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Plessy's Ghost: *Grutter*, *Seattle* and the Quiet Reversal of *Brown*

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"Cartoonist Gary Trudeau's genius is the truth his characters speak. The earnest young man from the law school's development office exudes liberal angst, but rather than the expected excuses and euphemisms, he simply says, 'We no longer admit black people.'"[1]

I. INTRODUCTION

Affirmative action is dead.

The evidence abounds in the unmistakable and systemic decline in black enrollment in the nation's colleges and law schools.[2] Such evidence is

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1. Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 928 (2001) (italics added).

2. *See generally* D. Marvin Jones, *When "Victory" Masks Retreat: The LSAT, Constitutional Dualism, and the End of Diversity*, 80 ST. JOHN'S L. REV. 15 (2006). As John Nussbaumer writes:

> The total number of African-Americans enrolled at all ABA-approved law schools peaked in 1994 at 9,681 students, which at that time represented 7.5% of all enrolled students . . . . From 1994-2004 . . . total African-American enrollment decreased from 9,681 to 9,488 students (-2%), which represents just 6.8% of all enrolled students.

John Nussbaumer, *Misuse of the Law School Admissions Test, Racial Discrimination, and the De Facto Quota System for Restricting African-American Access to the Legal Profession*, 80 ST. JOHN'S L. REV. 167, 168 (2006).

There is anecdotal evidence from recent news reports that enrollment is down at undergraduate colleges all across the country. *See Black Enrollment: A New Challenge; Decline in Black Freshmen at U-M, Elsewhere, Reason for Concern*, GRAND RAPID PRESS, Dec. 6, 2004, at A6. The decline is especially obvious in states where either referenda have passed limiting the use of race or, as is the case in Florida, where state law prohibits the use of race in admissions. *See Black Enrollment Still Falling In Universities*, SUN SENTINEL, Sept. 12, 2005, at 6B. The author notes a decline in black enrollment at the college level in Florida:

> New figures show fewer black students are attending Florida universities than in the past

equally apparent from the Supreme Court's resounding rejection of voluntary affirmative action in the Seattle, Washington, and Louisville, Kentucky, school districts.[3] And it is evident in the ominous success over the last five years of conservative legislation, like Governor Jeb Bush's *One Florida*[4] and the Ward Connerly anti-affirmative action referenda in California[5] and Michigan.[6] Affirmative action was a ladder. It allowed generations of blacks, from Clarence Thomas to Barack Obama, to climb up out of the socio-economic well and become important members of society.

What *seems* ironic is that the systemic decline in black enrollment in law schools and the success of legislation hostile to affirmative action is taking place in the shadow of *Grutter v. Bollinger*.[7] In *Grutter* the Supreme Court held that promoting racial diversity was a "compelling" reason that

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> seven years. Six of the state's 11 public universities reported a drop, and the percentage of blacks in this year's freshman class is at its lowest since Bush became governor. The decline comes despite continued growth in the overall student population, a 3.1 percent increase to nearly 282,000 students . . . .

Id.

3. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.,127 S. Ct. 2738 (2007).

4. "On November 9, 1999, Governor Jeb Bush signed Executive Order 99-281 as part of his 'One Florida Intiative.' Executive Order 99-281 eliminated the use of 'racial or gender set-asides, preferences and quotas' in government employment, state contracting, and higher education." Michelle Adams, *Isn't it Ironic? The Central Paradox at the Heart of "Percentage Plans"*, 62 OHIO ST. L.J. 1720, 1743-44 (internal citations omitted). Bush's "proposal was subject to intense opposition from its inception." *Id.* at 1745. One Florida resulted in lower enrollment of Blacks in Florida's universities:

> Black freshman enrollment at the University of Florida is expected to be down by nearly half this year under Gov. Jeb Bush's ban on racial preference in public university admissions. Blacks represented nearly 12 percent of the freshman class last year, but the class starting this month will be only 6 percent to 7 percent black, said officials at the state's most elite public university.

'One Florida' Cuts College Enrollment of Blacks, CNN.COM, Aug. 13, 2001, http://cnnstudentnews.cnn.com/2001/fyi/teachers.ednews/08/13/minority.enrollment.ap/index.html.

