and allowed the opposition an arsenal of maneuvers to maintain segregation in education. The Civil Rights Act was clear in the prohibition of discrimination. However, the landmark legislation also ushered in an ironic form of resistance: the emergence of "race-neutral" policies and practices. Regardless of the appearance of its race-neutrality, these new policies and practices continued to subordinate racial minorities. As a result, the Court was asked to confront a new form of racial subordination.

## RESISTANCE: FIRST *BROWN*, NOW THE CIVIL RIGHTS ACT



School districts immediately began to resist the constitutional mandate of integration ordered by *Brown*. However, discrimination in employment, voting, and other civil areas continued until the passage of the Civil Rights legislation. Nevertheless, although opposition to the Civil Rights legislation came some ten years after white uprisings in schools, the motivations from education and employment officials were the same: to prevent integration and maintain the existence of white dominated institutions. The response from businesses to the Civil Rights legislation was not as overtly racist and discriminatory as the educational response to *Brown* due to the clear anti-discriminatory mandate of the Civil Rights Act. Whereas *Brown* was vague in its educational mandate, which allowed for much ambiguity (read: white avoidance), the Civil Rights Act of 1964 in general, and specifically title VII, was clear in prohibiting discrimination based on race, color, religion, sex, and national origin. In other words, unless places of employment were overtly discriminatory and did not care about violating federal statute and risk imprisonment, any attempt to subvert the Civil Rights Act would be covert in tone and manner compared to Whites' rejection of *Brown's* findings (i.e. school closings, George Wallace's school house speech). Anti Civil Rights maneuvers came in the form of prima facie race-neutral changes in employment and work place policies. Although facially neutral, these maneuvers were enacted with the intent to prevent integration in the work place.

### *A Glimmer of Hope from the Court*

The Court first addressed so-called race-neutral maneuvers in *Griggs v. Duke Power Co* (1971). The Duke Power Company in North Carolina practiced workplace discrimination and segregation since the early 1950's. Duke power only allowed black workers to work in its labor department where employees were paid the lowest in the entire company. Only white workers were promoted above labor-intensive positions into management. In 1955, Duke required a high school diploma for its higher paid positions. In response to the Civil Rights Act forbidding racial discrimination in the workplace, Duke dropped its racially discriminatory practice but maintained its high school diploma requirement while adding an IQ test for higher paid management positions. Because black workers were less likely to hold a high school diploma and scored on average lower on the IQ test, Whites continued to receive promotions and dominate high paying positions. These "race-neutral" employment policies represented a novel problem for the Court within the post-*Brown* Civil Rights era. Created from apparently race-neutral requirements and policies, Blacks were harmed at a significantly higher percentage than their white counterparts. This phenomenon became known as adverse/disparate impact, or disproportionate harm litigation (Eisenberg, 1977).

Although the policy was colorblind and contained no clear racial distinction or classification, the *Griggs* Court unanimously ruled that such requirements were in fact racially motivated. The Court ruled that the high school diploma and IQ test requirement were utilized as a barrier further to restrict black workers from attaining higher paying positions. Because the requirement of a high school diploma and IQ test disproportionately harmed Blacks compared to their white counterparts, the Court ruled that under title VII of the Civil Rights Act, if employers utilized requirements that disproportionately harmed a class of workers (e.g., sex, race, religion), the employer must show that the requirements (e.g., IQ test) are 'reasonably related' to the employment. In the opinion of the unanimous Court, the Duke power plant did not sufficiently demonstrate the necessity for their high school requirement and IQ had little to do with job performance. In fact, clear evidence persuaded the Court that white workers with no high school

diploma and who did not take the IQ test performed satisfactory work and made progress in departments that had now instituted the new requirements. The ruling was a significant decision because the Court was not persuaded by supposed race-neutral employment requirements. The Court did not take at face value Duke's argument that it had no intention to discriminate against its black workers through its race-neutral requirements. The judgment did not focus on discriminatory *intent*, but on disproportionate *harm*. In a powerful recognition, the Court ruled disproportionate harm resulted because Blacks in the company had systematically received inferior education in segregated schools (*Griggs*). The opinion cited a previous position where it prohibited the institution of a literacy test for voter registration because of the history of Blacks receiving an inferior education due to segregation (p. 430). Therefore, *Griggs* established that the imposition of tests and requirements for promotion or employment must show a "legitimate business interest".

The unanimous decision first recognized that facially race-neutral requirements and tests were not inherently legal just because they did not overtly discriminate against a class of people based on race. Secondly, *Griggs* recognized the persistence of racial subordination in society. In other words, so-called race neutral requirements take advantage of the long history of racism in order to inflict disproportionate harm. Finally, the Court did not focus its analysis on the colorblind requirements and tests, but on outcomes that are the direct result of "mechanisms that operate as built in headwinds" (p. 432). In a memorable reflection of its position on the issue, the Court famously proscribed that "congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox" (p. 431). However, although the ruling was a sweeping win against attempts to subvert integration and the promise of the Civil Rights Act, the case was decided as a statutory decision utilizing the Civil Rights Act. Therefore, the same ruling could not be applied to the constitution, as disproportionate harm under equal protection of the Fourteenth Amendment still had to be settled.

### *The Court Backtracks*

The statutory rule adopted in *Griggs* demanded companies show a legitimate business interest in instituting any mechanisms of hiring or employment promotion if these mechanisms caused disproportionate harm to a targeted class. However, since the case was decided under the Civil Rights Act, it was a statutory opinion that meant the Court's holding does not automatically apply to constitutional equal protection claims. In *Washington v. Davis* (1976), the Court would establish the constitutional rule when it comes to disproportionate harm. *Davis* marked the point when the Fourteenth Amendment's equal protection clause began to constrict against minorities and provided employers with a more favorable constitutional alternative to *Griggs*'s Civil Rights statutory standard (Strauss, 1989).

In *Davis*, employment applications to the D.C. police department from two African Americans were rejected due to their performance on a verbal skills exam (test 21). African Americans failed test 21 at a ratio of 4-1 in comparison to white applicants. Encouraged by *Griggs*, the black applicants alleged test 21 violated both the Civil Rights Act and the Fourteenth Amendment's equal protection clause. The case appeared easily resolved through an application of the statutory disproportionate harm tests established under *Griggs*. If *Griggs* were applied, the Court would ask whether or not the hiring mechanism (i.e., the civil service literacy test) constitutes a necessary business interest in relation to the employment. However, in *Davis* the

Court augmented and clarified its position in *Griggs*, rather than simply affirming and applying its statutory rule. The Court stated the statutory rule established in *Griggs* did not automatically translate in creating a constitutional rule, and the Court refused to establish such a rule for *Davis* (pp. 238-239). We must recall that in *Griggs*, Duke Power's supposed colorblind intent requiring a high school diploma and IQ test was not the focus. Instead, the Court emphasized the racially disparate impact of Duke's hiring mechanisms and asked whether or not they constituted a necessary business interest. In *Davis*, the Court shifted from disparate impact and instead focused on intent. The shift from results to intent would make it much more difficult for minorities to "prove" racial discrimination before the Court.

The Court ruled the D.C. Police Department's civil service literacy test was not instituted with a discriminatory purpose. The shift to intent was born out of thin air because in *Griggs*, the Court did not give much attention to intent. Rather, the court recognized that even though Duke's requirements were apparently race neutral, the disparate impact was due to institutional manifestations of racism such as poor education and segregated schooling. As a result, the Court in *Griggs* demanded that Duke show a specific relationship between the employment mechanism and a business necessity. In a drastic departure from its statutory rule established only five years earlier, the Court elevated the importance of intent while diminishing the relevancy of disproportionate harm. *Davis* ruled, "disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the constitution" (p. 242). This is a perplexing straw-man argument. In *Griggs*, disproportionate harm was not the sole touchstone criterion that invalidated Duke's hiring policy. Duke's hiring mechanisms were invalidated because the IQ test and high school diploma requirements showed no specific business necessity to the company other than to serve as a built-in headwind against African American applicants. Therefore, the *Davis* court sets up a false binary that did not exist in *Griggs*. *Griggs* was neither about disproportionate harm nor intent, but rather the middle ground of whether or not disproportionate harm was justified under an examination of business necessity. The *Davis* Court abandons this middle ground altogether and establishes the polar extremes of disproportionate harm (which it said was not enough) and intent.

Additionally, by refusing to ask if the D.C. police department's civil service literacy exam constituted a legitimate business necessity, the Court abdicated its authority of judicial review by trusting the D.C. police department that the test "rationally may be said to serve a purpose the government is constitutionally empowered to pursue" (p. 246). This standard of review is clearly less stringent than the standard imposed in *Griggs*. The Court in *Griggs* discovered that white workers who did not possess a diploma or take the IQ test had performed in a satisfactory manner compared to those who had taken the tests and completed high school. But in *Davis*, the Court did not ask the D.C. police to prove a business necessity. In moving away from enforcing its business necessity standard and retreating to a 'rational basis review' (see chart below), the Court established a judicial binary that proved impossible for minorities to obtain legal relief from disproportionate harms absent evidence of intentional discrimination.

#### STANDARD OF REVIEW: FRIEND OR FOE

In adjudicating disputes against possible violations of constitutional and statutory rights, the Court utilizes a hierarchy of review standards. Strict scrutiny is the most stringent standard of review followed by intermediate scrutiny and rational basis review (see Killian, Costello, & Thomas, 2004, p. 1906-1910).

	Rational Basis Review	Intermediate Scrutiny	Strict Scrutiny
State/Employer Interest	Legitimate, can be merely conceivable—need not be actual.	Must be genuine and important	State interest must be compelling
Law's relation to State/Employer Interest	Must be <i>rational</i> related, or non-arbitrary.	Must be Substantially related	Must be <i>necessary to achieve the purpose</i> , and discriminating policy is 'narrowly tailored'

Rational basis review simply requires the government to show that the law in question is “rationally” related to state interests. The Court utilizes this lowest standard of review on benign classifications like prohibiting the sale of alcohol to those under 21. In these instances, the court essentially abdicates its responsibility of review and defers to the justification of the government or private actor. To illustrate further the lax requirement of rational basis review, a law’s relation to state interests only needs to be conceivable; whether or not the law is smart or intelligent is of no concern. Therefore, Justice Marshall has often said, “the constitution does not prohibit legislatures from enacting stupid laws” (*New York State*, 2008, p. 801). However, strict scrutiny is a much more difficult standard of review. The Court has consistently ruled that all government classification based on race must apply strict scrutiny as the standard of review (see *Bakke*, 1978; *Richmond*, 1989; *Grutter*, 2003). Therefore, strict scrutiny renders all racial classifications constitutionally suspect.

The *Davis* decision begins to establish that issues of disproportionate harm and affirmative action (a constitutional issue to come later) would fall under the false binary of Rational Basis (RR) review or Strict Scrutiny (SS). But as the chart and the *Griggs* case showed, there is an intermediate standard of review that requires the Court to find a genuine and important interest that is related to the practice or law in question. The *Griggs* court clearly articulated what constitutes intermediate scrutiny, a standard of review that sits between rational basis and strict scrutiny. The results from this extreme binary have been catastrophic for people of color and can only be understood as a retrenchment of racial inequality while limiting the Court’s ability to address the persistence of racial disparity. The Court’s false binary is troubling in at least two critical areas: ongoing racial problems cannot be dealt with effectively under rational basis review, while policies and strategies that attempt to address racial problems are struck down by strict scrutiny. In calling the Court’s binary false, I am editorializing that the Court’s insistence on avoiding intermediate review is a purposeful choice that subjects its methodological review to two extremes. In other words, starting with *Davis*, the Court restricts itself based off its own unwillingness to expand constitutional review. In less than five years, *Davis* simply abandons the intermediate standard of review used in *Griggs*. As a result of the Court’s binary imposition neglecting the existence of intermediate review, even though *Griggs* was not overturned explicitly, the Court’s elevation of intent in *Davis* greatly diminished *Griggs*.

### *The Elusiveness of Racial ‘Intent’ in the Colorblind Era*

*Davis* fundamentally altered the methodological focus of how the Court would go about determining future statutory and constitutional violations based on race. By elevating intent and diminishing the importance of adverse/disparate impact, the Court utilized the antiquated racial discourse of slavery and Jim Crow racism in order to adjudicate racial problems in the colorblind

era. That is, ‘slaves as property’ (see *Dred Scott*, 1857) or ‘separate but equal’ during Jim Crow (see *Plessy*, 1896) were clear examples of legislative and political *intent* to subordinate Blacks. However, *Brown* and the Civil Rights Acts made overt discriminatory racial intent a thing of the past. In other words, discriminatory racial intent was outlawed and those who wanted to advance racial subordination with intentional acts of discrimination faced arrest and imprisonment in violation of federal law. The changing racial dynamics that made discriminatory intent a thing of the past also spurred an evolved campaign to maintain white privilege in accordance with the new legal standards. We have already discussed Prince Edward County offering tuition credits for students to attend private, and ultimately white, schools and Duke Power Plant instituting an IQ requirement for promotion. Without contextual consideration, both are race neutral policies. Nevertheless, these ‘race neutral’ policies created racial results that subordinated Blacks and benefited Whites.

Even though the elevation of intent signaled the diminished importance of disparate impact, the intent test articulated in *Davis* was not impossible. The Court provided several ways to prove discriminatory intent that was, in theory, at least workable. The Court spelled out three approaches in order to infer discriminatory intent:

1. Look at circumstances as a whole, and infer discriminatory purpose.
2. Disproportionate harm so severe that the disparate impact is hard to explain on non-racial grounds.
3. Measure intent from foreseeable outcome. (p. 241-243)

For these approaches to find discriminatory intent, motive was not a factor, as intent was measured in an inferential way. That is, even in the face of racial motives, intent was not measured by the subjective motives of the actor, but by inferring from the totality of evidence. For instance, if intent was measured by subjective motives, various actors could just deny the existence of discriminatory motives. Therefore, the *Davis* Court’s intent test was theoretically workable since it allowed room for intent based on: circumstances as a whole, disproportionate harm, and foreseeable outcome.

This all changed when the Court further elevated and clarified the importance of intent by demanding a show of purposeful discrimination. In both *Arlington Heights v. Metropolitan Housing Corp.* (1977) and *Personnel Administrator of Massachusetts v. Feeney* (1979), policies with a clear disparate impact on people of color and women, respectively, were upheld because plaintiffs could not produce evidence of clear intent to discriminate. A suburb of Chicago, Arlington Heights had utilized a zoning ordinance to prohibit the building of multi-family housing facilities in favor of single-family dwellings. As a result, the zoning ordinance barred many minority families and others from low socio-economic backgrounds from living in Arlington Heights. Similarly, in *Feeney*, Massachusetts had a hiring policy that gave preference to veterans over non-veterans. The hiring policy was challenged since less than two percent of all Massachusetts veterans were women, therefore the disproportionate harm for women’s hiring prospects in public sector jobs was undeniable. However, in both cases, the Court found the disproportionate harm to racial minorities and women did not violate the constitution because: in *Arlington Heights*, the official action was not found to discriminate *intentionally* against a suspect or protected class, and in *Feeney*, the hiring policy was not found to reflect in any way a *purposeful* discrimination on the basis of sex.

