Schools and Race in the Language of the Law: Precision or Meaningless Jargon?

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The decision of the United States Supreme Court in *Brown v. Board of Education* inaugurated the desegregation of the nation's public schools, but the rationale was not clear and the Court's interpretation of what the decision required has changed over time. Most recently the Court has refused to engage with the issue of so-called "resegregation," so that the divergence between legal language and that of lived experience on matters of schools and race has become more pronounced. This paper explores that divergence in the context of the Court's affirmative action jurisprudence and considers what might be the consequences when the language of the law and the language of the people whom it serves fail to coincide.

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1 Introduction

In the story of race in the United States, the decision of the Supreme Court in *Brown v. Board of Education*[1] has iconic status but a linguistic dilemma lies at its heart. The ruling that heralded the desegregation of the nation's public schools now bears responsibility for the apparent inability of the Constitution to respond to the reemergence of schools that are racially identifiable. Fifty years after *Brown*, the Civil Rights Project of Harvard University (Orfield & Lee, 200, pp. 21-20) reports that growing numbers of black, Latino and Asian-American students

1 *Brown v. Bd. of Educ.(Brown I), 347 U.S. 483 (1954).*

attend "intensely segregated" schools, or those where students of color make up more than 90 percent of the student body, but the Supreme Court will not recognize "resegregation" as a constitutional problem and school boards that use race for integrative purposes risk a federal court ruling that they themselves commit acts of unconstitutional racism.[2] Racial discrimination, it seems, has now been redefined. Where once it meant segregation, now it means integration (Adams, 2011, p. 883).

This paper considers a tension between the language of classification and the language of racial subordination in U.S. Supreme Court equal protection jurisprudence by reference to three themes discussed in three main sections. In the first section, I examine the Court's latest response to attempts to achieve a racially diverse student population in the context of the opacity of a *Brown* mandate which used the language of discrimination but did not make clear whether this was always objectionable. In Section II, I consider the view that the Court's interpretations of the requirements of equal protection reflect models of racial justice or fairness which must resonate with those of contemporary popular intuitions. From this perspective, I suggest, the current Court's preference for the language of classification reflects the view that in twenty-first century America race is no longer a sufficiently significant factor to justify a departure from a model of formal neutrality requiring equal treatment for all. In the final section, I consider the extent to which the language of post-racialism now echoes the language of the Court and consider what might be the implications for those who seek to argue that for many Americans today it is still the case that matters of race and racial discrimination can and should be conceptualized in anti-subordination terms.

2 Discrimination: Subordination or Classification

"In the field of public education the doctrine of 'separate but equal' has no place."[3] So asserted the *Brown* court and the conclusion that separate educational facilities deprived the black plaintiffs of the constitutional guarantee of the equal protection of the law was clear.

2 *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No.1, 551 U.S. 701 (2007).*
3 *Brown I, 347 U.S.483, 495 (1954).*

The rationale, however, was not. To support its ruling, the Court gave three reasons. A dual system of education which separated children on the grounds of race violated the Equal Protection Clause of the Fourteenth Amendment because: a) state-mandated separation of black from white children offends the Constitution *per se*;[4] b) governmental discrimination by race causes psychological damage to black children[5] and c) governmental discrimination by race deprives black children of the educational benefits of mixing with white children.[6] What the Court did not make clear was the mischief to which the constitutional guarantee is addressed. Specifically, it did not spell out whether the Constitution prohibits race-based classifications *per se* or merely those classifications that are invidious because they are mechanisms of racial subordination.

In the context of *Brown* itself, it did not need to do so;[7] the separate provision of education required by Southern states in the first half of the twentieth century was part of a caste system which assigned subordinate status to African-Americans on the basis of their race or color. (Vann Woodward, 2001). From this point of view a dual system of education was necessarily invidious. For *Brown* supporters, this hardly needed stating (Ryan, 2007, p. 152). Racial equality could not be accomplished whilst the races were separated, so to prohibit discrimination was to promote integration (Wilkinson, 1995, p. 994). As Thurgood Marshall later judicially explained, "unless our children

4 *Id.* "Separate educational facilities are inherently unequal."

5*Id.* "To separate [children] 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 ever to be undone."

6 *Id.* (citing *Sweatt v. Painter, 339 U.S. 629 (1950),* and *McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950)* regarding the "intangible" benefits for a law student of mixing with white students, i.e "his ability to study, to engage in discussions and exchange views with other students and, in general, to learn his profession").