5. Introduced in 1996 as a California ballot proposition, Proposition 209 amended the state Constitution to prohibit a "public university system" from "discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race . . . [or] sex . . . ." CAL. CONST. art. I, § 31(a), (f). Like what occurred in Florida, this so-called colorblind policy had a devastating impact on minority admissions:

> The Berkeley campus of the University of California . . . was forced by California's Proposition 209 to switch to race-blind admissions. Underrepresented minorities in the student body dropped sharply, from 25% to 11%. At the University of Texas School of Law, the number of black first-years fell to just four the year after the school was ordered to adopt race-blind admissions—from 38 the year before.

Adam Cohen, *Coloring the Campus*, TIME, Sept. 17, 2001, at 48.

6. *Lose in court? Take it to the ballot box. Michigan opponents of affirmative action were defeated in the judicial system but called on Ward Connerly to help them win voters*, COLOR LINES MAGAZINE, Jan. 2007, at 6.

7. 539 U.S. 306 (2003). *See* Monica Bansal, *Groups Challenge Michigan Affirmative Action Referendum*, CNSNEWS.COM, Oct. 13, 2006, http://www.cnsnews.com/ViewNation.asp?Page=/Nation/archive/200610/NAT20061013a.html.

justified Michigan's consideration of race in the law school admissions process.[8] *Grutter* was hailed by "both liberals and conservatives as a great victory for affirmative action."[9] The Supreme Court of the United States placed its imprimatur of constitutionality on diversity as a compelling interest of the state. People of color won the battle! Hurrah. Yet, resegregation is taking place in the midst of "victory."

This article is about why this is happening. I argue there is no irony here: *Grutter* is a very conservative framework at war with the project of affirmative action. *Grutter* is not a victory, but a defeat in disguise. Prior to *Grutter*, a series of cases, from *Richmond v. J.A. Croson Co.* in 1988[10] to *Hopwood v. Texas*,[11] developed the rule that race was an impermissible consideration. The only exception was where it was necessary to consider race in order to remedy a legal wrong: identified discrimination.[12] The underlying notion was a contractarian view of equal rights: the right of the individual to equal treatment could not be sacrificed in order to achieve a perceived social good.[13] The problem for the civil rights community is that this framework perpetuates a terrible socio-economic gulf. Because *Grutter* allows diversity—a social goal—to stand as justification,[14] many scholars received this as a crack—if not a back door—in the wall the court was building. It was not.

First, I wish to show that the current debate we are having is a debate which has its roots in reconstruction. We are, in my view, simply witnessing the end of the second reconstruction. It all begins with the debate over the

8. *See Grutter v. Bollinger*, 539 U.S. 306, 328 ("Today, we hold that the Law School has a compelling interest in attaining a diverse student body.").

9. Jones, *supra* note 2, at 16.

10. 488 U.S. 469 (1989) (holding unconstitutional a state regulation requiring contractors awarded city construction contracts to subcontract at least thirty percent of the work to minority-owned businesses).

11. 78 F.3d 932 (5th Cir. 1996) (holding that a state university law school admissions program that gave minority applicants substantial preferences violated Equal Protection).

12. *See J.A. Croson Co.*, 488 U.S. at 497; *see also Hopwood*, 78 F.3d at 942.

13. *See J.A. Croson Co.*, 488 U.S. at 505-06 ("To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group . . . . We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality."); *see also Hopwood*, 78 F.3d at 945 ("[T]he use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of equal protection. Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals. It may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility.").

14. Grutter v. Bollinger, 539 U.S. 306, 329 (2003).

reconstruction Civil Rights Acts and culminates with *Plessy v. Ferguson*.[15] During this era two models of equality emerged. One model I trace to Lincoln[16] and another model I trace to Georgia Senator Joshua Hill.[17] I refer to these models of equality as "equality as redemption" and "equality as imposition." *Plessy*, as I see it, simply places its stamp of approval on the philosophy of Joshua Hill. First, I will show the continuity between the concept of equal protection that was used to rationalize segregation in *Plessy* and the concept of equal protection in the *Croson-Hopwood*[18] line of cases. There are uncanny parallels. Second, I will show that *Grutter* is the alter ego of the *Croson-Hopwood* cases. Finally, I will address the question Gary Orfield asked in a recent article[19]—whether the law the Supreme Court has been writing is imbued with the spirit of *Brown*[20] or the ghost of *Plessy*—in light of the Court's latest affirmative action case, *Parents Involved in Community Schools v. Seattle School District No. 1*.[21] I write to show how that ghost, the ghost of *Plessy*, pervades the law of affirmative action and pervades both the *Grutter* and *Seattle* cases.