The Court's insistence on plaintiffs' ability to show intentional and purposeful discrimination is perplexing. Again, its understanding of racism in the colorblind era is stuck in racial narratives of the past. The Court essentially asks plaintiffs to prove overt, clear, and direct practices of racial discrimination in order to invalidate a particular policy or practice. With this standard, the only possible way for any policy or practice to be invalidated is a finding of clear bigotry either in the text of policy itself or affirmative words by policy actors. Furthermore, even though the intent standard in *Davis* presented a difficult barrier, proving discriminatory intent was at least theoretically possible through the inference of a totality of consequences. However, *Arlington Heights* and *Feeney* articulated further that intent needed to be intentional and purposeful. The Court wiped out arguments of intent determined by results. Instead, discriminatory intent could only be determined by a showing of purpose and intention independent of result. This means that just because a policy has a disproportionate harm does not necessarily suggest that the policy actors purposefully intended for that disproportionate harm to happen. Here, intent was further clarified to mean malice. Together, *Arlington Heights* and *Feeney* made *Davis*' intent test of inferred circumstances meaningless. The only consideration was whether or not racial minorities can show malicious discriminatory intent.

### *Finding the Unicorn of Malicious Discrimination*

The Court's evolving intent test results in situations where, absent a finding of malicious discrimination, policy practices and laws would survive judicial review even if disproportionate harms to minorities were clear and indisputable. This point was validated in *McCleskey v. Kemp* (1987). The Supreme Court reviewed *McCleskey* concerning the state of Georgia's death penalty sentencing guidelines. Warren McCleskey, an African American, was found guilty of two counts of armed robbery and one count of murder. The jury found two circumstances beyond a reasonable doubt: McCleskey committed a murder during the course of an armed robbery, constituting a felony murder, and McCleskey murdered a police officer while the officer was on duty. According to Georgia's sentencing guidelines, either aggravating circumstance is sufficient to impose the death penalty. The jury recommended the death penalty and the Judge agreed, sentencing McCleskey to death. The Supreme Court's review of *McCleskey* was based on whether or not Georgia's sentencing guidelines violated Title VII of the Civil Rights Act and the Fourteenth Amendment's equal protection clause.

Georgia's sentencing guidelines for murders are divided into three categories

1. Murder convictions with an automatic death sentence.
2. Murder convictions where death penalty option is up to the discretion of the prosecutor.
3. Murder convictions where death penalty is NOT an option. (Baldus, Pulaski, & Woodworth, 1983)

Georgia's three sentencing categories for murder and the death penalty are rather clear. Category one is reserved for murders so heinous the only available sentence is the death penalty. Category three is for murders that are not severe enough to merit considerations of the death penalty. Category two concerns crimes that are heinous and severe but do not fall within range of category one. Sentencing severity for murder cases that fall within category two are left entirely up to the discretion of the prosecutor. Therefore, the prosecutors' office is given

discretion as to whether or not the death penalty is an option for murders in category two. The *McCleskey* case hinged on the constitutionality of prosecutorial discretion for category two murders. McCleskey charged that because category two death penalty sentencing hinged on the discretion of mostly white prosecutors' offices, Blacks were disproportionately harmed. Category two convicted black murderers faced the death penalty at a significantly higher percentage than category two convicted white murderers. The Baldus Study (1983) clearly supported McCleskey's claim that Georgia's discretionary sentencing guidelines disproportionately harmed Blacks. Law professors David Baldus, Charles Pulsaski, and statistician George Woodworth studied more than twenty five hundred murder cases in Georgia and found category two discretionary sentencing had racially disproportionate results on several categories. With the help of the Baldus Study, McCleskey showed that when black defendants were *accused* of murder, they were twenty two times more likely to face the death penalty when the victim was White than when the victim was Black. Second, when black defendants are found *guilty* of murder, the convicted murderer is 4.3 times more likely to receive the death penalty than when the defendant was white.

Despite the findings of overwhelming disproportionate harm against Blacks in Georgia's death penalty sentencing structure, the Court found no constitutional violation. Regarding the Baldus study's findings, the Court did not dispute the validity of its claims. This means that the Court accepted the validity and existence of the disparate impact of Georgia's discretionary death penalty sentencing. The study clearly showed that race was the biggest factor in the midrange category two cases. However, the Court was unmoved absent a finding of purposeful discriminatory intent. Referring to the Georgia state legislature, which instituted the sentencing structure allowing for prosecutorial discretion, the Court reasoned:

There was no evidence...the Georgia legislature enacted the capital punishment statute to further a racially discriminatory purpose. Nor has McCleskey demonstrated that the legislature maintains the capital punishment statute because of the racially disproportionate impact suggested by the Baldus Study. (pp. 298-299)

Here, the Court clearly differentiates between discriminatory purpose/intent and discriminatory effect. Clearly, disparate impact no longer holds any constitutional importance. This is why despite the clear evidence of the Baldus Study proving the existence of disproportionate harm, the Court is unmoved because the Baldus Study does not prove discriminatory intent by the Georgia State legislature. McCleskey argued that the state legislature is guilty of equal protection violation because it has adopted a death penalty statute with discriminatory application and continue to utilize it despite evidence of its disparate harm (Ibid.). Here, McCleskey argues for implied intent by the Georgia legislature because of the overwhelming and consistent frequency in racially disparate death penalty sentencing.

McCleskey argued that for a sentencing program to produce such consistent results, intent and purpose should be implied due to the clear statistical results of the Baldus study. The Court refused to accept McCleskey's argument for implied intent. The opinion explained:

Discriminatory purpose implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker, in this case a state legislature,

selected or reaffirmed a particular course of action at least in part ‘because of’, not merely ‘in spite of’ its adverse effects upon an identifiable group. (p. 298)

With this clarification of intent/purpose, the Court articulated that intent would now mean *malice*. That is, foreseeable consequences and awareness of predicted outcomes is not sufficient to prove intent. *McCleskey* had to prove that the racially disparate application of Georgia’s death penalty sentencing was the intended result when the Georgia state legislature enacted the sentencing guideline. *McCleskey* would need to produce evidence, such as recordings, legislative memos, or documents that affirmatively prove malicious intent. Absent these types of evidence, the Court argued the discrepancies that correlate with race are “inevitable part of our criminal justice system” (pp. 312-313). In essence, the Court is sanctioning *de facto* discrimination so long as no evidence of malice exists. To the Court, disproportionate harm no longer matters. The Court focused its judicial review entirely on purposeful and intentional acts of legislative practice that are only proven by malicious intent. Because of *McCleskey*’s ‘malice test’, not a single racially disproportionate policy has met the Court’s standard of malice.

### TOO MUCH JUSTICE?

Not only was the *McCleskey* Court not swayed by the Baldus Study’s statistical evidence to overturn Georgia’s death penalty statute, it was also mindful of other social and civil policies that produced racially disproportionate results. Fearing an avalanche of potential lawsuits if the Court were to recognize and affirm the disparate impact of race in sentencing penalty, the Court realized the problem was not only limited to death penalty sentencing. In other words, the Baldus Study could be replicated to prove racial disparate effect in other areas of the criminal justice system. Predicting a ‘parade of horrors,’<sup>1</sup> (pp. 314-319) the Court warned against an impending avalanche of litigation. Utilizing the rhetorical device of the ‘parade of horrors’, the Court admitted, “[I]f we accepted *McCleskey*’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty” (p. 315). As a result, the Court argued the integrity of the entire justice system would be called into question. Interestingly, the ‘parade of horrors’ argument is utilized as if eradicating racial bias from all areas of the criminal justice system was in fact a horrible thing to do. That is, the Court cautioned against too much justice.

Receiving little fanfare (infamy?) within our popular memory of canonical Supreme Court cases, *McCleskey* is nevertheless considered one of the worst Supreme Court decisions since WWII by leading progressive scholars (Liptak, 2008). Some have called *McCleskey* the *Plessy* and *Dred Scott* of our time (Savage, 2008). Opinions and their place in history aside, *McCleskey* fundamentally changes how discrimination is viewed by the Court in our colorblind era. To the Court, discrimination is no longer measured by the disparate impacts any policy or statute may produce even if the racial disparity were clearly detectable. Discrimination only exists in express acts of purposeful discrimination, measured by malicious intent, not disproportionate impact. The Civil Rights and legal scholar Michele Alexander argued:

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<sup>1</sup> The ‘Parade of Horribles’ is a rhetorical device the Court has routinely used in order to avoid ruling adversely against a law or statute by claiming doing so would usher numerous judicial challenges, real or imagined, before the Court.



*McCleskey* has immunized the criminal justice system from judicial scrutiny for racial bias. It has made it virtually impossible to challenge any aspect, criminal justice process, for racial bias in the absence of proof of intentional discrimination, conscious, deliberate bias, evidence of conscious intentional bias is almost impossible to come by in the absence of some kind of admissions. (Bill Moyers PBS Interview, 2010)

Additionally, because proof of malicious discrimination is nearly impossible to prove, the Supreme Court has substantively closed its doors to claims of racial abuse, thereby turning a blind eye toward racial disparity within the criminal justice system and other civil institutions. With *McCleskey* and the progeny of cases where the Court elevated intent over disparate impact, the Court went from punting, deferring, and finally to abdicating completely its responsibilities of judicial review in cases of disproportionate harm. As a result, full faith and credit were given to legislatures and other bodies of authority to continue administering policies and practices that have grossly disproportionate impact on minorities without threat of impunity from the courts. Recalling the chart showing the differing levels of judicial scrutiny, disproportionate harm cases are treated with the same judicial rigor as benign issues such as the national drinking age. In shifting its scrutiny away from disproportionate harm and focusing instead on malicious intent, the Court equated the racial disproportionate harm of the death penalty with the ‘disproportionate harm’ of those affected by the legal drinking age, because under both instances, the Court utilize the same ‘rational basis’ standard of review.

The Court’s judicial trajectory elevating intent, purpose, and malice over evidence of disproportionate harm also signified its approach toward legislative action that expressly utilizes race, such as affirmative action policies in employment and education. It is here where, in the eyes of the Court, issues such as death penalty sentencing distinguish themselves from affirmative action policies because of racial intent. That is, Georgia’s death penalty sentencing guidelines were ‘race neutral’ whereas affirmative action policies are race-positive. In the next chapter, I will discuss the Court’s procedure in differentiating express uses of race (what it calls ‘discrimination’) versus so-called race neutral policies that have a disparate impact.

## Chapter 6: The Colorblind Court - How Affirmative Action and Race Base Preferences are Treated as ‘Discrimination’

### INTRODUCTION

In tracing the trajectory of the Court’s approach towards ‘race-neutral’ policies and practices that produce racially disparate impacts, the Court’s methodology outlining what it considers discrimination is important. For disproportionate harm cases, discrimination was defined by intent, purpose, and malice. The emphasis on intent over results had a discriminatory effect on individuals or groups’ ability to make a compelling claim for equal protection in disparate impact cases. The shift toward malicious intent in disproportionate harm cases signaled the narrowing of ‘equal protection.’ Disparate impact claims consistently failed because the Court steadily increased the required threshold to prove discriminatory intent. The Court’s rigid definition of what constitutes express practices of discrimination established a limiting and restrictive structure to review affirmative action practices. Beginning with issues of disproportionate harm and continuing contemporaneously with affirmative action and race positive policies, the constitutional world on race related issues is sharply divided into two divergent approaches. On one hand, ‘race-neutral’ practices that produce an immense amount of disproportionate harm almost always survive constitutional review. On the other hand, race positive affirmative action approaches almost never survive because of how the Court approaches and defines ‘discrimination’.

In the previous chapter, I discussed the ‘built in headwinds’ (see *Griggs*) that claims of disproportionate harm face as a result of the Court’s focus on malicious intent over disparate impact. In constructing and narrowing the definition of discrimination as only express forms of racial practices, the Court not only constructed its own rules on how to adjudicate ‘colorblind’ policies, but most importantly, it articulated the parameters for affirmative action cases. By mapping the historical trajectory of race related cases since the era of Jim Crow racism, the Court has exhibited three distinct approaches to race:

1. **Jim Crow Racism:** Enforcement of *Plessy*’s ‘Separate but equal’ constitutional mandate. Express forms of racial discrimination were legal so long as separate accommodations were ‘tangibly equal’. Eventually overturned by *Brown*.
2. **Colorblind/Race Neutral Disproportionate Harm:** Express forms of discrimination were no longer legal. Colorblind, facially ‘race neutral’, practices were utilized but nevertheless maintained racial disparity (see *Griggs*, *Arlington Heights*, & *Feeney*). Here, the court started by looking at disparate impact, but precipitously moved toward intent, purpose, and malice.
3. **Affirmative Action/Race Positive Policies:** policies that purposely and intentionally attempt to address racial disparity. Here, the Court constitutes these policies as ‘express discrimination’ because they use racial classifications, thereby ushering in a completely different standard of review (i.e., strict scrutiny) compared to race-neutral disproportion harm claims.

Arguably, the various disparate impact claims could be considered as attempts by policy makers and employment authorities to maintain racial stratification and subordination. There were clear examples of ‘colorblind’ attempts at maintaining a white-dominated racial hierarchy (e.g.

*Griggs*), and ones less obvious (e.g., *Washington v. Davis*). Nevertheless, whatever the intent or purpose of policy actors from the progeny of disproportionate harm cases, none was for the express purpose of *promoting* racial diversity and integration. This changed with the emergence of affirmative action policies practiced at the federal and local level in order to speed up the interests of the Civil Rights movement towards respect for diversity and promotion of integration.

If policies that produced disproportionate harm were on one side of the political spectrum, affirmative action policies were on the opposing end. Not surprisingly, there was tremendous opposition to affirmative action policies. Despite the struggles to pass affirmative action laws and policies, they were immediately contested through the courts. Historically with *Dred Scott*, *Plessy*, and other Pre-*Brown* cases, the Court overwhelmingly ruled in the interests of Whites to the detriment of minorities. *Brown* and the Civil Rights legislation were supposed to be a major turning point in the Court’s trajectory. The developing “equal protection” promise that started in *Brown* and continued through anti-miscegenation and discriminatory employment cases signaled perhaps the Court’s developing willingness to understand the pervasiveness of racial practices and subordination. Unfortunately, the promise was short lived. However damaging the Court’s effect upholding disproportionate harm policies and practices, its methodological approach in striking down affirmative action policies is at least equally damaging.

#### THE DISPROPORTIONATE CONSTITUTIONAL WORLD ON RACE

As mentioned previously, the Court uses three standards of review in adjudicating laws, policies, and public practices under its power of constitutional and statutory review. Although three distinct approaches are clear, the Court has only utilized intermediate scrutiny in one case: *Griggs*. After establishing a promising standard looking at foreseeable outcome, the Court backtracked on race related cases to a position where it now only utilizes two extreme approaches of rational basis and strict scrutiny.