7 Technically there were four cases which were consolidated on appeal to the Supreme Court: *Gebhart v. Belton, 87 A.2d. 862 (Del. Ch. 1952)* (on appeal from Delaware); *Brown v. Bd. of Educ., 98 F. Supp. 797 (D. Kan. 1951)* (on appeal from Kansas); *Briggs v. Elliott, 98 F. Supp. 529 (E.D.S.C. 1951) (on appeal from South Carolina); and Davis v. School Bd. of Prince Edward County, 103 F. Supp. 337 (E.D. Va. 1952)* (on appeal from Virginia).

Following the Supreme Court's ruling that the provision of 'separate but equal' education was a violation of the Fourteenth Amendment, the case was adjourned for the Court to hear argument concerning the remedy. The remedial ruling came one year later in *Brown v. Bd. of Educ., 349 U.S. 294 (1955)* (hereinafter *Brown II*). In this text, references to '*Brown*' should be taken as references to both *Brown I* and *Brown II*.

begin to learn together, there is little hope that our people will ever learn to live together."[8]

After *Brown*, wrote civil rights attorney Robert L. Carter, (2005; 1993, p. 885), it seemed certain that the civil rights fight had been won but now he fears his confidence may have been misplaced. The latent ambiguity in the reasoning sustains a different court with a new vision and a different language for the relationship between race and social justice and constitutes a fault line in the narrative of racial progress that was the promise of *Brown*. What the Constitution requires, the court now claims, is not integration but a society free from official and intentional classification on the grounds of race.

The problem was apparent in the conceptualization of the *Brown* remedy. Twelve months after the Court handed down its decision, *Brown II*[9] directed federal courts to supervise the implementation of the remedial process but was deliberately vague as to how this was to be done, and gave little guidance as to how judicial discretion was to be exercised. Significantly, the words "segregation," "desegregation" and "integration" were not used. Instead, the formulations of the Court underwent a significant shift. What was at stake, said the Chief Justice, was "the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis."[10] The earlier ruling, he claimed, asserted "the fundamental principle that racial discrimination in public education is unconstitutional." All legal provisions "requiring or permitting such discrimination must yield to this principle."[11]

For more than ten years, Southern states, in opposition, relied upon these words to offer black students facially neutral "freedom of choice" plans producing only minimal changes in the racial composition of the public school population until 1968 when the U.S. Supreme Court in effect acknowledged that "desegregation" required race-conscious integrative action.[12]

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8 *Milliken v. Bradley, 418 U.S. 717, 783 (1974)* (Marshall, J., dissenting).
9 *Brown v. Bd. of Educ., 349 U.S. 294 (1955) (Brown II).*
10 *Brown II,* 349 U.S. at 300.
11 *Id*. at *298*.
12 *See Green v. County Sch. Bd., 391 U.S. 430, 437-38 (1968)* (noting that 10 years after *Brown*, a "freedom of choice" policy had made virtually no changes to the racial composition

Nearly sixty years later, however, a Supreme Court of a very different political persuasion relies upon the same words to justify its commitment to a symmetrical "color-blind constitution" which protects both white and blacks from racial classification.[13] The effect is to separate equal protection jurisprudence from its contextual link with racial subordination and to define the current attempts of school districts to achieve an integrated student population as the pursuit of racial balance for its own sake, tantamount in Justice Thomas's terms to mere "classroom aesthetics" or the desire to have a classroom that looks a particular way.[14]

In *Parents Involved in Community Schools v. Seattle School Dist. No. 1* (2007), the Court considered challenges to the admissions policies of two school districts, both of which used race to allocate places in over-subscribed schools.[15] The Seattle district had never operated legally segregated schools or been subject to court-ordered desegregation; the Jefferson County, Kentucky district had been subject to a federal court desegregation decree but this was dissolved in 2000. The Seattle plan classified children as white or nonwhite, and used the racial classifications as a "tiebreaker;" the Louisville plan classified students as black or "other" in order to make certain elementary school assignments and to determine transfer requests.[16] Both plans were "racial balance" plans, i.e. they aimed to produce school populations that were reflective of the racial composition of the school district as a whole. Both school districts claimed that their goal was to achieve the educational and social benefits of racially integrated schools but the Court was unimpressed.

Applying a strict scrutiny standard[17] which he said was "well–established when the government distributes burdens or benefits on the

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of the schools of New Kent County, VA and quoting *Griffin v. County Sch. Bd. of Prince Edward County, 377 U.S. 218, 234(1964)*: "[t]he time for mere 'deliberate speed' has run out").

13 *Parents Involved in Cmty Sch. v. Seattle School Dist. No. 1, 551 U.S. 701 (2007).*

14 *Id*. at 750 n.3 (Thomas J. concurring).

15 *Parents Involved in Cmty Sch.*, 551 U.S. 701(2007).

16 *Id*. at 710-18.