II. THE RECONSTRUCTION FRAMEWORK

Equality is not a fixed star, but a constellation of concepts and narratives.[22] During the first reconstruction, a framework for equality emerged from the struggle to not only emancipate blacks, but to eradicate the philosophy on which slavery rested.

Slavery rested on the notion that blacks were not citizens and were not intended to be citizens.[23] As I stated in an earlier conversation, because slaves were property, because they were entities without rights, the statuses of slave and citizen were, by definition, mutually exclusive.[24] If the legally,

15. 163 U.S. 537 (1896) (upholding the constitutionality of segregation on the grounds of "separate but equal").

16. *See infra* notes 30-33 and accompanying text.

17. *See infra* notes 44-52 and accompanying text.

18. *See supra* notes 10-13 and accompanying text.

19. *See* Gary Orfield & Chungmei Lee, Brown *at 50: King's Dream, or* Plessy*'s Nightmare?*, The Civil Rights Project—Harvard University (2004), *available at* http://www.civilrightsproject.ucla.edu/research/reseg04/brown50.pdf.

20. Brown v. Bd. of Educ., 347 U.S. 483 (1954) (overturning *Plessy* and abolishing segregation in public schools).

21. 127 S. Ct. 2738 (2007) (holding unconstitutional school districts' "student assignment plans" that relied on racial classification "to allocate slots in oversubscribed high schools").

22. Law is authoritative largely based on claims of objectivity—"The rules laid down." Narrative is persuasive in large part because of the moral claims it makes. I argue that despite its claim of being perspective-less, much of law, particularly in the Constitutional context, relies on moral and or ideological claims for its persuasive power. The purpose of this essay is to limn out the political narratives that have defined the boundary between two competing notions of equality.

23. *See* Dred Scott v. Sandford, 60 U.S. 393, 404-421 (1856).

24. *See generally* D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*,

artificially created status of slave was the only rationale for the dichotomy between slave and citizen, the whole scheme of master-slave relations would be tautological and without foundation in reason.[25] Thus, if blacks could be citizens, the legal bonds that bound white masters and slaves in their respective places could potentially unravel.[26]

Justice Taney in *Dred Scott* addressed this problem by finding that blacks were, for all intents and purposes, an inferior order of human life.[27] Because of their inherent inferiority they were not citizens and could not be made so.

Blacks had for more than a century been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights that the white man was bound to respect. Thus the negro might justly and lawfully be reduced to slavery for the white man's benefit. The negro was bought and sold and treated as an ordinary article of merchandise and traffic whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. "*It is not a power to raise to the rank of a citizen any one . . . who . . . belongs to an inferior and subordinate class.*"[28]

The era of reconstruction was defined by an effort to eradiate this view: "The term *reconstruction*, in the civil rights context, is a shorthand description of the legal, political, and social efforts to eliminate slavery and the racist legacy of slavery captured in the *Dred Scott* philosophy."[29]

Lincoln prophetically and perfectly articulated the concept of equality that would charter the era of reconstruction to follow. He said: "As I would not be a *slave*, so I would not be a *master* . . . . Whatever differs from this . . . is no democracy."[30]

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82 GEO. L.J. 437 (1994).

25. *See id.*

26. *See id.*

27. *See Dred Scott*, 60 U.S. at 404-05, 409-10. To be sure, Taney attributed this view of inferiority to the Framers rather than himself. *Id.* at 405; *see also* Jones, *supra* note 24, at 464 n.108. But original intent in Taney's terms is the arbiter of constitutional meaning. *See Dred Scott*, 60 U.S. at 409-10. The proposition that blacks "are inferior" was a "fact" for purposes of constitutional interpretation. *Id.* at 404-05, 408.

28. *Dred Scott*, 60 U.S. at 418 (emphasis added).

29. Robert Belton, *The Civil Rights Act of 1991 and the Future of Affirmative Action: A Preliminary Assessment*, 41 DEPAUL L. REV. 1085, 1092 (1992).

30. Document by Abraham Lincoln (Aug. 1, 1858), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 532 (Roy P. Basler ed., 1953).