	<b>Rational Basis Review</b> After <i>Griggs</i> , applies to all “race-neutral” disproportionate harm claims	<b>Intermediate Scrutiny</b> <i>Griggs</i> ’s “Legitimate Business Necessity” standard	<b>Strict Scrutiny</b> Any express use of race. applies to <u>all</u> affirmative action cases
State Interest	Legitimate, can be merely conceivable—need not be actual.	Must be genuine and important	State interest must be compelling
Law’s relation to State Interest	Must be <i>rationaly</i> related, or non-arbitrary.	Must be Substantially related	Must be <i>necessary to achieve the purpose</i> , and discriminating policy is ‘narrowly tailored’

In early disproportionate harm cases, although the Court initially utilized intermediate scrutiny in *Griggs*, it abandoned intermediate scrutiny in *Washington v. Davis* and regressed to rational basis review. As a result, there are now only two divergent standards of review when it comes to

race related cases: rational basis and strict scrutiny. For disproportionate harm claims, the Court has only vacillated between intermediate scrutiny and rational basis review. The Court *never* utilized strict scrutiny for any disproportionate harm claims, no matter how drastic the disparate impact. The Court's most stringent standard of review, strict scrutiny, comes into play for affirmative action and race positive policies because the Court treats these policies and practices as express forms of 'discrimination'. Therefore, because affirmative action policies purposefully utilize racial considerations, the Court's "intent test" is satisfied and must be reviewed under strict scrutiny.

The chances for any challenged action to survive constitutional review can be predicted with a high probability according to the Court's standard of review. That is, any challenged action reviewed under rational basis is essentially guaranteed to pass. On the other hand, before the emergence of affirmative action claims, only President Roosevelt's Executive Order 9066 internment about one hundred and twenty thousand Americans of Japanese ancestry survived strict scrutiny<sup>1</sup> (see *Korematsu v. United States*). Strict scrutiny was established in *Korematsu* because Executive Order 9066 expressly and purposefully discriminated against Americans of Japanese ancestry. Nevertheless, the *Korematsu* Court agreed with Roosevelt's argument that Japanese internment was necessary to achieve the compelling interests of "national security". The Court's history has produced only two examples where an express use of race has survived strict scrutiny: Japanese Internment and diversity in graduate level higher education (e.g. *Bakke*, discussed below).

The Court's definition of discrimination constructs a reality where all disproportionate harm practices are left undisturbed while nearly all affirmative action policies are struck down. Here, the constitutional word bifurcates into two polar extremes with an 'anything goes' standard of review on one end, and a 'nothing goes' standard on the other.

- Racial Classification/Express Use of Race?
  - Yes → Strict Scrutiny (Affirmative Action Policies and Practices)
  - No ↓
- 'Race Neutral'/No Express Use of Race? (Results in Disproportionate harm)
  - Intentional/Purposeful/Malicious?
    - Yes → Strict Scrutiny
    - No → Rational Basis Review

With the Court's rigid review structure when it concerns race related issues, social and political movements that campaign for integration and diversity through race-positive practices face a steep terrain of resistance. Additionally, if so-called 'race neutral' policies are challenged, they are all but guaranteed protection due to the soft standard of rational basis review. The totality of these positions by the Court is made possible by its naive, yet devastating, construction of what constitutes racial 'discrimination'. As a consequence, not only is equal protection constricted, but also used as a weapon *against* efforts to speed up integration and achieve racial equality. As

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<sup>1</sup> Even though scholars have pointed to *Korematsu* as the standard cite signifying the Court's establishment of strict scrutiny as the highest standard of review, the Court did not in fact apply strict scrutiny in *Korematsu*. Rather, Scholars point to the Courts' deference to Congress' enumerated 'war powers' as a sign that strict scrutiny was in fact not followed. This was a point contested in Justice Frank Murphy's dissent, pointing to the fact that although the Court lays out the initial structures of strict scrutiny, it substantively defers to Congress' 'war powers', resulting in a procedure that is not 'strict' at all.

the Court's recent history shows, the arc of race positive and affirmative action policies before the Court reflects the same trajectory as that of disproportionate harm cases discussed in the previous chapter: a glimmer of promise early on, followed by extreme constriction and push back.

*Affirmative Action: A Glimmer of Hope*

*United Jewish Organization of Williamsburg v. Carey* (1977) (*UJO*) was the first case where the Court adjudicated the constitutionality of race-based affirmative action. In *UJO*, several voting districts in New York City were reapportioned under a 1972 plan with the goal of guaranteeing at least a 65% nonwhite voting majority. New York's motivation was to prevent racial minorities from being repeatedly outvoted by majority White populations in assembly and senate districts. Under the Voting Rights Act, any redistricting plan had to be submitted to the U.S. attorney general or the district court of D.C. for pre-clearance to satisfy safeguards against racial gerrymandering. Upon review, the U.S. attorney general established for New York a 65% nonwhite threshold for constitutional and statutory approval. Before the plan was instituted, a community of over thirty thousand Hasidic Jews lived entirely within one assembly and senate district of the Williamsburg area in Brooklyn, New York. Under the 1972 plan after pre-clearance guidance from the U.S. attorney general, New York redrew two adjacent districts. In meeting the minimum 65% nonwhite majority threshold, the redrawn districts split the Hasidic Jewish community, each belonging to two adjacent senate and assembly districts. As a result, the United Jewish Organization of Williamsburg, representing the Jewish community, petitioned to the Court that their equal protection rights were violated by New York's redistricting plan.

*UJO* is the first instance before the Court where a public authority expressly used race in its policy in order to promote greater minority representation. This was a radical shift from the disproportionate harm cases that at the time were common before the Court. In the disproportionate harm cases, the Court had to *find* intent, purpose, or malice in order to strike down the particular policy practice (See *Griggs*, *Washington v. Davis*, *Feeney*). In *UJO*, intent and purpose were obvious. New York State sought to increase minority representation by redistricting. If the Court was to follow its own intent test for 'race neutral' disproportionate harm cases, New York State's redistricting plan would have surely faced the Court's highest standard of review: strict scrutiny. However, like in *Griggs v. Duke Power Co.* (1971), the *UJO* Court focused on intent *and* harm. In *Griggs*, just because Duke Power utilized a 'race neutral' policy of requiring a High School diploma and IQ test for promotion, the Court was unmoved that the 'race neutral' criteria were *not* racially discriminatory practices. Therefore, the Court additionally focused on the discriminatory impact of Duke Power's employment policy. With the same approach, the Court in *UJO* was not immediately moved that New York state's race positive consideration to reapportion senate and assembly districts amounted to racial discrimination. As it did in *Griggs*, the Court wanted to figure out the real or foreseeable impact of the 1972 redistricting plan. In a near unanimous 7-1 decision (Justice Thurgood Marshall did not participate), the Court ruled in favor of New York's apportionment plan. New York's plan to guarantee racial minority representation was approved and the redistricting plan did not violate the Fourteenth or the Fifteenth (Right to Vote regardless of race, color, or previous condition of servitude) amendments.

In a clear ruling, the Court found that neither amendment prohibited the use of racial factors in districting and apportionment. Additionally, the State's plan to establish a 65% quota

of nonwhite majority does not violate the same amendments. The most compelling part of the Court's opinion stated that although New York was purposeful, intentional, and deliberate in using race as a factor to increase nonwhite majorities with its redistricting plan, the Court ruled there was no systematic 'fencing out' of the white population in the county from electoral participation. That is, New York's plan did not in any way under-represent Whites in the electoral process relative to their share of the population. It is important to note the inherent racial fallacy that UJO utilized to argue against New York's plan. If there is a minimum 65% nonwhite majority, then there is a maximum 35% white minority. One of the main motivations for New York's plan was to prevent Whites from systematically outvoting minority groups. The establishment of a 65% threshold of nonwhite voters does not automatically suggest that the entire nonwhite majority will outvote Whites as one monolithic bloc. The 65% nonwhite majority is just that: nonwhite. It surely does not mean all Black, or Latino, or Asian. In fact, due to the city's diverse population encompassing more than just a binary black and white population, the 65% nonwhite majority goal does not automatically mean that any particular group can outvote a 35% white voting bloc. The *UJO* Court understood this. More importantly, the Court showed a critical understanding of race and what ultimately constitutes an act or practice of racial discrimination.

In *UJO*, the Court understood discrimination as a form of classification *and* subordination. Members of the majority court acknowledged that New York had classified nonwhite minorities as the target of their apportionment. This was fundamentally an act of classifying nonwhite and white groups in accordance with a clear racial classification. However, classification was not the only metric the Court used to measure discrimination. With the acknowledgment and discussion of 'electoral participation', being 'fenced out', and 'proportional representation', the Court investigated the reasonable and foreseeable outcome of New York's redistricting plan. The Court's investigation led the justices to believe reasonably that White voter participation and representation would not be 'fenced out' in the same way that literacy tests were once utilized to disenfranchise Blacks from suffrage. The Court concluded that as long as Whites, as a group, were provided fair representation, there was not a 'cognizable discrimination against whites' (p. 146). This shows that the *UJO* Court understood discrimination as a form of classification and subordination. Furthermore, the Court demonstrated a critical understanding of racialization that begins with an identification of difference, but most importantly, that this classification is then used to subordinate groups.

Express forms of classification and substantive subordination were the *modus operandi* of historical acts of racial subordination (e.g., Jim Crow Segregation). But with *Brown*, *Loving*, and the Civil Rights Act, the focus on classification as the prerequisite and central characteristic of identifying acts of racial discrimination lost its importance because overt forms of discrimination were outlawed. With *Griggs* and *UJO*, the Court at least signaled an understanding of the changing nature of racial practices as a result of the shifting legislative and political landscape. In both cases, the Court placed an enhanced emphasis on impact and foreseeable results underscoring the importance of subordination as the measure of unconstitutional racial discrimination. Unfortunately, the *UJO* Court's nuanced and historically specific understanding of racial discrimination was all but lost in less than a year when affirmative action entered higher education in *Regents of the University of California v. Bakke* (1978).

*Affirmative Action: Hope is Lost*

The dispute in UJO centered on New York's attempt to ensure and increase nonwhite political participation in senate and assembly elections. *Bakke* was predicated on the University of California, Davis' attempt to increase minority representation in its medical school. UC Davis' medical school instituted a quota system that set aside 16 out of 100 spots for racial minorities. After two consecutive years of being rejected by U.C. Davis, Allan Bakke sued the University alleging an equal protection violation due to its special quota system. Before Davis twice denied Bakke, 12 other medical schools rejected him, including the University of Southern California and Northwestern University, which expressly said a major reason for his rejection was due to his older age (Dreyfuss, 1979). At the time of his application, Bakke was already thirty-three years old, making his admission into medical school much more difficult since, at the time, many schools openly practiced age discrimination. Bakke's GPA and MCAT scores were both above the average of those admitted during his two unsuccessful years applying to Davis. The admissions committee signaled a hesitation in admitting Bakke because of his age. Most importantly, during an interview with Dr. George Lowry, the chairman of the admissions committee, Lowry gave Bakke an unsavory evaluation, which was the only part of Bakke's application that received a negative evaluation (Schwartz, 1988). In his assessment after Bakke's interview, Dr. Lowry reported that Bakke:

Had very definite opinions which were based more on his personal viewpoints than on a study of the whole problem...He was very unsympathetic to the concept of recruiting minority students. (Liu, 2002, p. 1)

In comparison with New York State's redistricting plan in UJO, both instances were examples of express uses of race with the goal of filling a minimum racial quota of minorities. Like in UJO, the Court had the same circumstances and opportunity to utilize UJO's standard of review in looking at the impact and intent of Davis' admissions quota system. However, a divided court split sharply on the preferred standard of review. Rational basis review was automatically out of the question because Davis' quota system contained an express use of race. The standard of review rested on the remaining two possibilities: intermediate review and strict scrutiny.

In a plurality decision, the dissenting liberals argued for intermediate review, suggesting that although Davis' quota system was a clear express use of a racial classification, it was well within reason to satisfy a multitude of state interests presented by the University of California system. The dissenting liberals felt the case should have been decided like *UJO*, with the Court's decision resting on whether or not there is intent *and* disparate impact on Whites generally, and Bakke specifically. If the Court adopted intermediate review and its reasoning in *UJO*, Davis' quota admissions system would have easily survived review because its admissions number would neither have 'fenced out' Whites from participation nor would a 16 seat set aside for minorities create conditions where Whites would be disproportionately underrepresented at the medical school. In fact, it was due to persistent underrepresentation of minorities that spurred Davis' proactive attempt to increase minority enrollment, meaning, white students were already well represented. The plurality opinion was tightly contested and the liberals were in the minority on the constitutionality of Davis' quota system. Four conservative justices wrote their own opinions, while Justice Powell authored his own opinion, thus creating some confusion as to the ultimate outcome of the case (Schwartz, 1988). In what was ultimately considered a great compromise (O'Neil, 1979), Justice Powell sided with the conservatives in striking down Davis'

affirmative action quota system, but sided with the liberals in ruling affirmative action policies constitutional in order to pursue the compelling governmental interest of promoting diversity in higher education.

On the standard of review, Justice Powell sided with the conservatives in imposing strict scrutiny. Following the standard set in *Korematsu*, Davis had to prove a compelling governmental interest to justify its racial classification in the same way that “national security” was the justification for internment in *Korematsu*. The University of California presented four justifications to satisfy the Court’s compelling interests test:

1. Reducing the historic deficit of traditionally disfavored minorities in medical school and medical profession.
2. Countering the effects of societal discrimination.
3. Increasing the number of doctors to under-served communities.
4. Diversity in the classroom.

Joined by four conservative justices, Justice Powell rejected the first three justifications. In a famous proclamation, Powell declared that the U.S. was “a nation of minorities” (*Bakke*, p. 292). Therefore, Davis’ quota system amounted to “discrimination for its own sake” (p. 294). Specifically in response to Davis’ argument that its quota system counters the effects of societal discrimination, Justice Powell believed that the reason was too amorphous and imposes a burden on Whites who bear no responsibility for the harm. Regarding the charge that Davis’ program will increase the number of minority doctors to under-served communities, the Justices dismissed the claim because Davis had failed to provide any evidence to prove that this will actually happen. In the only position where Justice Powell could agree with the liberal justices, he declared promoting diversity in the classroom *was* a compelling governmental interest. As a result, the plurality opinion recognized the interest of diversity in the classroom as a compelling governmental interest, but Davis’ usage of a quota system was declared unconstitutional and the Court ordered the medical school to admit Bakke.

#### “A (WHITE) NATION OF MINORITIES”

Although initially hailed as a compromise, the enduring affirmative action landscape established by *Bakke* meant that all future race positive policies in education would be adjudicated within the parameters of *Bakke*’s ‘diversity’ discourse, with strict scrutiny as the standard of review. Powell and the conservatives automatically concluded that the existence of a minority quota system meant that Bakke and other Whites suffer from ‘discrimination’. By identifying Bakke as a victim of ‘discrimination’ and locating the U.S. as a ‘nation of minorities’, Justice Powell declared that ‘equal protection’ was about individuals, as opposed to groups. This was a significant move because it allowed Whites to claim ‘minority status’, thereby making it possible for Whites to be ‘victims’ of discrimination. More importantly, by defining equal protection as a focus of individuals over groups, group discrimination is discarded as a worthwhile, or even relevant, point of analysis. The ramification of focusing on individual discrimination over acts of group subordination is far reaching. Justice Powell manages to shift fundamentally the historical understanding of racial subordination of Blacks and minorities toward a racial discourse where *anyone* can be a victim of discrimination, regardless of historical



precedents or whether or not they are members of an underrepresented group. This is perhaps the most important legacy of *Bakke*.