17 Strict scrutiny is part of a hierarchy of standards employed by federal courts to balance governmental goals against constitutional rights or principles. It requires the asserted governmental interest to be "compelling" and means which are "narrowly tailored" or "the least restrictive" to achieve it. It is the most stringent level of review (the others being the lower

basis of individual racial classifications," Chief Justice Roberts ruled that the Court's precedents recognized only two state goals as sufficiently compelling in this context: reversing the effects of prior de jure discrimination and the pursuit of diversity in the context of higher education.[18] The plans in question, being insufficiently narrowly tailored to target the claimed educational and social benefits, pursued racial balance for its own sake. This might be a "worthy goal," but did not "mean the school authorities were free to discriminate on the basis of race to achieve it." The Equal Protection Clause of the Fourteenth Amendment, said the Chief Justice, "protect[s] *persons*, not *groups*;" "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[19]

The decision split the court 5-4. For Justice Breyer in dissent, the plurality had distorted precedent, misapplied the relevant constitutional principles, and announced legal rules that would obstruct efforts by state and local governments to deal effectively with the growing resegregation of the nation's public schools. The effect, he said, was to undermine "*Brown*'s promise of integrated primary and secondary education that local communities have sought to make a reality." This could "not be justified in the name of the Equal Protection Clause."[20]

3 The Search for Underlying Principles

Debates concerning what is, or should be, the relationship between the language of the law and ordinary language generally assume the greater precision of the law. For James Boyd White (1973, pp. 6-7), legal language is "a linguistically separate dialect, with a peculiar vocabulary and peculiar constructions." "Inherited" and "traditional," it is a "technical language" with "precise terms" for expressing "precise ideas" so that when ordinary language is "vague, ambiguous and loose," the lawyer has a "finer, keener, sharper instrument."(Eisele, 1976, p. 367). Whether that is so on matters of race is a theme of this

standards of rational basis review and exacting or intermediate scrutiny), and its adoption is nearly always fatal.

18 *Parents Involved in Cmty Sch*. 551 U.S. at 720-725.

19 *Id*. at 743-748 (emphasis in the original).

20 *Id*. at 803 (Breyer J. dissenting).

paper and a matter that I consider further below, but it is, I think, incontrovertible that when the lawyer's precision becomes the layperson's meaningless jargon the result can be mutual frustration and alienation. As Justice Breyer (2008, p. 139) has remarked, "the judicial system […] floats on a sea of public opinion" and the Court has always understood that its role as the guardian of the nation's constitutional rights depends upon its ability to explain itself in a way which can capture "the community consensus that defines [its] sphere of competence." It is also true, as Professor Deutsch (1968, p. 259) has observed, that "the general public cares not only about the reasoning of opinions but about the results." From this perspective, ambiguities in the way in which the Court conceptualizes its explanations are problematic only to the extent that they enable the Court to avoid engagement with the material issues that represent the social reality of people's lives.

According to his biographer (Schwartz, 1983, p. 97), Chief Justice Warren had been determined that the opinions he had authored for the Brown Court should be "short [and] readable by the lay public" but as James Boyd White argues (2011, p. 381), and this paper now considers:

> [t]he law is a not an abstract system or scheme of rules, as we often speak of it, but an inherently unstable structure of thought and expression. It is built upon a distinct set of dynamic and dialogic tensions, which include: tensions between ordinary language and legal language; between legal language and the specialized discourses of other fields; between language itself and the mute world that lies beneath it.

From this perspective, the language that the court uses to conceptualize equal protection issues is both reflective of and contributive to a larger conversation concerning the meaning of racial equality and the significance, if any, of race and racial identity in political and social life. If the court has explained what constitutes the nation's most iconic decision in two distinct ways the question now must be: which best resonates with popular intuitions on these matters in the age of Obama? As Professor Fiss (1976, pp. 107-08) has pointed out, the Equal Protection requirement that no state shall "deny to any

person within its jurisdiction the equal protection of the laws,"[21] until mediated by an understanding of what equality might mean, is simply text without meaning.

With his Seattle and Kentucky formulations, Chief Justice Roberts[22] tied equal protection jurisprudence to a model of equal treatment and a "color-blind" Constitution with guarantees that are symmetrical; the clause protects whites from affirmative action policies that favor blacks just as much as it protects blacks from state policies that deny to them the privileges that are accorded to whites. The language is that of classification and the premise is that of formal equality defined in negative terms, i.e. equality means equal opportunity, and the constitutional promise which "ranks among the most deeply entrenched tenets of American political ideology" (Rosenfeld, 1986, p. 1687), is considered secured when the legal obstacles that prevent citizens from accomplishing their goals are removed. This is a model which sees equality in terms of neutrality or even-handedness between competing issues. In Douglas Rae's (1981, pp. 65-8) terminology it is "means-regarding" i.e. concerned with mechanisms: "[t]wo persons, j and k, have equal opportunities for X if each has the same instruments for attaining X," as opposed to "prospect-regarding," which is concerned with outcomes: "[t]wo persons, j and k, have equal opportunities for X if each has the same probability of attaining X." It uses metaphors of the playing field, fair play and a uniform set of rules to ground its opposition to affirmative action but, as Professor Rae (1981, pp. 65-8) suggests, it is concern with prospects that gives the opportunity concept an emotional driving force and, in a situation where success depends upon talents, characteristics or circumstances which are unequally distributed, the application of common standards to all will operate to "systematize and legitimate unequal prospects of success."[23] Nevertheless, as Professor Rae (1981, pp. 65-8) also points out, it is the means-regarding model, with its rhetoric of neutrality, that resonates both with the practical