There is here a sense of an imperative, perhaps a democratic imperative, to break with the slavocratic past. While the term "racial caste" may not yet be part of the lexicon, the logic of Lincoln's argument clearly extends beyond slavery to any institution of domination of one race by another. I call it *redemption* because Lincoln clearly saw freedom for former slaves as the defining characteristic of democracy. The concept of redemption is deeply bound up in freeing those who are in bondage.[31]

By positing an antithesis between democracy and slavery, Lincoln did not speak philosophically. He was making a political statement rejecting *Dred Scott*, and in so doing, he redeemed the nation from the "wrong" of that infamous case. Lincoln logically went beyond slavery. Carrying his idea to its logical conclusion, Lincoln articulated an anti-caste notion of equality.[32]

Lincoln's exhortation against the *Dred Scott* philosophy crystallized into law in the first sentence of the Fourteenth Amendment, which begins with the statement, "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . . ."[33]

The Supreme Court in the *Slaughterhouse Cases*[34] articulated another aspect of this substantive notion of equality—an affirmative duty to protect the former slaves:

> [N]o one can fail to be impressed with the one pervading purpose found [in all the amendments], lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.[35]

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31. Redemption has at least two aspects. One aspect has to do with liberation: "For freedom Christ has set us free; stand firm therefore, and do not submit again to a yoke of slavery." Galatians 5:1 (English Standard Version); *see also* Exodus 6:6, where the Jews are "redeemed" from bondage. "Redemption," I feel, also connotes a notion of getting one's freedom through sacrifice. In the Christian tradition, it is Christ's sacrifice, which "frees" us or redeems us. Redemption seems to fit here because Lincoln was saying we must "give up" slavery in order to achieve democracy.

32. The phrase "anti-caste principle" orginates with Cass Sunstein. *See* Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994). The same idea, however, was articulated earlier by Owen Fiss. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFAIRS 107, 127 (1976) (arguing that equal protection proscribes legally entrenched socioeconomic castes under a "group-disadvantaging principle" or "antisubjugation" principle). I think the concept, though not the phrase, traces back to Lincoln.

33. U.S. CONST. amend. XIV.

34. 83 U.S. 36 (1872).

35. *Id.* at 71.

> The words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored: exemption from legal discriminations that imply inferiority in civil society and lessen the security of their enjoyment of the rights which others enjoy, and discriminations that are steps toward reducing them to the condition of a subject race.[36]

The *Slaughterhouse* interpretation of the Fourteenth Amendment echoes Lincoln: for the Court, domination of former slaves by whites—the problem of caste—is inconsistent with the new Constitution created by the enactment of the Thirteenth, Fourteenth and Fifteenth Amendments.[37] Also, it is key that the Court described blacks as "citizens" and "freemen." I posit that citizens and freemen are categorical opposites of "subject race." Equal citizenship is the promise at the heart of the Fourteenth Amendment. The government has an affirmative duty to guarantee this.

The same framework of affirmative duty to protect equality as full citizenship is explicit in *Strauder v. West Virginia.*[38]

> The true spirit and meaning of the amendments, as we said in the *Slaughter-House Cases*, cannot be understood without keeping in view the history of the times when they were adopted. At the time, when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed . . . . Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted.[39]

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36. Strauder v. West Virginia, 100 U.S. 303, 307 (1879).
37. *See* U.S. CONST. amends. XIII-XIV.
38. *Strauder*, 100 U.S. 303.
39. *Id.* at 306.

Strauder underscores with a rhetorical hammer the importance of historical context.[40] The opposite of textualism or rigid formalism, the Court spoke in terms of lived experiences of blacks as victims of discrimination.[41]

Historical consciousness, affirmative duty to protect, citizenship as the goal of equality: all of these values come together in a single constellation to guide the path of reconstruction. Buoyed by this expansive notion of equality for blacks, the Northern Republicans enacted a panoply of civil rights laws to protect the freed slaves.[42] This whole framework was knocked into a cocked hat by the Supreme Court in the aftermath of reconstruction.