*Bakke*'s importance does not lie in the forced admission of Bakke, or even in its declaration that diversity is a compelling governmental interest, as the issue would be revisited and narrowed later on. *Bakke*'s far-reaching significance is located within the shift in the Court's definition of racial discrimination. In *Griggs* and *UJO*, the Court's understanding of racial discrimination was heavily influenced by a historical appreciation of how race was utilized as a stratifying and subordinating principle. As a result of *Bakke*'s shifting rhetoric on race, Omi and Winant (2014) observe that the Court's decision amounted to a fundamental pivot signifying a new racial formation. This new racial formation elevated the importance of racial classification of any kind for anyone while discarding any importance of subordination. Taken together, the Court effectively eliminated the significance of historical racism. As a perplexing result, the Court is "unable" to tell the difference between Jim Crow policies and voluntary affirmative action policies. Additionally, because the Court cannot identify any difference between Jim Crow policies and affirmative action policies, Whites can consider themselves as much a victim of racial discrimination from affirmative action as Blacks did under Jim Crow segregation. With the Court's new definition of 'discrimination', both circumstances are categorically the same. Additionally, because all Jim Crow acts of overt racism are considered prohibitively antiquated, the only explicit practices of racial classification are voluntary affirmative action policies. Through the prism of the Court's *Bakke* decision, Whites become the only members of Justice Powell's 'nation of minorities' who are racially discriminated in the colorblind era.

If Justice Powell's belief in a 'nation of minorities' is to be taken seriously, the Court's trajectory since *Bakke* appears overwhelmingly to favor White 'minorities' over nonwhite minorities. First, the *Bakke* decision had the collective effect of expanding the possibility and opportunity for Whites to claim discrimination. Secondly, by only identifying diversity as a compelling state interest, *Bakke* drastically narrowed the likelihood of success for future affirmative action policies in education to survive strict scrutiny. If the country were indeed a nation of minorities, all policies enacted by government agencies should be treated as products of political struggles between competing minorities and the Court should defer to the political process and utilize rational basis review, as it did in all of the disproportionate harm claims of the 60's and 70's. But this was not the case. The Court viewed Davis' quota system with the same antagonism at par with Roosevelt's Executive Order 9066 that interned Americans of Japanese descent in *Korematsu*. 'National security' in *Korematsu* and 'diversity in higher education' in *Bakke* represent the only two circumstances where a government action has survived strict scrutiny, the Court's highest standard of review.

The reasoning behind strict scrutiny's rigid and difficult standard of review is that the disputed action in question is believed to violate a fundamental right protected by the constitution. For instance, in *Korematsu*, President Roosevelt's executive order violated several constitutional rights, the most obvious of which being freedom, due process, and equal protection. As a result, the Court asked the government to provide a compelling state interest to justify the violation of these fundamental constitutional rights. The U.S. Government argued it was in the best interest of 'national security' during a time of war and that the Court should defer to Congress' constitutional enumerated war powers to conduct its business. In other words, the U.S. government argued that the proposed internment was an act under the scope of its war powers. The *Korematsu* Court agreed. Dissenting Justices argued the Court cannot demand a standard of strict scrutiny on one hand while simultaneously deferring to Congress' war powers

on the other. The *Korematsu* dissent concluded that deference is antithetical to strict scrutiny. The Court's ironic deployment of strict scrutiny aside, the *Korematsu* case established that 'national security' was a compelling government interest to satisfy strict scrutiny. With *Bakke*, diversity in higher education was added to the list of government interests that could possibly satisfy strict scrutiny. Although Justice Powell's independently authored opinion in *Bakke* endorsed diversity as a compelling government interests, he nevertheless rejected that intermediate review can ever be used in cases of 'intentional discrimination'.

Along with the conservatives on the Court, Justice Powell's opinion that strict scrutiny is the required standard of review for affirmative action cases was solidified in *City of Richmond v. J.A. Croson Co.* (1989) and *Adarand Constructors, Inc. v. Peña* (1995). These cases involved equal protection disputes of municipal (*Croson*) and federal (*Adarand*) programs designed to award work and construction contracts to minority-owned businesses. Both cases collectively established the structure of strict scrutiny for affirmative action, racial classification, and race-positive considerations we see today. Although *Bakke* established that diversity was a compelling interest, it did not concretely provide the structure regarding how state authorities can go about satisfying strict scrutiny. *Croson* and *Adarand* changed this. Even though both cases were sharply divided between conservatives and liberals on the Court, conservatives came out victoriously in both. Justice Sandra Day O'Connor was the deciding vote tilting the balance of the Court towards the conservatives. First in *Croson*, the Court ruled it was appropriate to utilize strict scrutiny to review the City of Richmond's usage of a racial quota to award minority contractors municipal contracts. Secondly, the majority Court accepted Richmond's statistical evidence showing inequality in the granting of municipal contracts between white and minority owned businesses. However, the Court ruled that Richmond had not investigated any 'race-neutral' alternatives to correct the imbalance before resorting to its racial quota system. As a result, *Croson* established that under strict scrutiny, race positive options could only be used as a last resort.

Six years later in *Adarand*, again influenced by Justice O'Connor's swing vote, the Court's conservatives not only held that strict scrutiny was warranted for state actions that utilize racial considerations, but mandated that all racial classifications imposed by federal, state, or local government actor *must* be analyzed under the standard of strict scrutiny. Most importantly, the disputed racial practice must be narrowly tailored to impact the very racial problem it is designed to address, with Justice O'Connor citing *Croson* declaring that "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification" (*Croson*, 1989, p. 516-517). Taken together with the established precedent in *Croson*, *Adarand* established the structure of strict scrutiny for race positive affirmative action policies.

#### “(WHITE) GOVERNMENT CANNOT MAKE US EQUAL”

Together, *Croson* and *Adarand* establish the two-pronged test that all race positive affirmative action policies must satisfy under the constitutional review standard of strict scrutiny:

1. All non-racial alternatives have been exhausted and racial inequality still persist
  - a. Racial consideration is the only remaining option, making the government sponsored policy a last ditched effort, i.e. of last resort.
2. Narrowly tailored to combat the identified problem of racial inequality

- a. Will not exacerbate other racial problems from proposed action any further than the principal racial problem.

Of the many controversial points of contention to arise out of *Adarand* is the dispute between ‘benign’ and ‘invidious’ racial classifications. The dissenting liberals in *Adarand*, led by justice John Paul Stevens, chided conservatives on the Court for their inability to tell the difference between benign and invidious racial classifications, asserting that normal citizens can surely tell the difference between good and bad intentions (p. 27). Conservatives shot back suggesting that strict scrutiny is too important and stringent a standard of review to rely, i.e. defer, to the supposed ‘good’ or ‘bad’ intentions of legislators. Justice Stevens criticized the majority Court because it “equates remedial preferences with invidious discrimination” and ignores the difference between “an engine of oppression” and an effort “to foster equality in society” (p. 28). In response, the conservatives ignored Justice Steven’s assertions by proclaiming an adherence to the principle of constitutional consistency in the application of equal protection. Focusing on individual harm, conservatives argued judicial intervention is required when individuals have “suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection” (*Ibid.*). The majority Court’s insistence on consistency and its unwillingness to differentiate between benign and invidious acts of racial discrimination is best articulated by Justice Clarence Thomas’ concurring opinion.

Justice Thomas agreed with the conservative majority that all governmental racial classifications should be reviewed under strict scrutiny. However, he wrote his own concurring opinion to emphasize his disagreement with the liberal justices arguing that “it is irrelevant whether a government’s racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged” (*Adarand*, Thomas Concurring Opinion, p. 1). In Justice Thomas’ opinion, the single most important factor in deciding the constitutionality of racial considerations is in the existence of a classification, regardless of whether there is a history of ‘racial paternalism’ (*Ibid.*). To articulate further his disagreement with Justice Stevens, Justice Thomas declared:

I believe that there is a moral and constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. *Government cannot make us equal*; it can only recognize, respect, and protect us as equal before the law. (*Ibid.*; italics mine)

Justice Thomas’ assertion of moral and constitutional equivalency between invidious acts of racism, such as Jim Crow legislation, and benign or race positive attempts to promote racial equality goes even further than the O’Connor-led majority opinion. Justice O’Connor focused on the consistency of applying strict scrutiny, thus underscoring the importance of constitutional jurisprudence to the majority. However, in utilizing a moral, albeit rhetorical, equivalence between benign and invidious racial practices, Justice Thomas collectively compares hundreds of years of systematic institutional racism with half-hearted and feeble affirmative action attempts, attempts that Leonardo (2007) has called ‘ambivalent action’. I use half-hearted and feeble to describe the limited effectiveness of affirmative action policies, not as a criticism of the arduous and careful planning required to bring these policies to fruition. In remembering the legacy of Jim Crow racism, ‘separate but equal’ policies are historicized today not only for their passage as

legislation, but for the deleterious material effects of stratifying blacks and nonwhites for nearly a hundred years. As a result, for Justice Thomas to compare and equivocate peace-meal affirmative action policies that were barely getting off the ground as morally equal to systematic practices of Jim Crow racism reveals at best a negligent ignorance of history, and at worst, a willful act to prevent the Court from meaningfully dealing with ongoing racial problems.

How else can we understand Justice Thomas' assertion that "government cannot make us equal"? If the moral equivalency of Justice Thomas is in fact negligently ignorant, then perhaps there is a glimmer of hope that affirmative action policies can be disengaged from being equated with historical legacies of institutional racism. Negligence and ignorance suggest an innocence, of not knowing, and preserves a degree of unintentional culpability. Therefore, if Justice Thomas' moral equivalence were evidence of classical ignorance, then it may be overcome by understanding and engaging Justice Stevens' race positive position. Nevertheless, Justice Thomas and the other conservatives on the Court are members of the nation's highest Court, recognized, nominated, and approved by a political process as the best and brightest legal minds in the country. This leads Justice Stevens to scold the conservative Justices for their inability (unwillingness?) to tell the difference between benign and invidious usages of race. However, the more we investigate Justice Thomas' logic of equivalence between benign and invidious usages of race, his opinion is clearly an example of willful volition meant to establish a racial *tabula rasa*. In Justice Thomas' view, this racial blank slate will "recognize, respect, and protect us as equal before the law" (p. 1). Equality before the law is a noble goal for the function and limits of the law, but this goal is entirely subject to the validity of Justice Thomas' initial premise: that government cannot make us equal.

If it is true that government cannot make us equal, then perhaps the next best thing is for all of us to be treated equally before the law. This is the overall sentiment of Justice Thomas' opinion in *Adarand*. The position is built on the neoliberal colorblind view that society is inherently unequal, that we are born into unequal lots in life (Friedman, 1980). As a result, neoliberalism argues a government that attempts to equalize an inherently 'natural' organizing principle would only amount to an exercise in social engineering (Friedman, 1990; Hayek, 2007). However, Justice Thomas' premise that 'government cannot make us equal' is a perplexing premise that inverts and forgets what government has already been guilty of for hundreds of years. That is, perhaps it is true that government cannot and will not make us equal, but the Court's racial history has clearly shown that government has time and time again made us unequal.

We have already analyzed in detail the many examples of the Court inventing, reproducing, and articulating various positions of racial significance that privileged Whites over nonwhites (e.g., *Dred Scott*, *Plessy*, *Sweatt*, *Korematsu*, etc.). As an officer of the Court, Justice Thomas is well aware of these cases and how they represent canonical examples of instances where the Court has perpetuated racial subordination. In affirmative action cases where Justice Thomas has authored his own concurring or dissenting opinions, he has routinely cited Justice Harlan's famous dissenting words in *Plessy*. Although Justice Harlan acknowledged the supremacy of the white race "in prestige, in achievements, in education, in wealth, and in power" (p. 559), he believed that

in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind and neither knows nor tolerates classes among citizens. (*Ibid.*)

Justice Harlan's famous words have been repeatedly referenced as a justification for a colorblind reading of the constitution and the outright rejection of race conscious affirmative action as a perversion of the law. However, in his repeated citation of Justice Harlan, Justice Thomas and other opponents of affirmative action have rarely ever mentioned that Justice Harlan's famous words came in a dissenting opinion, therefore it did nothing to change the material ramifications for Homer Plessy, who, along with all other non-whites, continued to be segregated and subordinated under Jim Crow laws. As a result, not only did the majority *Plessy* Court not agree with Justice Harlan's colorblind view of the constitution, the majority opinion legitimized a subordinating racial practice for nearly a hundred years. Clearly, rather than attempt to treat people as equals before the law, *Plessy* is only one in many examples where the law solidified the status of Whites and nonwhites as unequal. The fact that Justice Thomas and his supporters reject affirmative action policies by referencing a case that clearly made us unequal reveals the fallacy of colorblindness when it concerns racial equality. As a result, reflecting Justice Thomas' own words, the law will never make us equal if it does not atone for treating us unequally.

The process of judicial atonement has never come. In *Brown*, the Court reversed *Plessy*'s 'separate but equal' constitutional doctrine and desegregated schools. Similarly in *Loving*, the Court struck down one of the main pillars of whiteness by outlawing once and for all anti-miscegenation laws. But these canonical cases are not acts of atonement; they are merely admissions of wrongdoing. Atonement is to make whole what has been fragmented. Admissions of wrongdoing do not repair injury from harm. In the case of civil law and criminal law, justice is served not only by convictions or admissions of guilt, but by serving a sentence or paying a civil judgment as punishment or atonement for the harm done. The Court has never atoned or 'paid' a punishment for its past racial harms; in fact, it has collected interest on its wrongdoings. It has only begrudgingly admitted to embarrassing mistakes only to respond by constitutionalizing a colorblind racial discourse that commits new forms of racial subordination. Justice Thomas and opponents of race conscious affirmative action policies are skipping steps in the process of racial atonement, if indeed it is atonement that is their ultimate goal, which seems doubtful.

## CONCLUSION

Since *Brown*, the Court has at times shown a willingness to admit its past racial wrongdoings, but has done little to fix them. Of course, it is not up to the Court as an arm of the government to "make us equal", but surely the Court can do more in its role not to block and strike down legislative actions designed to make us a little less unequal. This is the most destructive role the Court has played concerning the disproportionate harm and affirmative action cases. The trajectory of the Court since *Brown* via its interpretation of constitutional equal protection and Title VII of the Civil Rights Act has perverted Justice Thomas' goal for the law to 'treat us as equals'. In reality, the bifurcation of race related equal protection claims has flipped Justice Thomas' initial standpoint that 'the law cannot make us equal' on its head. With the Court unwilling to advance its initial commitment toward racial atonement shown in *Griggs* and *UJO*, equality was off the table and any glimmer of hope for authentic affirmative action was essentially lost. As a result, it is not that 'the law cannot make us equal,' the Court has simply refused even to try. As a consequence of its refusal, there is no escaping the apparent permanence of racism (see Bell, 1992). The Court's structure of review offers unconditional protection and survival for all so-called 'race neutral' practices with no regard for the predictable

and foreseeable amount of disproportionate harm. On the other hand, race-based affirmative action policies are now automatically reviewed with strict scrutiny, the same standard of review that was supposed to be used, but which failed, during the Japanese American Internment of WWII.