21 *U.S. Constitution, Amendment 14, § 1.*

22 *Parents Involved in Cmty Sch. v. Seattle School Dist. No. 1, 551 U.S. 701 (2007).*

23 " [The] power of equal opportunity […] lies […] in the wish and hope that the children of yesterday's losers may become tomorrow's winners, or, more exactly, in the belief that their birth-date prospects may become equal to those of other infants who are luckier in their choice of parents."

imperatives of a competitive market society and with the individualism of an Enlightenment tradition which prioritizes the value of each individual in abstract terms.

This is also a rhetoric for those who are critical of the "activism" of the Warren Court because they seek to refute the view that judicial adjudication is simply politics by other means. In the aftermath of *Brown*, ninety-six U.S. congressmen from eleven southern states issued a "Southern Manifesto," describing *Brown* as an exercise of "naked judicial power" by which the Court had substituted its "personal political and social ideas" in place of "the established law of the land."[24] The controversy prompted Professor Herbert Wechsler's (1959, pp. 15-34) now well-known paper calling for a principled explanation for the *Brown* decision which he required to be "neutral" in the sense that it should not depend upon the identity of the individuals involved. In order to avoid "the *ad hoc* in politics, with principle reduced to a manipulative tool" he claimed "[...] the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."[25] For Professor Wechsler, the constitutional issue presented in *Brown* was not discrimination but rather of freedom of association, with the unpalatable result that "if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant."

Whilst the explanation that he sought eluded him, there were others[26] who responded to his call (Friedman, 1997, pp. 507-520). The anti-subordination principle which was the result is premised on the view that equality has a social dimension and is as much a matter of status as it is of treatment. In Rawlsian terms, (Rawls, 1971, p. 73) if the concept of equality of opportunity is to be fair, then "those with

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24 *Southern Manifesto, 102 Cong. Rec. 4460 (1956).*

25 "To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?"

26 Notably Louis H. Pollack in a paper entitled *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

similar abilities and skills should have similar life chances [...] irrespective of the income class into which they are born." What is required is not simply the elimination of the legal obstacles, such as racial classifications which constitute the formal barriers to equal opportunity but also that differences which are directly attributable to inequalities in social conditions be addressed. On this view, the target of the Equal Protection Clause would not be classifications per se but rather those laws or practices which perpetuate the subordination of a specially disadvantaged group.

This is an interpretation that speaks to the view expressed by Justice Stone in *Carolene Products*[27] that the focus of judicial inquiry should be those "situations where prejudice against discrete and insular minorities may tend to curtail the operation of those political processes ordinarily to be relied on to protect minorities." It is a "neutral" principle, in Professor Wechsler's terms, in the sense that it is capable of transcending the immediate interests of the parties to the case (although he himself did not recognize it as such) (Friedman, 1997, pp. 515-16) and, as Justice Breyer's dissent indicates, it could have legitimated the integrative attempts of the Seattle and Kentucky school boards. In Professor Fiss' terms, (1976, p. 157) however, this model requires a theory of "status harm," which will show how the challenged practice "aggravates the subordinate status" of the group. It is in this respect that we might expect constitutional adjudication to become a fact-finding exercise and a matter of expertise; on a race matter the Court might consider it helpful, or indeed necessary, to take advice concerning the implications of racial identity or groupings for the formation and implementation of social policy goals and it is here that we might expect to see the Court disclose the social vision that is to ground its moral compass.