This is where the Court's colorblind trajectory on racial disputes has taken us. Its methodology of judicial review views the disproportionate harm of death penalty sentencing with the same vigor as the national smoking age. Similarly, a university's attempt to diversify its student body is as serious as Congress and the President interning one hundred and twenty thousand Americans of Japanese ancestry without due process. This is the result of a fundamental perversion of clarity around race and subordination. Time and time again, the Court's colorblind tendencies have shown a willful rejection and dismissal of arguments from dissenting justices imploring the Court to recognize the effects of racial subordination. In this rejection, the Court as a whole continues to abide by a strict scrutiny constitutional standard that all but guarantees the perpetuity of racial subordination in society.

## Chapter 7: Conclusion and Commitments

### Race, Law, and Education: The Current State and What We Can Do About It

#### INTRODUCTION

*Fisher v. University of Texas at Austin* (2013) has yet to be legally settled and at the time of this writing, two more lawsuits have been filed against holistic admissions at Harvard and the University of North Carolina, at Chapel Hill. The Project on Fair Representation, a right-wing legal defense fund, is behind the *Fisher* case and the newly filed challenges. In *Fisher*, the alleged ‘victim’ of reverse-racism was a white student. The new Harvard and UNC cases strategically recruit Asian Americans as ‘victims’ of race positive holistic admission while establishing a tenuous racial alliance. The new lawsuits, on its face, appears to dramatically shift the anti-affirmative action narrative away from Whites and place the scrutinizing spotlight squarely on the efficacy of affirmative action projects because they argue that a sub-minority group is “harmed”. The responses from proponents of holistic admissions have been focused primarily on the centrality of the lawsuits’ argument. Critics argue that pinpointing Asian-American student achievement, as measured by GPA and test scores, is too narrow a focus in determining admissions to selective Universities (Park, 2015). Additionally, the suit also forgets the impact of legacy admits whose candidacy often times are buoyed anywhere from 20-50% depending on the relationship to a family alumnus of the University (Yang, 2014). However, the arguments highlighting the excellence in diversity and the varied processes in which universities make their admissions decisions become more and more repetitive.

These arguments have already been made. They were made in *Fisher* a few years ago (2012), and clearly laid out in *Bakke* some four decades ago (1978). These arguments seem to fall on intentionally deaf ears. No amount of reason, statistical data, or well-intentioned arguments in favor of affirmative action seems to derail the single-minded campaign and its goal of dismantling the apparatus of civil rights and anti-subordination legislation. This myopic project is product of the racial discourse that many scholars have called whiteness (see Gallagher, 1997; Haney López, 2007; Leonardo, 2009), and this latest attack on holistic admissions in the name of Asian Americans as the proxy victim of reverse-racism is an act of whiteness (Gillborn, 2005; Leonardo, 2007). This contemporary maneuver to dismantle the political and institutional apparatuses intended to ensure minority participation in public and civic life cannot be dismembered from the trajectory of previous historical attempts toward maintaining white privilege. To take up these anti-affirmative action cases without connecting them to past trajectories would foolishly accept the premise that racial subordination was eviscerated as a result of *Brown* and the Civil Rights legislation.

Education has been at the forefront of the Supreme Court’s conversations on race and public policy. The Harvard and UNC litigation, *Fisher*, *Parents Involved* (2007), *Grutter*, and *Gratz* (2003) have all pivoted around the institution of education from grade school to higher education. However, although race-based education policy has suffered the brunt of colorblind attacks, the concerted colorblind campaign against race-based considerations is not limited to education. Education is only one target in a multitude of public policy arenas currently targeted by the Project on Fair Representation and other political non-profits (PFR, 2015). Its collective goals are to roll back the enforcement mechanisms of Civil Rights legislation and prevent any possibility that equal protection can be adjudicated with an anti-subordination understanding.

The attack on education is merely a contemporary fulcrum, but not the only site of contestation against racial consideration in public policy. As a result, although we start with education, the institution of education must be located as part of an entire set of race positive public policies currently under attack.

## THE CURRENT (SAD) STATE OF EDUCATION

With *Brown*, The NAACP had crafted together four consolidated cases that addressed educational segregation as a broad American practice. However, as the concerted and prolonged push back from segregationists prevented any substantive desegregation of public schools, black students did not have any access to white schools until the late 1960's when the Court finally and forcibly mandated desegregation (See *Green*, 1968<sup>1</sup>). With the Court taking a much more active role in enforcing desegregation, the percentage of black students in majority white schools peaked in the 70's and 80's. With the peak of 44.5% of black students in majority white schools occurring in 1988, the upward trend from the mid 1960's to its peak in 1988 has since reversed. As Orfield and Frankenberg's (2014) report commemorating the 60<sup>th</sup> anniversary of the *Brown* decision showed, the peak of 44.5% of black students attending majority white schools has almost been cut in half to 23.2% by 2011. The 2011 percentage mirrors the percentage that existed in 1968 and the downward trend shows no signs of reversing. The report is unequivocal about one fact: 60 years after *Brown*, more than 75% of Black students in American public schools attend majority-minority schools.

As the U.S. becomes increasingly more than just Black and White with growing Asian and Latino American populations, the problem of segregation is creeping into the suburbs. Highlighting Orfield and Frankenberg's UCLA Civil Rights Project report, *USA Today* noted 'Latino students are significantly more segregated than Black students in suburbia' (p. 1). Quoting an education researcher on why segregation is still in place, the *USA Today* report writes:

John Rury, education professor at the University of Kansas, contends part of the reason for continued segregation is racial discrimination, but also the movement of more affluent families to school districts with better reputations and better resources. Those affluent families tend to be white or Asian, he said. (Lee, 2014, p. 1)

The article commemorates the 60<sup>th</sup> anniversary of *Brown* by pointing out that segregation continues to be widespread in American communities and public schools (see Massey and Denton, 1993). However, it is perplexing for the article to feature a blurb that believes the continued segregation of American public schools is due to anything other than racial discrimination. The sentiment falls in line with the colorblind discourse of what constitutes discrimination and racism (see Bonilla-Silva, 2003). As a result, the 'movement' of families seeking better-resourced and reputable districts are simply non-racial choices that somehow less

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<sup>1</sup> In *Green v. County School Board of New Kent County*, the Court ruled so-called "freedom of choice" plans unconstitutional and in violation of *Brown's* desegregation mandate. Under these plans, white and black families almost uniformly chose schools identified with their own race. Additionally, students were automatically assigned to the school previously attended unless they applied for a different school that was determined according to a state board. These provisions collectively maintained *de facto* racial segregation.



affluent families do not also make. John Roberts, the Court's current Chief Justice, has also made these claims. Roberts believes the movement of families according to residential 'choices' is a benign contribution to racial segregation, articulated in a majority opinion signed on by all of the Court's conservative justices (see *Parents Involved*, 2007).

### *White Flight as Non-racial?*

Better-resourced and reputable schools do not just exist in a vacuum. The existence of desirable and undesirable public schools is undeniably indebted to the Court. In the early 70's, as black students began to make headway into historically white-only schools, the Supreme Court ruled in two cases that any amount of income disparity and racial segregation *across* district lines did not violate equal protection. To the Court, as long as there were no official state policies of racial segregation and income discrimination, it would do nothing to prevent segregation by white flight. The combination of *San Antonio Independent School District v. Rodriguez* (1973) and *Milliken v. Bradley* (1974) construct a nationwide trend where income disparity and racial segregation are only problems if they happen intra-district.

In the *Rodriguez* case, a consortium of minority families from the Edgewood school district in San Antonio filed a suit charging that Texas' property tax school financing system violated equal protection. The suit alleged that because some districts were much more affluent than other minority-majority school districts, the availability of resources to school districts adversely discriminated against minority communities in districts with a much lower tax base. Edgewood families pointed to nearby Alamo Heights school district, where per pupil expenditure nearly doubled Edgewood's. During the years the case went through the legal system, the disparity actually increased from \$310 in 1968 to \$389 in 1972. Unequal resources produced predictable difficulties for Edgewood and equally predictable advantages for Alamo Heights. Compared with Alamo Heights, Edgewood could not hire sufficiently qualified personnel, suffered from disadvantages in physical facilities, supplies, equipment, and books. In comparison, Alamo Heights enjoyed advantages in classroom size, student to teacher ratio, student to counselor ratio, and a four times lower dropout rate of 8% to Edgewood's 32%.

Decided the following year after *Rodriguez*, *Milliken v. Bradley* hinged on whether or not segregation across district lines in Detroit violated *Brown v. Board of Education* (1954). Due in part to the Great Migration (Lemann, 1991), Detroit's black population increased dramatically. As thousands of African Americans migrated from the South to Detroit, they were systematically excluded from white neighborhoods via institutional methods of segregation such as residential redlining, or subjected to discriminatory practices such as threats of violence, bombings, arson, and mob attacks (Shogan & Craig, 1964; Massey & Denton, 1988). These are well known. By the early 1970's, many urban Detroit school districts had black super majorities while white communities expedited their flight out of urban areas into the suburbs. The NAACP brought suit against Michigan State officials, including its Governor, William Milliken. The suit alleged that although Detroit did not have an official policy of forced segregation a la *Plessy's* 'separate but equal' doctrine, the city had practiced other policies that led to *de facto* educational segregation, such as redlining. The lower courts agreed with the NAACP and ruled that all levels of government in Michigan were accountable for segregation in education and it was the state's responsibility to integrate the heavily segregated Detroit metropolitan area. The lower and district court's ruling was an encouraging sign for the NAACP's campaign to address continued

segregation in the post-*Brown* era. As a result of the decision, Detroit began a busing program of inter-district integration across all 53 districts.

Local and state governments were not satisfied with the court's desegregation mandate and appealed to the Supreme Court. Led by the same conservative majority a year prior in *Rodriguez*, the Supreme Court reversed the lower district court. It clarified the distinction between *de jure* and *de facto* educational segregation. In the majority's opinion, neither state nor local governments in Detroit practiced an explicit policy of forced segregation and therefore *Brown* was not applicable. The Court attributed the ongoing persistence of racial segregation in Detroit to arbitrarily drawn district lines. A remedy of forced busing to desegregate Detroit public schools would only be appropriate if it could be proven that district lines were drawn with 'racist intent' for the specific reason to segregate public schools. Of course, no such evidence was produced to prove 'racist intent.' The Court concluded that just because arbitrary district lines produced segregation, it did not mean district lines constitute a form of *de jure* segregation. The Court's opinion established the legal foundation for any amount of racial segregation to persist so long as it occurs across district lines absent evidence of racist intent. As a result of the *Milliken* decision, Detroit public schools reached a black super majority of 90% by 1987 (Sedler, 1987).

### *Cementing the Urban/Suburban Divide*

*Rodriguez* and *Milliken* collectively put a halt to any projects designed to address educational inequality and segregation across district lines. As a result, the specter of addressing education inequality and racial segregation was reduced to intra-district politics, made even more impossible and fruitless by systematic white flight out of urban metropolitan areas into the suburbs (James, 1989). In both cases, the same Court provided the legal foundation for continued segregation and inequality in post-*Brown* America. Even more destructive, its differentiation between *de jure* and *de facto* forms of segregation further relegated *Brown*'s relevance only to instances where explicit state policies of segregation were still practiced, turning *Brown* into nothing more than a passing fad a mere 20 years after its passage. Rury's sentiment in *USA Today* that more reputable and better-resourced schools are not products of racial discrimination comes as no surprise when we consider the impact of *Rodriguez* and *Milliken*. As a matter of legal discourse, both have effectively severed the conversation of inequality and segregation in public schools from any considerations of race. Here, the Court's bifurcated approach to "express" usages of race versus "race-neutral" policies that produce disparate impact maintained income inequality and racial segregation across district lines.

In its jurisprudence adjudicating the issues of unequal funding and segregation across district lines, the Court looked specifically at whether or not an expressed use of race was involved in the language or implementation of both cases. None could be found. Twenty years after the *Brown* decision, the only policies that had an express use of racial considerations were affirmative action policies designed to promote racial integration. Other than affirmative action cases, the last policy that utilized an express mention of race was the remaining anti-miscegenation law in Virginia during the 1960's (see *Loving v. Virginia*, 1967). Under the Court's evolved racial discourse post-*Brown*, Edgewood parents and the NAACP stood little to no chance before the Supreme Court. The legacy of the Court's posture toward racially disparate impact claims reaches far beyond the immediate consequence for Edgewood and Detroit. Because any amount of inequality and disparity was allowed as long as it happened across

district lines, the Court had cemented the permissible structure of racial inequality in public education throughout the Country. Even more damaging, the Court's judicial approach refusing to use strict scrutiny also meant that although these cases had racial consequences, the disputed policies were effectively treated as non-racial, where race was an effect rather than a cause. Therefore, similar to disputes in employment law and criminal law, the Court's decision followed the bifurcated trajectory of affirmative action and disparate impact claims. All affirmative action (i.e., express usages of race) would face strict scrutiny, whereas all disparate impact claims (i.e., facially race neutral) survive constitutional review.

## THE DIVERSITY RESPONSE

The Supreme Court plays an important role as an institutional referee who legitimizes our historical and contemporary racial discourse (Haney López, 2006). By legitimacy and recognition, I mean that the Court acts as a referee in selecting the legally acceptable discourse on race while also identifying those to be treated as faddish, passé, extreme or marginal. The Court's response also has the power to drive public policy according to its racial sensibility, or in its current trajectory, toward a colorblind sensibility *sans* race. The Court's posture and its continued trajectory of both striking down affirmative action policies while upholding disproportionately harmful "race neutral" practices has fundamentally changed the current climate in public policy. That is, policy makers must attempt to address racial subordination by paradoxically utilizing non-racial tactics. For example, some readily accept explanations of white flight for better reputed and resource schools as a product of personal choice (Lee, 2014). The "personal choice" explanation leaves little room to discuss the subordinating history of case law that paved the way for financially unequal schools across district lines. With the Court as a principal actor, we are now in a twilight zone of double talk full with dog whistle race politics both from both sides of the affirmative action debate. For conservatives, the discursive approach mirrors the posture of the conservative Court. The racial rhetoric appears to be post-racial (or even non-racial) even though material circumstances produce incredible racial disparity (Haney López, 2013). On the other hand, proponents of affirmative action and race positive policies must craft policy that is non-racial in appearance but racial in substance, amounting to discursive summersaults. These circumstances, thanks in large part to the colorblind Court, contribute to a public racial discourse that often makes no material sense and borders on absurdity.

### *The Proponents*

It is worth recognizing that in the face of increasing racial segregation in society, many American institutions of higher education affirmatively work to provide racial minorities and other traditionally disadvantaged groups greater access. As colorblindness turns the screw a half turn tighter, reputable institutions, like UC Berkeley, struggle to maintain their commitment to diversity. In California, Proposition 209's ratification, which strikes a blow to affirmative action, makes sticking the landing of diversity summersaults even more difficult. In undergraduate admissions, due to the passing of propositions or laws that all but prohibit the express use race in admissions policy, many states have adopted holistic admissions plans to maintain minority representation while adhering to colorblind mandates, or whiteness turned into a veritable law (Leonardo, 2013). These dynamics make holistic policies difficult to understand, let alone implement, as an admissions policy. The issue comes down to whether or not an

admissions policy intended to increase racial representation can really be non-racial. The short and simple answer is no. However, this confusion is not of any school's doing, but exists as a historically specific response to the Court's mandates on the permissible use of race in education policy since *Brown*.

- *Regents of the University of California v. Bakke* (1978): Affirmative action constitutional, class diversity is a compelling governmental interest. However, UC Davis cannot use a quota system. Race can be a factor, but cannot be a decisive factor.
- *Hopwood v. Texas* (1996): Four white students successfully challenged affirmative action at the University of Texas School. The Fifth circuit ruled the University may *not* use race as a factor in admissions. The University appealed to the Supreme Court but was denied review. *Hopwood* would later be abrogated with *Grutter* in 2003 as a Supreme Court case. As a result, for a period of seven years, affirmative action was banned in Louisiana, Mississippi, and Texas, the three states within the Fifth Circuits' jurisdiction.
- *Grutter v. Bollinger* (2003): Class diversity is a compelling governmental interests, thus usage of race is constitutional to achieve class diversity. But policy to achieve class diversity must be narrowly tailored and of last resort to survive strict scrutiny.
- *Gratz v. Bollinger* (2003): University of Michigan's point system awarding automatic points to racial minorities in undergraduate admissions ruled unconstitutional because point system is not narrowly tailored in accordance with strict scrutiny. By automatically awarding minority applicants 20 points, Michigan treated race as a decisive factor and violates Justice Powell's opinion in *Bakke*.

Together, this bundle of cases establishes the permissible usage of race in higher education policy. Schools are allowed to consider race in admissions policy, but cannot treat race as a decisive factor (e.g., given a fixed value). In accordance with *Bakke*, race can be considered as one factor among a number of salient factors. However, consistent with *Bakke*, race must be utilized to meet a university's desire for a diverse learning environment. The diverse learning environment has to be specific, such as the value of a diverse learning environment in a law school where students are exposed to a diversity of opinions that reflects the legal world. Finally, racial considerations must be of last resort and narrowly tailored for the specific purpose of achieving the benefits of a diverse learning environment. In other words, the Court allows for the usage of racial consideration when it is the only remaining option available to schools in the pursuit of racial diversity. If in some way schools can achieve racial diversity without racial considerations, the Court can be expected to strike down the usage of race.

Due to these legal mandates, many U.S. universities have widely adopted the practice of holistic admissions in the pursuit of racial diversity. In addition to class rank, academic background, SAT/ACT, essays, honors and awards, The University of Texas, for example, considers:

- Special accomplishments, work, and service both in and out of school
- Special circumstances that put the applicant's academic achievements into context, including his or her socioeconomic status, experience in a single parent home, family responsibilities, experience overcoming adversity, cultural background, *race and ethnicity*, the language spoken in the applicant's home, and other information in the

applicant's file (UTA, 2015, p. 1; italics mine) (no need to underline italics – they serve the same purpose)

In states where there are prohibitive bans on any usage of race (See California prop 209 and Michigan voting to ban affirmative action in 2006), holistic admission policies are still used while the express criterion of race or ethnicity is eliminated. However, express racial considerations are replaced by benign criteria that essentially substitute for racial considerations. The University of California's holistic admissions procedure, called comprehensive review, uses criteria such as (UC, 2015):

- Quality of a student's academic performance relative to the educational opportunities available in their high school.
- Location of a student's secondary school and residence (p. 1)

Together, these criteria read a lot like the UC is considering whether or not students attend under funded schools and/or whether or not their high schools are segregated due to residential segregation, issues exacerbated by the Court's previous intervention in *Rodriguez* and *Milliken*. As a nod to the legal climate that the UC must fashion its admissions policy, specific language states that "no pre-assigned weights" (i.e., points) are given to any criterion while considerations based on race and ethnicity are excluded. Except for the express mention of race, both holistic admissions policies at the University of Texas and the University of California are essentially the same. Even if the specific considerations do not match word for word, both Universities share the common goal of attaining a diverse student body for their campuses. The Court's confounding trajectory forces both schools to tweak its admissions policy for it to satisfy national and local law even though they engage in very similar tactics to achieve diversity. It is no wonder that Justice Ginsburg believes "those that candidly disclose their consideration of race are preferable to those that conceal it" (*Gratz*, p. 301, 2003). But in our current constitutional world set fort by the Court's decisions, it is the University of Texas, candid about its usage of race, which faces costly litigation whereas the University of California, which conceals its intentions through 'non-racial' considerations, escapes costly litigation.

### *The Antagonist*

In a quintessential example of dog whistle politics, the *Fisher* (2013) case features racial double-talk from opponents of racial preferences. Abigail Fisher's claim of victimhood from the UT's holistic admissions policy is a fallacy when looking at the admissions data (Hannah-Jones, 2013). In an all too similar tale of claims about reverse-racism (See *Bakke*), Fisher argued:

There were people in my class with lower grades who weren't in all the activities I was in, who were being accepted into UT, and the only other difference between us was the color of our skin. I was taught from the time I was a little girl that any kind of discrimination was wrong. And for an institution of higher learning to act this way makes no sense to me. What kind of example does it set for others? (From a YouTube video posted by Fisher' Attorney, Edward Blum, 2012).

This is a common talking point for the discourse of reverse-racism. It comes with two related assumptions. First, lesser-qualified minority students are admitted only because of their race. Second, more qualified white applicants are denied admissions because they are white. Looking closely at UT's admissions data for 2008, neither the talking point nor the two related assumptions have any basis in fact. For the 2008 admissions year, UT accepted 47 students with lower GPA and SAT scores than Fisher, of which 42 were White. In undermining the second assumption, 168 students with as good as or better GPA and SAT scores than Fisher were rejected; all were students of color. Students of color with similar or better SAT and GPA were not the only ones rejected. Other white students with better scores than Fisher were also denied admission. However, the story of admissions remains the same. As was the case in *Bakke*, GPA, SAT, or MCAT scores do not make up the totality of the admissions criteria.

Fisher and a host of other conservative organizations that filed Amicus Briefs encouraged the UT and all of its sister campuses to abandon its holistic admissions criteria in favor of a strict merit-based standard, or expand its current Top-Ten Percent program. Enacted in 1997, the Top-Ten admissions program guaranteed admission to any UT institution if a student finished in the top-ten percent of their high school class. For instance, various<sup>1</sup> libertarian and conservative foundations advocated for the "race-neutral" Top-Ten Percent program as preferable to the "constitutionally suspect" race-positive holistic admissions program (Brief *Amicus Curiae*, 2011). For all students admitted in 2008 at UT, the Top-Ten admissions program accounted for 92% of admitted students. Therefore, the race-positive holistic program only accounted for 8%. Conservative justices sided with Fisher, arguing the university should get rid of holistic admissions altogether since it only accounted for 8%. The argument believed, rightly, that if Texas wanted a diverse, critical mass of students, a significant percentage would come from the Top-Ten program, not holistic admissions. This argument is correct, since statistically, even if 100% of admitted students from holistic admissions were students of color (they were not), it would only make up 8% of admitted students in 2008.

However, Fisher and her proponents never care to mention why the Top-Ten percent produces diversity. In her dissent, Justice Ruth Bader Ginsburg (*Fisher*, 2013) provides a stinging, yet appropriate, criticism of the Court's conservatives, Fisher, and her proponents. Referring to Fisher's advocacy of so-called race-blind merit review and Texas' Top-Ten Percent program, Justice Ginsburg quipped that "only an ostrich could regard the supposedly neutral alternatives as race unconscious" (p. 2433). Justice Ginsburg refers to the House Research Organization Bill Analysis of the Top-Ten percent program from the Texas legislature:

Many regions of the state, school districts, and high schools in Texas are still predominantly composed of people from a single racial or ethnic group. Because of the persistence of this segregation, admitting the top 10 percent of all high school students would provide a diverse population and ensure that a large, well qualified pool of minority students was admitted to Texas Universities. (*Ibid*)

Clearly, race consciousness drives the Top-Ten percent plan, not race blindness. It is only appropriate that Justice Ginsburg quipped that only an ostrich with its head in the sand can believe that a plan explicitly designed to produce racial diversity is in any way not race-

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<sup>1</sup> These organizations and foundations are: Pacific Legal Foundation, The American Civil Rights Institute, The Center for Equal Opportunity, Individual Rights Foundation, Reason Foundation, Project 21, and The National Association of Scholars.

conscious. But here is where the nature of colorblindness reveals itself. First, conservatives and Fisher reject any consideration of race in admissions processes. Second, in rejecting race positive practices, so-called “race neutral” alternatives like Texas’ Top-Ten program are favored. But clearly, the Texas legislature confirms that race is a fundamental component that allows the Top-Ten program to produce “a diverse population and ensure that a large well-qualified pool of minority students was admitted to Texas Universities” (*Ibid*). If conservatives and Justices are at all principled and committed to their rejection of race positive admissions policies, Texas’ Top Ten Percent should get the most constitutional scrutiny and rejection, not holistic admissions. The reason is rather simple and a basic exercise in arithmetic. Holistic admissions accounted for only 8% of admitted students in 2008, whereas 92% came from Top-Ten Percent. It is clear that race is a central factor in the Top-Ten percent program, but in holistic admissions, race is only one factor among other factors.

*Who are the ‘victims’ of race positive policies?*

Fisher’s reverse discrimination claim and its inability to hold up against empirical scrutiny should not be surprising. Occurring nearly forty years before *Fisher*, Allan Bakke (*Regents of the University of California v. Bakke*, 1978) similarly claimed victimhood due to the medical school’s affirmative action quota system. Upon empirical scrutiny, not only did Bakke have higher GPA and MCAT scores than admitted minority students, he fared better than most of the admitted white students. Ageism aside, Bakke should have been admitted because he was a top candidate regardless of the school’s quota system (Liu, 2002). However, in the same way that Texas’ holistic admission policy takes into account a multitude of factors in determining admissions, UC Davis’ medical school similarly accounted for factors beyond the MCAT and GPA scores. Discussed in greater detail in the preceding chapter, Bakke had two factors that negatively affected his candidacy: his advanced age as a 33 year old and a poor interview evaluation. Interviewers evaluated Bakke as someone who was combative, opinionated, and not open-minded towards different perspectives. Surely, these are not the characteristics that bode well for a potential physician. Nevertheless, despite careful scrutiny that revealed race had little to do with Bakke’s rejection to the medical school, the *Bakke* court nevertheless accepted his reverse-discrimination claim in the same way that a lack of empirical evidence did little to dissuade the *Fisher* Court.

This presents a peculiar problem because conservatives and colorblind adherents must find a victim of “discrimination”. Although Whites claim “reverse-racism”, careful analysis reveals white victimhood to be a red herring playing off a possessive investment in white privilege (see Lipsitz, 1998) and xenophobic fears of impending minority competition (see Liu, 2002b). Missing any real white victims of subordination, conservatives revert to a tried and true method of painting minority students as the unintended yet “real” victims of race positive admissions policy, exposing the splendor of its paternalistic attitude towards students of color. Referencing Thernstrom & Thernstrom (1999), Justice Thomas uses research data to show that an achievement gap persists between students of color and their white and Asian American counterparts at elite universities because so-called “under-qualified” students (read: African Americans and Latinos) are not prepared to handle highly competitive academic environments. To bolster his claim, Justice Thomas refers to Sanders and Taylor’s (2012) mismatch theory, whose advocates believe minority students will be better served if they attend less competitive schools where they are in environments that better suit or match their educational “abilities” (cf.

Bloom, 1987, at the height of the “cultural wars”). Finally, conservatives believe the ultimate harm for minority students is that they wear a badge of inferiority at elite schools, since minority students have no idea whether or not their admissions is based entirely on their ‘race neutral’ qualifications like SAT or GPA, or if race played a role in their admissions (*Fisher*, p. 2432).

The achievement gap, mismatch theory, and badge of inferiority line of arguments presumes that by getting rid of racial considerations, so-called merit based GPA and SAT admissions criteria have nothing to do with race. This assumption is wishful thinking. If a school like UT were only to make admissions considerations based on GPA, does it then regard all GPA scores equally? This would be impossible when the Texas legislature clearly admits that a majority of its schools are severely segregated based on race. Therefore, if the quality of education at white majority schools is the same as that found in minority majority schools, we would never have the problem of white school districts taking so-called district hoppers to court. For instance, there have been numerous examples of white majority school districts litigating against those they accuse of “stealing” an education via district hopping (Ramirez, 2009). Even Justice Thomas has criticized allegedly merit-based tests like the LSAT because they are measures influenced by factors such as wealth, educational access, and cultural capital (See *Grutter*, Thomas Dissent Part V). These factors have been shown again and again to be racial along the lines of segregation, discrimination, and disparity (See Roscigno & Ainsworth-Darnell, 1999; Lareau, 2000; Solorzano, et al, 2005).

Against this backdrop of colorblind repertoire, the Project for Fair Representation’s suit against Harvard and UNC at Chapel Hill has the potential to dramatically shift the affirmative action narrative. Locating high achieving Asian Americans who are “unfairly” rejected by Harvard and UNC Chapel Hill, the suit alleges the schools’ holistic admission policies amounts to a campaign of “invidious discrimination by strictly limiting the number of Asian Americans it will admit each year and by engaging in racial balancing year after year” (PFR, 2015). Specifically in the lawsuit against UNC Chapel Hill, the Project for Fair Representation opportunistically takes advantage of an *Amicus Curiae* brief previously filled by UNC in the *Fisher* case. In the brief, UNC hinted that the school could maintain and potentially increase racial diversity through ‘race-neutral’ means if the Court were to end race-based admissions policies. However, UNC argued this was an undesirable alternative because race-neutral policies like a top-ten percent program would limit the type of students it can admit. These cases have the potential to eliminate all racial considerations from education policy. If the Supreme Court hears these cases and rules that so-called ‘race-neutral’ policies can achieve the same amount of numerical diversity as race-positive admissions, the Court will surely ban all race positive admissions because strict scrutiny demands schools use racial considerations as a last resort.

The UNC Chapel Hill and Harvard campaign on behalf of Asian Americans is hardly about Asian Americans. Indeed, these cases are the first of its kind brought on behalf of Asian Americans against race positive public policy. However, these cases are by no means unique concerning Asian Americans being used as a wedge against other racial minorities. Kim’s (1999) influential racial triangulation theory chronicles several historical epochs where Asian Americans have been ostracized while also utilized as a ‘model minority’ to subordinate other racial minorities. Additionally, Kim argues Asian Americans are also simultaneously used to protect the racial privileges of Whites against claims of structural subordination. Particularly, Kim’s identification of the second wave of ‘model minority’ victimizing started under Reagan applies to the UNC and Harvard legal battle. These legal battles fall lock step in line with



vigorous 80's era conservative campaigns to eliminate all vestiges of Civil Rights and affirmative action programs in public policy.

Additionally, the 'model minority' trope not only disciplines other racial minorities, it fundamentally also subordinates Asian Americans as perpetually foreign. For instance, in his book extolling the virtues of so-called 'Confucian-Americans', Harrison (1992) argues that Asian Americans "have imparted pro-work, pro-education, pro-merit values to the melting pot at a time when those values are much in need of revival" (p. 149). Interestingly, Harrison's attempted valorization of Asian American values for America's melting pot, values of civic participation and citizenship are absent for Asian Americans. Kim's (1990) significant work chronicling the history of Asian American racial positioning as middlemen suggests not an intrinsic cultural value system that Harrison promotes, but confirms Sue and Okazaki's (1990) concept of "relative functionalism" in that Asian Americans perceive and experience restrictions in upward mobility in areas unrelated to education. As a result, gravitating towards and holding onto the promise of education is the only acceptable choice for Asian Americans in search of social mobility. In short, Asian American educational ascendancy is less about culture, let alone cultural superiority, and equally about responses to structure.