It is true that the use of the social science amicus curiae brief to inform the Court on social and economic matters has had some success in equal protection cases. This kind of brief was first filed by future Supreme Court Justice Louis Brandeis in the case of *Muller v. Oregon* (1908).[28] The brief containing only two pages of legal argument was accompanied by approximately 100 pages of sociological and

27 *United States v. Carolene Products, Co., 304 U.S. 144, 152 n.4. (1938).*
28 *Muller v. Oregon, 208 U.S. 412 (1908).*

economic data intended to convince the Court of the link between long working hours and adverse effects on women's health, and thereby persuade the Justices to uphold the constitutionality of Oregon legislation restricting the number of working hours for women. In *Brown* itself, a social science amicus curiae brief replicating the style and testifying to the adverse psychological effects of segregation upon African-American children[29] apparently hit its mark when Chief Justice Warren's opinion for the Court referred in a footnote to some of the research, including the work of Professor Kenneth Clark (Clark, 1950, p. 259) whose so-called "doll studies," carried out with his wife and fellow psychologist Mamie, claimed that black children in a segregated school system suffered from a sense of self-rejection and loss of self-worth. [30] Since then the methodological assumptions of the *Brown* research have been challenged and the effect of the footnote much debated (Brooks, 2005, p. 70; Kluger, 1975, pp. 317-18) while the shifting focus of the Court's equal protection jurisprudence has itself made new demands which social science has struggled to satisfy(Oakes, 2008; Oakes, 2010).

Most seriously, however, the fact that the practice has become routine on both sides of the adversarial divide has generated a perception on the part of some members of the Court that the science itself is politicized to such an extent that its value has become undermined. (Oakes, 2008, pp.91-2; Frankenberg & Garces, 2008). In *Parents Involved* (2007) out of a total of 64 amicus curiae briefs, 27 made reference to or relied upon social science research (Linn & Welner, 2007). Of these the majority, including one filed by 553 social scientists, supported the school respondents with research documenting the educational benefits of racial diversity and the harms of racially isolated minority schools (Frankenberg & Garces, 2008). [31] In the plurality opinion, the evidence was more or less completely ignored[32] but in the dissent of Justice Breyer and the concurrence of Justice

29 Brief for Appellants at 5, *Oliver Brown, et al., Appellants, v. Bd. of Educ. of Topeka, KS et al., 347 U.S. 483(1954) (No. 1).*

30 *Brown v. Bd. of Educ., 347 U.S. 483, 495 n.11 (1954)(Brown I).*

31 *Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, Parents Involved in Cmty. Schs., 551 U.S. 701 (2007) (Nos. 05-908, 05-915), 2006 WL 2927079.*

32 Roberts C.J., Scalia and Alito JJ.. Thomas J. filed a concurring opinion. Kennedy J. filed opinion, concurring in part and concurring in the judgment.

Thomas we see two very different views of the extent to which questions of racial justice can be conceptualized in empirical terms. For Justice Breyer, the Louisville and Seattle plans needed to be seen in a context of attempts to tackle racial justice conceptualized in terms of "segregation", "integration" and then "resegregation." From this point of view, what he termed the "educational element" ("overcoming the adverse educational effects produced by and associated with highly segregated schools") and the "democratic element" ("producing an educational environment that reflects the 'pluralistic society' in which our children will live") were not only intended to "improve the conditions of all schools for all students, no matter the color of their skin," but were integral to the "historical and remedial" attempt to overcome "the adverse educational effects produced by, and associated with, highly segregated schools." Citing to the empirical evidence of researchers in support of the educational and democratic enhancements of integrated schooling, Justice Breyer noted that there were competing views but concluded that the evidence was sufficiently weighty ("well established", "firmly established" and "strong") to permit a school board to make its own evaluative judgments without interference from the Court.[33]

For Justice Thomas, however, the absence of consensus on the part of the researchers was fatal. Noting that the claimed educational and democratic benefits of the race-conscious policies were not only not substantiated but in some cases positively controverted by the evidence, he reprised the oppositional stance that he had demonstrated in the precedent case concerning the admissions policies of the University of Michigan Law School.[34] The school boards, he said, were engaged in "classroom racial engineering." This might be a fashionable solution to a particular social problem but constitutional adjudication could not depend upon "the mercy of elected government officials evaluating the evanescent views of a handful of social scientists." "[T]he Constitution", he claimed, "enshrines principles independent of social theories" and those involving race were particularly suspect: "[if] our

33 *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 551 U.S. 701, 838-40 (2007).*
34 *Grutter v. Bollinger, 539 U.S. 306 (2003).*

history has taught us anything, it has taught us to beware of elites bearing racial theories."[35]

Ostensibly an argument about social science, the issue that divided the Seattle plurality and the dissent and specifically Justices Thomas and Breyer is, I suggest, really about race, and whether the Court uses the language of subordination or the language of classification tells us something about its members' attitude towards the relationship between race and equality in the twenty-first century. This is important because as I suggested earlier, the relationship between constitutional adjudication and popular perceptions of justice should not be seen in passive terms. The Court may like to claim that it acts merely as a conduit for the political values that the Constitution enshrines[36] but, as Professor Fiss (1976, pp. 173-74) suggests, the relationship is more correctly seen as reflexive and to that extent more complicated. In the context of equal protection, the Constitution "provides the Court with a textual platform from which it can make pronouncements as to the meaning of equality". In so doing "it shapes the ideal." The pronouncements of the Justices "are viewed as authoritative, part of the 'law'", and to that extent their role goes beyond the reflective; "[l]aw is a determinant, not just an instrument, of equality."(Fiss, 1976, pp.173-74).

4 The Significance of Race in a Post-Racial Era: Symbolism versus Social Facticity

Professor Fiss's article (1976, pp.147-51) was written in 1976 and reflected a specific view of the meaning of race and its social significance at that time. The conceptualization of race in terms of subordination requiring compensation corresponded with social fact because, as he claimed, blacks represented a natural class or social grouping which in material terms was "very badly off."

35 *Parents Involved in Cmty Schs., 551 U.S. 701, 780-81(Thomas J. concurring).*

36 There are many examples but *see eg. Grutter v. Bollinger 539 U.S. 306, 858 (2003)* (O'Connor J.): "The Founders meant the Constitution as a practical document that would transmit its basic values to future generations through principles that remained workable over time. Hence it is important to consider the potential consequences of the plurality's approach, as measured against the Constitution's objectives."

> There are natural classes, or social groups, in American society and blacks are such a group. Blacks are viewed as a group; they view themselves as a group; their identity is in large part determined by membership in the group; their social status is linked to the status of the group; and much of our action, institutional and personal, is based on these perspectives.[…] […] In a sense they are America's perpetual underclass.

Thirty-five years later, however, the emergence of an African-American professional and middle class, which affirmative action programs have done so much to bring about, suggests that the connection between race and subordination can no longer be relied upon (Adams, 2011 p.882 n.25). More fundamentally, the foundational assumption, that the concept of race has a meaning that is independent of context, must itself now be called into question.

In an influential lecture, Professor Stuart Hall (1996) has reminded us that although "one of those major concepts which organize the great classificatory systems of difference which operate in human society,"[37] in the absence of any sustainable biological or genetic account, race must be regarded as a "floating signifier." By this he means that it operates like language; it is a discursive construct, part of the "systems and concepts of a culture," of its "making meaning practices" which because they are culturally determined can never be "finally or trans-historically fixed." Like all signifiers, that of race will be subject to what he describes as

> the constant process of redefinition and appropriation, to the losing of old meanings, and the appropriation and collection on contracting new ones, to the endless process of being constantly re-signified, made to mean something different in different cultures, in different historical formations, at different moments of time.[38]

The election in 2008 of a black President is said to have inaugurated a new era - a post-racial era - in which the association of blackness with victim status no longer pertains and the role of race as

37 *See* transcript available at www.mediaed.org/wp/transcripts).
38 *Id.*

an organizing social force has become much more nuanced so that the language of subordination is no longer required. In this new era, as Barack Obama (2004) proclaimed, "[t]here's not a black America and white America and Latino America and Asian America; there's the United States of America." If this is the language of post-racialism, it is remarkably close to that of the Roberts Court. In *Parents Involved* the Chief Justice cited with approval the words of Justice O'Connor : "[w]e are a Nation not of black and white alone, but one teeming with divergent communities knitted together by various traditions and carried forth, above all, by individuals."[39] Recognition by the Court of racial balancing or proportionality as constitutionally acceptable mechanisms of formulating and implementing social policy goals, he continued, "would 'effectively assur[e] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decision-making such irrelevant factors as a human being's race' will never be achieved.'"[40] With these formulations, the message of the Roberts court is only thinly veiled: the time for remedying past social ills, if not yet completely over, soon will be and the nation and the Court must move on. To date only Justice Scalia has been direct on this point:

> [T]here can be no such thing as either a creditor or a debtor race […] To pursue the concept of racial entitlement – even for the most admirable and benign of purposes, is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege, and race hatred. In the eyes of government, we are just one race here. It is American.[41]

The *Grutter* court was more circumspect[42] but the negative view of the relevance of race-based remedies, and the centrality of race as an organizing principle of social justice, which underpins them, clearly

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39 *Parents Involved in Cmty Schs v. Seattle School Dist. No. 1, 551 U.S. 701,730 (2007)* (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 610 (1990) (O'Connor J. dissenting).
40 *Id.* (internal citations omitted).
41 *Adarand v. Constructors, Inc. v. Pena, 515 U.S. 200, 438 (1995)* (Scalia J. concurring in part and concurring in the judgment).
42 *Grutter v Bollinger, 539 U.S. 306, 343 (2003)*(O'Connor J.: "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interests approved today").

now resonates with state voters whose support, in Michigan, of a 2006 election ballot initiative banning the consideration of race in higher education, effectively neutralized the impact of the Court's decision. (Beydoun, 2007, p. 510).[43]