### A POST-RACIAL AMERICA OR WHITENESS RISING?

The Project on Fair Representation "is designed to support litigation that challenges racial and ethnic classification and preferences in state and federal courts" (PFR, 2015). The Project's goal is not only to eliminate racial considerations from educational policy, but *all* governmental policies. The Project is quite specific about its goals. On the front page of its website, its mission is clear: "the mission...to challenge government distinctions and preferences made on the basis of race and ethnicity" (*Ibid.*). The Project identifies four arenas where it will work to influence jurisprudence, public policy, and public attitudes:

1. Voting: Reforming those provisions of the Voting Rights Act and other laws that encourage and mandate the creation of racially gerrymandered voting districts.
2. Education: Ending the use of race-based affirmative action in college admissions and k-12 student assignments, as well as racial considerations in awarding scholarships, fellowships, and academic enrichment programs.
3. Contracting: Challenging the courts' municipal, state, and federal programs that award fixed percentages of contracts to individuals and firms based upon race, gender, and ethnicity.
4. Employment: Representing individuals who have been victims of racial discrimination in hiring, firing, and promotion.

If the Project on Fair Representation existed during the Jim Crow era, the likes of Homer Plessy (1896), Takao Ozawa (1922), Bhagat Singh Thinh (1923), and Herman Sweatt (1950) would have benefited greatly from its resources and mission. Because of their status as racial minorities, all of these men suffered from discrimination in areas of education, civil society, and land ownership. In every instance, the Supreme Court sanctioned their racial subordination. Additionally, as lead counselor for the NAACP during the consolidated *Brown v. Board of Education* case, Thurgood Marshall would surely accept the Project's mission to eliminate racial distinctions in the areas of voting, education, contracting, and employment in public policy. In

the *Brown* case, Marshall demanded the Courts not only find that segregation was unconstitutional, but also as a form of relief, to order schools to desegregate immediately. With the hindsight of history, we know the political nature of the Court and the resulting political pushback all but stunted the integrative promise of *Brown* (see *Brown II*, Prince Edward county). Nevertheless, Marshall's demand to end immediately practices of racial distinction in education is akin to the Project on Fair Representation's current demand for the Court to end race positive considerations in education and other areas of public policy. In fact, conservative Justices (e.g., Thomas) routinely cite *Brown* as a justification to reject current regimes of race positive considerations. Conservatives reject proponents of affirmative action by equating them with Jim Crow segregation alleging that both wish to use race in educational policy (see *Parents Involved, Fisher*).

Are Edward Blum and the Project for Fair Representation continuing to wave the flag of the NAACP, which flew during the Civil Rights Era? Conservatives and those who oppose race positive policy considerations indeed think so, as they routinely utilize the famous words of the most prominent figure from the Civil Rights Era, Dr. Martin Luther King Jr. However, criticisms that colorblind conservatives gratuitously quote Dr. King equally apply here when the Project on Fair Representation attempts to associate itself with *Brown's* legacy. Both pick and choose appropriate moments of importance while purposely refusing to acknowledge the nature of systematic and structural racial subordination. In other words, conservatives who claim to carry the flag of the Civil Rights Era and *Brown's* legacy are able to sever the subordinating practices of race from the use of race in order to track social inequality. Colorblind adherents today claim that race positive policies and systematic segregation during Jim Crow are one and the same because they both utilize a classifying mechanism to identify different people based on race. Or to repeat Justice Roberts, they both discriminate based on race. But the similarities end there. It is this strategic end where the campaign against race positive policies masks itself as a "post-racial" campaign while maintaining race as a classifying concept in policy and practice. By attempting to sever the subordinating elements of race and only talk about race in terms of classification, the "post-racial" campaign reveals itself as a discourse of whiteness and white privilege.

### *White Privilege via Post-Race Discourse*

When McIntosh (1988) opened the invisible knapsack of white privilege, it represented a fascinating take on the taken-for-granted privileges and advantages that are practiced and enjoyed by Whites (cf., Bonilla-Silva, 2003). Building off the momentum created by critically engaging with white privilege and whiteness in the colorblind era, multiple interventions have identified the ways that race advantage continues to manifest in the colorblind era (Harris, 1995; Brown & Carnoy, et al., 2003; Bonilla-Silva, 2003;). Particularly, Leonardo (2009) argues that one cannot talk about white privilege without identifying the structures of white supremacy that make white privilege possible. In other words, white privilege, or a state of being, owes itself to a structure that recognizes and sanctions it. In the colorblind era, white supremacy goes beyond the KKK, racial riots, lynching, *de jure* segregated schools, or segregation. In the colorblind era whiteness manifests itself through institutions, the political process, and the ways that racial privilege is woven through the various participatory and subject-making avenues of political and social life. In short, white privilege is structured into common sense. Omi and Winant (1986) suggest:

The meaning of race is defined and contested throughout society, in both collective action and personal practice. In the process, racial categories themselves are formed, transformed, destroyed, and re-formed. We use the term racial formation to refer to the process by which social, economic, and political forces determine the content and importance of racial categories, and by which they are in turn shaped by racial meanings. Crucial to this formulation is the treatment of race as a *central axis* of social relations which cannot be subsumed under or reduced to some broader category or conception. (p. 61; italics in original)

Although Omi and Winant were not specifically talking of whiteness in their description of racial formations, Gallagher (1997) identifies a white racial formation (see also, Leonardo, 2007), a practice of white racial identity based off both past and *future* formations. Gallagher argues past and future white racial formations are dependent on the political, social, and institutional engagement of other racial groups in the public arena and the perceived threat of material deprivation as a product of a diversified public arena. The focus on the future continuation of white privilege is perhaps the most important and perhaps sheds light on the costly and enduring campaign against race-positive policies. Liu (2002) has called the threat felt by Whites in race positive college admissions as a white anxiety against impending minority competition, and the perceived threat that racial minorities receive an advantage via race positive admissions. Here, Lipsitz's (1998) contribution in identifying the possessive investment of whiteness is germane. As an identity politics with material and structural consequences, white interests are observed by investing valuable resources and time via the political process with the hope of a return in investment in the form of 'colorblind' admissions policies that ultimately benefit Whites. Whites are the biggest users of the so-called "race card."

The campaign against race positive considerations in public policy is not just about the simplistic goal of removing racial considerations from governmental policy. Removing race positive considerations in public policy in our current racial climate would, in Lipsitz's words, widen "the gap between the resources available to Whites and those available to aggrieved racial communities" (p. 74). This is what Lipsitz calls the possessive investment in whiteness. Beyond Bakke, Grutter, Gratz, Fisher, or any yet to be identified Asian American students claiming victimhood for failing to be admitted into the schools of their choice, the anti-affirmative action campaign is fundamentally about maintaining white spaces and guaranteeing that whiteness and its ability to recruit allies sustain privilege across various institutions. When universities utilize race positive admissions, the educational return in investment for whiteness loses value because race positive policy ameliorates racism. White privilege is the ability to attend white majority schools funded by advantageous tax laws like California's Proposition 13, exacerbated by residential segregation. This racial privilege is further enhanced when college admissions standards do not recognize the inherent inequality of under-resourced and segregated schools. As the majority of Whites increasingly attend white majority schools (Orfield & Frankenberg, 2014), particularly in the suburbs, a legal standard that forbids all institutions of higher education from considering racial inequality not only rewards Whites, but legitimizes segregation under the banner of a "colorblind" and "race-less" social discourse.

The only thing "blind" about the colorblind racial discourse is that it no longer cares (has it ever?) for a Civil Rights racial discourse that focused on classification *and* subordination. Like

neoliberalism in economics, which restores class power in the hands of the bourgeoisie (see Harvey, 2005), colorblindness in the law represents the white gambit to restore race power (see Leonardo and Tran, 2013). Whereas it shows at best an indifference to issues of subordination and structural racism, at worst, colorblindness shows a downright disdain for any mentions of race, believing that racism will go away when the U.S. stops talking about race. Colorblindness champions a race-less individualism. In this way, achievement and access to desirable privileges in life are allegedly earned and accrued through hard work and stick-to-it-ness. But Harris (1995) has portrayed that these white privileges do not simply drop out of the sky only to be picked up by the fittest, or in the case of education, the children of the fittest (Leonardo, 2015). As Leonardo (2004) has recounted, it is akin to someone walking down the street while random and unidentified persons repeatedly place money in their pockets. In the end, this person enjoys the newly acquired cash and believes that his industry of walking down the road is responsible for the newly accrued money. In the same scenario, minorities can exercise the same industry and effort in walking down the street while having their pockets picked by whiteness. This is an appropriate illustration depicting the current state of racial accumulation and its mystification, helped along by the continued judicial assault on affirmative action education policy.

If we only focus on the end and inspect who has the most accolades in order to reward privileges (e.g. college admissions), the privileged will perpetually be rewarded. However, if we not only inspect the end product but also observe the entire process of how candidates accumulate their accolades, our ideas around meritocracy will have to change as a response to the arbitrary and discriminate manner in which resources and opportunities are distributed. In fact, Leonardo argues that not only are Whites advantaged, minorities often times have their precious few resources taken away in the form of new policies, laws, and practices. Observed in this study, the Supreme Court has played a discriminatory and arbitrary role in awarding privileges to Whites at the expense of minorities. In conjunction, the Court has also acted as an impenetrable safety net sanctioning white privilege by prohibiting any substantive attempts at racial redress. In this way, not only is our minority pedestrian unable to accrue any amount of money in comparison to his counterpart who enjoys institutional white privilege, he is dismissed at the end when she points out that her fellow white pedestrian enjoyed privileges along the way, no thanks to his own industry. As simplistic as this allegoric exercise is, it is unfortunately not far from describing the current state of affair in race, law, and education.

### *Whiteness Rising: An Assist from the Court*

Before we can consider the appropriate educational response, it is imperative to grasp fully the current legal climate for race positive educational and public policies. In education, the prospects are not promising for race positive holistic admissions. Despite failing to overturn diversity as a compelling governmental interest in *Grutter* (2003), the *Fisher* Court reaffirmed its standard of strict scrutiny pertaining to race-based cases. Historically, strict scrutiny has been fatal to race positive policies (see *Adarand*, *Croson*, *Gratz*, *Parents Involved*). Additionally, if the *Fisher* Court finds that UT and other institutions can achieve diversity with alleged ‘colorblind’ alternatives such as automatic High School percentage plans, it then goes to reason that the Court will strike down the constitutionality of race positive considerations. Every year, Texas’ top ten admissions plan already accounts for anywhere from 80-90% of its admissions class. As a result, the Court will likely treat this percentage as sufficient to achieve diversity. The Court is already in possession of *Amicus Curiae* briefs (UNC Chapel Hill in *Fisher*)

attesting to the ability of universities to continue the goal of diversification under ‘race neutral’ means in the event that race positive holistic admissions is shut down. Collectively, these circumstances will likely spell doom for UT and racial considerations in undergraduate admissions in general.

True to the mission statement of the Project on Fair Representation, education policy is not the only area of public policy being attacked. In the 70’s, the Court ruled in several cases that disproportionate harm does not automatically equate to an act of intentional discrimination (see *Davis & Feeney*). As a result, the Court allowed many ‘race-neutral’ policy practices to continue despite persistent disparate impact to minorities. Today, the Court has gone even further to ensure that policy practices that produce disparate impacts will face no legal threat. In *Ricci v. DeStefano* (2009), the Court ruled the city of New Haven could not invalidate and therefore must reinstate a civil service examination even though the test disproportionately impacted minorities. Originally, New Haven elected not to utilize the civil service test out of concern that disproportionate litigation could be brought due to the test results. One hundred eighteen New Haven firefighters took the promotion exam for fifteen captain and lieutenant positions. Out of 118 firefighters, 50 were minorities. From the 50 minority firefighters, only two had scores that qualified them for promotion. The case exemplifies the viciousness of whiteness, what Leonardo (2013) calls the “production of meanness” (cf., Bell, 2005). The Court revealed its indifference toward disparate impact against minorities. The *Ricci* Court ordered New Haven to reinstitute its examination against the wishes of city officials.

Voting rights and housing policies are also under attack. In another 5-4 vote (*Shelby County v. Holder*, 2013), the conservative majority all but guts the important Voting Rights Act of 1965. The Court invalidated two of the most important sections of the Voting Rights Act:

1. Section 5: Requires that certain state and local governments must obtain federal preclearance before implementing any changes to their voting practices and laws.
2. Section 4(b): Contains formula of preclearance determination of which voting jurisdictions are subjected to the preclearance requirement based on their histories of discrimination in the voting process.

The elimination of these two provisions effectively allows jurisdictions carte blanche to gerrymander and implement voting laws according to their politics. Shortly after the Court’s announcement, the state of Texas immediately implemented a previously blocked voter identification law (Liptak, 2013). In addition, Texas proclaimed that redistricting maps would no longer require voter approval in accordance to the new decision. The Voting Rights Act is not the only 60’s era Civil Rights legislation that may be gutted by the Court. The Court is also considering whether or not “disparate impact” can continue as justifiable evidence for federal lawsuits against lenders and housing authorities under the Fair Housing Act of 1968. Historically, disparate impact has been the *modus operandi* for plaintiffs under the FHA and did not require evidence of purposeful discrimination. Now, the Court could move toward demanding proof of malicious intent, in line with other disparate impact claims. As an ominous forecast, it is unlikely Justices will grant review to disputes just to maintain the status quo of current practices. In other words, future housing discrimination claims will be required to show intentional racial discrimination for disparate impact under the FHA of 1968.

Taken together, these recent changes in the Court signal a concerted effort not only to preclude future race related litigation, but also to challenge Civil Rights Legislation. It is not enough only to say that race positive policies are being stunted from future implementations. Rather, the future vitality of race positive policies is being wiped out while incremental Civil Rights advances are systematically drawn back. In this climate, disparate impact to minorities in and beyond education will continue to increase without fear of litigation. As Leonardo (2007) highlighted, the colorblind discourse of whiteness within No Child Left Behind Act amounts to an act of whiteness. Likewise, the Court's current trajectory in gutting any and all regimes of racial consideration is similarly an instantiation of the strident march toward whiteness. In this way, the conservative colorblind Court should be added to McIntosh's (1988) invisible knapsack of white privilege. The Court has systematically guaranteed the possessive investment of whiteness in areas of education, employment, and housing.

### THE RESPONSE STARTS WITH EDUCATION

Notwithstanding a final decision in *Fisher* or the impending verdicts in the Harvard and UNC Chapel Hill cases, we should also be engaged in ways proponents of race positive policies can get out from under the Court's legal trajectory. Education must continue to emphasize the significance of race in educational policy, governance, practice, and results. It is by no coincidence that as the Court's colorblind trajectory continues to make a mockery out of the relationship between racial subordination and its so-called colorblind jurisprudence, education continues to face difficulty trying to address racial problems via 'race-neutral' policies. The fundamental problem lies in whether or not the Court and various neoliberal educational forces truly desire to confront racial problems. With the Court's history as an indicator, the answer is an unequivocal no. Not only is the Court negligent, or squeamish at best, in addressing the issues of race, it participates in prolonging racial subordination, a reality much worse that just simply not doing anything about it.