President Obama, the nation's first African American president, has faced criticism for his refusal to use the language of race (Cho, 2009, p.1604 n.35).[44] When the reality is that of white racial dominance, "color-blindness," it is said, (López, 2010, p. 1061; Bonilla-Silva, 2003, p.28), becomes a legitimating ideology. Post-racialism is dangerous not just because "it obscures the centrality of race and racism in society," and "serves to reinstate an unchallenged white normativity" (Cho, 2009, pp. 1592-93). More problematic for those who challenge an unqualified narrative of racial progress is the issue of consensus; post-racialism "more effectively achieves what the Racial Backlash movement sought to do over two decades ago – forge a national consensus around the retreat from race-based remedies on the basis that the racial eras of the past have been and should be transcended." (Cho, 2009, pp. 1592-93). If this is so, and the language of legal conservatism is indistinguishable from that of post-racialism, what should we say about the current Court's moral vision? Is the Court colluding in a denial of a legacy of Jim Crow which continues to make race a social reality in the United States or, in the same way as the jurisprudence of Earl Warren's court resonated with a racialized experience whose time for recognition had come, has it simply captured and given legal voice to the differently but now equally socially situated intuitions of ordinary people? And if the latter, how do we respond to Justice Breyer and those who use the language and principles of anti-subordination to advance the view that race and racism still function as key obstacles to equality in contemporary society?

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43 A similar initiative had succeeded in California in 1996 (Proposition 209) and in Washington State in 1998 (Proposition I-209). In 2008, however, Connerly's "Super Tuesday for Equal Rights" campaign, a "nationwide thrust" to dismantle affirmative action programs in five states collapsed when proposals failed to make it onto the ballot in three of those states, and Colorado voters rejected Amendment 46 by a narrow margin, leaving Nebraska the only state to approve the proposal. *See* Naomi Zeveloff, Colo. Independent (Aug.11 2008).

44 E.g. the criticism that followed President Obama's renunciation of his former pastor, Reverend Jeremiah Wright.

In a recent analysis of the role of race in the criminal justice system, critical race theorist Ian Haney López (2010, pp. 1064-69) has commented on a lack of receptivity on the part of white Americans to empirical evidence of racial injustice. He concludes that "partly through colorblindness and partly through the accumulated weight of cultural beliefs and historical practices, most Americans accept that major American institutions are race-neutral so that the inequalities that they are prepared to recognize are regarded not so much a function of race but "a legitimate feature of social reality." He calls for "a countervailing narrative about race as a form of social stratification […] to explain how racism actually functions in today's society." He faces the problem that to an audience intuitively committed to the standpoint that society is constructed upon principles that are fundamentally fair, no kind of explanation or factual evidence is likely to be persuasive.

The problem for the Court is similar. Whilst a view of social reality is a necessary component of constitutional adjudication, as Professor Dworkin (1977, pp. 20-31) has suggested, the importance of empirical evidence is always constrained by the underlying normative assumptions. In *Parents Involved*, Justice Breyer called on the empirical findings of social science research in effect to substantiate the continuing effects of race in the context of education but, if Professor López is correct, then this evidence will do little to overcome a basic intuition that the concepts of racism and racial injustice have outlived their usefulness in 21st century America. New types of research into "implicit" or unconscious bias will face the same problem (Greenwald & Krieger, 2006, p. 951). "Rightly or wrongly," observes Barack Obama, (2006, p. 247) "white guilt has largely exhausted itself in America," and the automatic association of race with victim status now offends liberals and conservatives alike.

As I noted earlier, the preference for formal neutrality resonates strongly with values that are dear to the national psyche. When the popular assumption is that race is no longer an issue that needs to displace the default position of formal neutrality, then the Court's reconceptualization of equal protection jurisprudence represents a recognition of the need to reconnect with its wider audience which was

arguably the message of its former Chief Justice. Justice Thomas[45] has dismissed the pursuit of racial diversity as the "faddish slogan of the cognoscenti." This might translate into the vernacular as "so much meaningless jargon". The Court is vulnerable to the criticism that its ability to avoid the conclusions of inconvenient empirical research is tantamount to disingenuity but if popular acceptance is the key to its legitimacy, the Court must be able to justify its decisions in language that not only people can understand but also in a way that is responsive to popular standards.

There is however, a deeper problem for those who seek to persuade the justices to confirm a reality to the connection between race and the opening of the doors of opportunity. Professor López (2010, p. 1069) has commented that minorities experience racism but "struggle to explain cogently how race continues to function so deleteriously in American life." If an African-American is now the most powerful man in the world and race is no longer to be an automatic badge of victimhood, what then can we say about what it might mean and how can we conceptualize a connection between race and racialized inequalities in a way of which the Court can take note?

In February 2011, a three-judge panel of the Fifth Circuit upheld the affirmative action plan used by the University of Texas for its undergraduate admissions. *Fisher v. Texas* [46] is the first federal litigation challenging the use of race in university admissions since the Supreme Court's 2003 decision upholding the University of Michigan Law School's race-conscious admissions process in *Grutter v. Bollinger*.[47] The panel found that the plan was modeled on that upheld by the Supreme Court in *Grutter*, used race as only one factor, looked at applications as a whole in order to achieve the educational benefits of racial diversity and for these reasons satisfied the requirements of strict scrutiny. In a lengthy special concurrence, Circuit Judge Emilio

45 *Grutter v. Bollinger, 539 U.S. 306,350 (2003) (Thomas J. dissenting).*
46 *Fisher v. University of Texas, No. 09-50822 (5th Cir. Feb.11 2011).* On 23 February 2012, the U.S. Supreme Court agreed to review this decision which is now widely predicted to be reversed. The case will be heard in the next Term, starting 1 October 2012.
47 *Grutter v. Bollinger, 539 U.S. 306 (2003).*

Garza, [48] agreeing with the result though not with its reasoning, commented as follows:

> The idea of dividing people along racial lines is artificial and antiquated. Human beings are not divisible biologically into any set number of races. A world war was fought over such principles. Each individual is unique. And yet, in 2010, governmental decision-makers are still fixated on dividing people into white, black, Hispanic, and other arbitrary subdivisions […]

As Stuart Hall (1996) reminds us, the loss of faith in a biological explanation of race has serious political implications; the disappearance of the reality of race as a "foundational guarantee" is "a very difficult truth to come to terms with amongst those people who feel […] the reality of race gives a kind of guarantee or underpinning to their political argument and their aesthetic judgments and their social and cultural beliefs." It is, of course, true, as Linda Nicholson (2010, pp. 71-2) has observed, that social meanings are not confined "in the head only" but find reflection in the laws and institutions of the nation. This means that even in its symbolic/linguistic conceptions, there can be an issue of "social facticity" about race that might ground a constitutional inquiry. If this is to be conceptualized in equal protection terms and the Court is to be persuaded that racism and racist practices still constitute the lived experience of people's lives, then, I suggest, it can only do so as part of a national conversation still to be addressed on the relationship between racial identity in its various manifestations and those no-go areas for American political discourse, the twin issues of poverty and class (see Michaels, 2006, pp. 75-70). Professors Barnes and Chemerinsky, (2009, pp.100-25), have commented on the "improvised and largely impoverished" nature of constitutional jurisprudence in the area of socioeconomic class. However, when, as they observe, "society overall seems to have lost interest in the problems of the poor" and the desirability of conceptualizing affirmative action in terms of class is itself not uncontested, this should

48 *Fisher, No. 09-50822, slip op. 86-87).* Garza J. supported his assertion with footnoted references to academic sources concluding "There is broad scholarly support for this proposition." *Id.* at n.22.

not surprise. Such counter-majoritarian credentials as the Court may have chosen to claim are necessarily limited by parameters of context and have arguably always been overstated; the Court "identifies and protects minority rights only when a majority or near majority of the community has come to deem those rights worthy of protection."(Klarman, 1996, p. 18).

Without a structural analysis of race that can connect with this wider debate, those who would criticize the conservative wing of the Roberts Court for its refusal to conceptualize the pursuit of racial diversity in a way that satisfies current equal protection formulations must be prepared to counter the argument that affirmative action programs not only deflect attention and resources from a national problem of increasing economic inequality but also perpetuate a language of race and racial identity which is ideologically uncritical and for that reason itself inherently conservative in character (Michaels, 2006; Darder & Torres, 2004, p.11).

5 Conclusion

In this paper I have queried the suggestion that, at least in relation to race, legal language can be characterized by its precision. I now suggest two things: first, that if "[t]he terminology of a profession constitutes both the world of that profession and that profession's picture of the world," (Eisele, 1976, p.377) then the indeterminacy of the referents of race in a post-racial era means that imprecision will be unavoidable and, second, that if, as Stuart Hall (1996) suggests, in the absence of foundational guarantees, politics is all we have, then race is not the only floating signifier. With the open texture of the language of the Equal Protection Clause comes both a forum and a mechanism by which the content of constitutional norms can be negotiated. If the language of the Court is to be not only reflective but also constitutive of that wider "maelstrom of a continuously contingent guaranteed political argument, debate and practice" by which the meaning of race in a "post-racial" society falls to be determined, then the words of Justice Blackmun[49] in the Court's first affirmative action case have never been

49 *Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., dissenting).*

more apt: "[i]n order to get beyond racism, we must take account of race."

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