Our colorblind era is not post or *sans* race. It is the next installment, chapter, phase, or as Omi and Winant (2014) would argue, the next formation in the long and unfortunate history of racial subordination in the U.S. During the slave era, the institution of slavery, colonialism, the slave trade, state-sponsored violence, and dehumanization of transplanted African bodies contributed to the discourse of white superiority and black inferiority. As a result of the changing landscape in acceptability of racial practices after the Civil War and constitutional amendments during Reconstruction, racial practices shifted dramatically toward segregation between Blacks and Whites in accordance with *Plessy's* 'separate but equal' legal doctrine. *Brown*, the Civil Rights Era, and the tense geopolitical climate of the Cold war (see Bell, 2004 & discussion on interests convergence) enveloped what were becoming increasingly outdated racial practices in the U.S. In response to these national and geo-political developments, the U.S. again shifted its racial discourse away from 'separate but equal' toward a colorblind model of 'race-neutral' governance. As a consequence, our colorblind era has witnessed ample examples of institutions, forces, and political movements that have utilized so-called 'race-neutral' mechanisms to advance racial subordination.

Orfield and Frankenberg's (2014) report measures the improvements and retreats in school reform, and forecasts the long road ahead for racial equality for integration in U.S. public schools. Progress was clear during the 70's and early 80's, which produced the highest ratio of integrated schools. This was an advance in comparison to the 10 years immediately after *Brown*

*II* where schools were slow to integrate due to large and wide-ranging white campaigns against desegregation. The rate of integration in the decade following the *Brown* decision was modest at best. The progress witnessed in the 80's has nearly been cut down to half and the downward trend shows little signs of abating. The long road ahead is dependent on a collective commitment to reverse the troubling downward spiral of (re)segregation. The road toward increased integration does not need to be paved anew, but renewed with the hard fought commitments established previously by activists and scholars during *Brown* and the Civil Rights era.

The clichéd undertaking of race as a social construction is repeated often in public discussions on race. The problem does not revolve specifically around the number of times this particular undertaking of race is mentioned, but because it is often done without critically considering for what purpose race socially is constructed. The early legal activists (e.g., Delgado, Bell, Matsuda, Harris) exposed Civil Rights era legal practices that continued to subordinate racial minorities. CRT scholars did not simplistically understand race as a concept of classification, but as an entire discursive regime of difference utilized to distribute resources. Their work radically implicated the law and its governing apparatuses as a conspirator in social and institutional processes of subordination based on the concept of race. Hence, not only did CRT fundamentally identify that America had a race problem, but that the current climate of supposed legal progress spurned by *Brown* and the Civil Rights Era did little to confront directly issues that contributed to racial inequality.

Today, America's race problem continues to be ignored. The pink elephant in the room has become the woolly mammoth. The Civil Rights era fought tooth and nail for incremental progress in areas of education, employment, criminal justice, and housing. However, these incremental positive changes are being rolled back by a colorblind jurisprudence hell bent on eliminating the modest built-in mechanisms of racial protection gained from the Civil Rights Era. The institution of education is currently on the front lines and taking the heaviest blows. As the Court continues to chip away at the permissible use of race in education policy and governance, democratic educational institutions are struggling to adjust their policies, forced at times to craft the kernel of racial arguments within the shell of race neutral logics. Schools must both meet their desire to diversify while also remain legally palatable to outside forces who are all too eager to pursue costly litigation as an oversight mechanism. However, we must take a step back from this tit-for-tat game of policy practice and governance oversight. Education's current trajectory of using 'race-less' or quasi-race positive holistic admissions while having to simultaneously remain 'colorblind,' is in no way the most effective strategy dealing with persistent segregation in education. Education cannot effectively take up America's race problem when the Supreme Court and other governing apparatuses forbid education from recognizing the significance and continuing salience of racial subordination in the first place.

Pioneering research on race and education has identified many facets such as curriculum, teacher workforce, resources, and cultural capital that require careful attention toward the ways in which these issues may singularly or collectively compound racial disparities in education. In our current historical conjuncture when colorblind sensibilities are hegemonic, it is time educational research turns its critical eye toward the law. The legal institution, as represented by the Supreme Court and its Justices, must be stripped of its veneer of impartiality and supposed objectivity. Specifically, the conservative wing's church of 'originalism' must be tackled and laid bare in educational discourse as nothing more than a mechanism that advances racial subordination.

## A REFRESHING YET SOBERING REMINDER OF WHERE WE ARE

Not all is lost with the Supreme Court. Nearly all the contentious race related cases have been decided by a slim a 5-4 vote. Although many cases have been decided against the interests of integration and equality, every case has nevertheless been one vote shy of having a completely different outcome. It is almost unfathomable to imagine how U.S. society and public education would look today if many of the adjudicated racial issues since *Brown* were instead decided with a tendential balance against racial subordination and colorblindness. As much as conservative justices are lampooned for their incompetence in meaningfully addressing racial issues, liberal justices should in the same breadth be celebrated for fully comprehending the seriousness of ongoing racial problems. Since *Brown*, every era has had its Civil Rights lion on the Supreme Court who continues the drumbeat for integration and equality. Thurgood Marshall's near quarter of a century on the Court epitomized his own predictions immediately after *Brown* that the battle for meaningful integration had only begun. Time and time again, Marshall's opinions demanded the Court to tackle the insidiousness of racial subordination. Unfortunately, many of these inspiring opinions were legally powerless dissenting opinions. Two years after Justice Marshall's retirement, Ruth Bader Ginsburg assumed the mantle of being the Court's Civil Rights champion. Justice Ginsburg's opinions have been equally inspiring and valuable in reminding the Court of the continued invidiousness of racial subordination in society, the most recent example being her stinging dissent in the *Fisher* (2013) decision. Advanced in age, Justice Ginsburg will soon likely retire. Fortunately, it appears her successor is already on the Court in the form of Justice Sonia Sotomayor.

### *When the Court Truly Understood Race*

*Brown* is popularly remembered as one of the most significant race cases, but it is also infamous for allowing prolonged resistance to desegregation via *Brown II*. In terms of a Supreme Court case that meaningfully understands the nature of race and racial subordination in a majority opinion, perhaps no case achieves these elements quite like *Hernandez v. State of Texas* (1954). Decided earlier, but in the same year as *Brown*, *Hernandez* hinged on whether or not a history of systematic exclusion of Mexican Americans from serving in juries violates equal protection for Mexican American defendants when they are only judged by their white "peers." Pete Hernandez was convicted of murder and sentenced to life in prison. His legal team did not appeal the murder conviction, but alleged equal protection violation on the basis that the convicting jury was all White. All white juries in Texas was a product of systematic exclusions of Mexican Americans. This was not unique in Texas and Jackson County, the site of the trial. Both sides acknowledged that no Mexican American or persons with Latino last names had served on a jury for 25 years, a time span that totaled more than six thousand jury members in a county with a 15 percent Mexican American population. As Haney López (2004) points out, the case is unique because *Hernandez* is not expressly a race case. This is because both sides acknowledged Mexican Americans were legally considered as 'White' in the state of Texas. Texas simply argued no equal protection violation exists because since Mexican Americans were widely considered White (i.e., not Black), Mexican Americans were not racially, systematically excluded from participating in juries. In response, Hernandez's team argued that even though



the state of Texas considered Mexican Americans as White, they were subordinated as a distinct sub-class of White.

Chief Justice Earl Warren was faced with a tricky case alleging systematic discrimination and exclusion even though both parties agreed that Mexican Americans were White. In other words, *Hernandez* was not expressly a case about race as both sides acceded to the simplistic notion that race was a black and white issue. However, Warren was not persuaded by an understanding of discrimination and exclusion based solely on race or color but instead asked whether or not a class of people was subordinated. Warren's emphasis focusing on group subordination as the basis for determining whether or not certain groups require constitutional protection is worth repeating in full. Warren wrote for the unanimous court:

Throughout our history, differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. *But community prejudices are not static, and, from time to time, other differences from the community norm may define other groups which need the same protection.* Whether such a group exists within a community is a question in fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for difference treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. (*Hernandez*, p. 478; italics mine)

Whether or not the Warren Court knew, it was expressing a profound understanding that race is based on community norms and practices and whether or not these social practices subordinate groups based upon ideas of differences. To determine if Mexican Americans in Jackson County were indeed treated as a subordinated class, the Court simply looked at social practices that clearly distinguished Whites from Mexican Americans. The Court noted that in education, Mexican Americans were segregated up until the fourth grade. Restaurants in town prominently displayed signs that read "No Mexicans Served" or "We Serve Whites Only, No Spanish or Mexicans". Even at the time of the case's hearing in Texas' courthouse, there were two men's bathrooms, one unmarked and the other marked "Colored Men" and "Hombres Aqui". The collective evidence was clear to the Court: social practices in Texas and Jackson county distinguished Mexican Americans as a different group from Whites. Consequently, the systematic exclusion of Mexican Americans from serving in juries was not unlike other institutional practices of group subordination and subsequently required the court to guarantee Mexican Americans, and Hernandez specifically, equal protection.

As Haney-Lopez points out, despite the fact that the case is not expressly a race case, it is ironically perhaps the only Supreme Court majority opinion to understand fully that race is a social construction. Haney López (2004) writes:

The case's holding is perhaps the single most insightful Supreme Court Opinion on race ever handed down. *Hernandez* understands (even if Chief Justice Warren as the opinion's author does not quite) that race is ultimately a question of community norms and practices—that is, a social construction. No Supreme Court opinion before or since has come so close to this understanding, nor

perceived so clearly that subordination should be the touchstone for invoking Constitutional intervention when a state distinguishes between groups. (p. 6)

### *How does the Court Understand Race Now?*

Recently in 2014, Justice Sonia Sotomayor wrote an impassioned opinion in *Schuette v. Coalition to Defend Affirmative Action (BAMN)* (2014). In 2006, Michigan voters approved Proposal 2 that amended the state constitution. In a bit of irony, the proposal was also called the Michigan Civil Rights Initiative, headed by Jennifer Gratz (Plaintiff in *Gratz v. Bollinger*, Michigan undergraduate case) and supported by businessman Ward Connerly (who was also a driving force behind California's Proposition 209 and former member of the UC Board of Regents). Proposal 2 enshrined a ban on race and sex-based preferences in employment, contracting, and public education. It was essentially Michigan's equivalent of California's Proposition 209. Like 209 in California, Proposal 2 effectively ended affirmative action in Michigan after it passed by a margin of 58%-42%. The case is unique in the sense that the traditional plaintiffs in race related cases during the colorblind era have usually been individuals who alleged racial discrimination as a result of race-based policies (e.g., *Bakke*, *Grutter*, *Gratz*, *Fisher*). However, in this case, Michiganders voted to outlaw completely all affirmative action considerations from public policy, and those in favor of affirmative action were now alleging discrimination. This claim is entirely of a different nature than reverse-discrimination claims. Reverse discrimination claims appeal on an individual basis. The Coalition to Defend Affirmative Action made a group claim, arguing that Proposal 2 puts those in favor of affirmative action at a disadvantage against a majority that opposes affirmative action.

In a 6-2 verdict with the recusal of Justice Elena Kagan, the majority comprising of the conservative bloc plus liberal Justice Breyer ruled that Proposal 2 did not violate the equal protection clause of the Fourteenth Amendment. However, in a dissenting opinion joined by Justice Ginsburg, Sonia Sotomayor disagreed with the majority and accused it of continuing to ignore the country's "long and lamentable record of stymieing the right of racial minorities to participate in the political process" (*Schuette* Dissent, 2014, p. 1). Sotomayor charged that Proposal 2 had fundamentally changed the political landscape by prohibiting racial consideration and favoring its outright ban. She went further and argued that the measure amounts to a mechanism that fences off proponents of affirmative action from the political process altogether because it was now enshrined permanently in the Constitution and any reactionary campaign to repeal Proposal 2 would practically be impossible. In her opinion, the democratic process in and of itself does not sufficiently provide protection for insular minority groups against oppression, which is why the equal protection clause is needed. Sotomayor stressed that without judicial checks on democratic processes, majorities can subordinate minority groups via the democratic process. In speaking of the guarantees of equal protection granted by the Constitution, Sotomayor writes:

Although the guarantee is traditionally understood to prohibit intentional discrimination under existing laws, equal protection does not end there. Another fundamental strand of our equal protection jurisprudence focuses on process, securing to all citizens the right to participate meaningfully and equally in self – government. That right is the bedrock of our democracy. (*Ibid*)

She suggests that if Michiganders opposed race positive considerations, they can elect school officials to change the policy of the university through the political process, a process that would also be available to those in favor of race conscious admissions. This participatory process guarantees that those in favor of race-based preferences can in the future elect and campaign for representatives who may implement policies constitutive of their politics. Sotomayor argues that legacy and athletic admits can participate politically to influence school admissions policies, but Proposal 2 bans such political activity on the basis of race. In this case, majority voters who opposed affirmative action elected to change the political process altogether by enacting a state constitutional provision that locked out their opponents. To Sotomayor, this is fundamentally unconstitutional and violates equal protection. She concludes her impassioned dissent, arguing “the constitution does not protect racial minorities from political defeat. But neither does it give the majority free rein to erect selective barriers against racial minorities” (p. 57).

Sotomayor’s dissent is noteworthy because her focus on the political process, results, and substance is similar to the understanding of racial subordination as socially constructed exhibited in *Hernandez* more than 60 years ago. In both instances, race was not about Black, White, or any other identifiable racial signifier, but hinged fundamentally on community norms and practices. Most importantly, both opinions focused on whether or not social practices subordinated insular minority groups. Even though both sides vehemently denied that the case was a race case, in *Hernandez* the Court nevertheless identified Mexican Americans as an oppressed class in political process because they were systematically denied the opportunity to serve on juries. In the same way, Sotomayor did not identify any particular racial group suffering from racial discrimination, but identified a class of the political process who were effectively shut out by their political adversaries with the passage of Proposal 2.

Unfortunately, Sotomayor’s opinion holds absolutely no legal weight because it was a dissenting opinion. But it is still historically meaningful. This fact notwithstanding, the arc of the Court’s trajectory on race is distressingly clear. Haney López (2004) rightly states that the Court’s equal protection jurisprudence in the colorblind era is an absolute tragedy that works directly against the interests of integration and anti-subordination. *Hernandez* was a unanimous decision recognizing the salience of social practices that subordinated insular minority groups. 60 years later, only justice Ginsburg joined Sotomayor’s dissenting opinion in *Schuetz*, an opinion that nevertheless carries no binding legal significance. In the important arena of the Court’s colorblind jurisprudence and its relationship to policy and governance, we have unquestionably gone backwards. There are few alternatives available to reverse the tide of racial subordination in society, but the few alternatives are nevertheless our only hope. As a form of social understanding race cannot be abandoned. The political processes that continue to fence off insular minority groups must be targeted via the original language of racism that focuses on oppression, exploitation, and subordination. Without doing so, education specifically, and civil society as a whole will continue speeding down the downward spiral of increasing racial subordination under the ‘race-less’ sensibilities of colorblindness.

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