Every normative framework comes into existence by suppressing competing value systems. One of the projects of the reconstruction Congress was the integration of inns and places of public accommodation. They did this through the Civil Rights Act of 1875. The legislation provided:

> That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.[43]

During the debate over the Civil Rights Act of 1875, Joshua Hill, a Senator from Georgia, articulated for the opponents of reconstruction the ideas which would later become the framework for *Plessy* and ultimately the legitimization of segregation:

> I must confess, sir, that I cannot see the magnitude of this subject. I object to this great Government descending to the business of regulating the hotels and the common taverns of this country, and the street railroads, stage-coaches, and everything of that sort. It

40. *Id.* at 303.

41. *Id.*

42. These include The Civil Rights Act of 1866 declaring that "all citizens of the United States shall have the same right, in every State or Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property," (this becomes the precursor to the Fourteenth Amendment), the Ku Klux Klan Act of 1871, prohibiting conspiracies by state or private actors to prevent a person "from exercising any right or privilege of a citizen of the United States," and The Civil Rights Act of 1875, prohibiting race discrimination in privately owned places of public accommodation.

43. The Civil Rights Act of 1875, 18 Stat. 336, was declared unconstitutional by the Civil Rights Cases, 109 U.S. 3 (1883).

> looks to me to be a petty business for the Government of the United States . . . . What he may term a right may be the right of any man that pleases to come into my parlor and to be my guest. That is not the right of any colored man upon earth, nor of any white man, unless it is agreeable to me.[44]

Hill argued that civil rights laws were an imposition.[45] Hill's framework centered on the right of an individual to freedom—freedom to control his or her property, and to choose his or her associates.[46] It could also be thought of as a claim to a private sphere of life, beyond the reach of government.[47] Also, it was an argument about federalism: that the Federal Government was an evil and had to be constrained within its plane of power.[48] By talking about the fundamental right of individuals to liberty or freedom, Hill invoked the lofty social contract on behalf of maintaining a status quo that privileged whites.

In the upside-down moral universe of Hill and his brethren, civil rights laws were a formidable evil because they threatened the foundations of the Constitution. These foundations were threefold: liberty (i.e the social contract itself), the right to control one's own property, and the Federal Government as a government of enumerated powers.[49] "This classical approach made no challenge to the command that all citizens be treated equally, but it did make the severest effort to constrain its *boundaries and scope*, limiting its meaning to a certain public sphere of life."[50] All of these values formed points within the constellation of values of the Southern opposition.

But there was another star in this constellation of concepts: the point that blacks were an inferior race of people. Hill stated, "[i]t is not the fault

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44. D. Marvin Jones, *No time for Trumpets: Title VII, Equality, and the Fin de Siecle*, 92 MICH. L. REV. 2311, 2329 (1994) (quoting 50 CONG. GLOBE, 42nd Cong., 2d Sess. 242 (1871) (remarks of Sen. Hill)).

45. *See id.* For an analysis of the use of "imposition language" in reform efforts such as "blacks struggle for equal opportunity," see Richard Delgado & Jean Stefancic, *Imposition*, 35 WM. & MARY L. REV. 1025 (1994). When Delgado uses the term imposition he refers to it as a narrative, as a set of assumptions underlying the thinking of one side of a political debate. *See id.* at 1026. I take this a step further and argue that the concept of imposition best describes a particular theory of equality, one side in a *judicial* debate. This concept in different variations has bedeviled blacks since reconstruction.

46. *See* Jones, *supra* note 44, at 2329.

47. *See id.*

48. *See id.*

49. *See id.*

50. *Id.* at 2330 (emphasis added).

of the race that, socially, they are not the equals of the white race to-day; nor is it incumbent upon every philanthropist to devote every spare hour to the elevation of the race."[51] This was old wine in new bottles: this was the *Dred Scott* philosophy reborn.[52]

Hill was eloquently opposed by Senator Sumner.[53] He claimed in effect that the social contract cut the other way. Sumner argued that the Fourteenth Amendment made blacks citizens.[54] Citizens! In Sumner's view the right to access to public accommodation, in effect the integration of all citizens in civil society, flowed from the concept of citizenship itself: "The Senator may choose his associates as he pleases . . . . That taste which the Senator has now declared belongs to him he will have free liberty to exercise always . . . but when it comes to rights, there the Senator must obey the law."[55]

Hill and his side lost the debate in 1871.[56] But after reconstruction ended the Supreme Court wrote Hill's philosophy into law.[57] Now why was the reconstruction framework—the will of Congress—overturned by the Supreme Court? Antonio Gramsci in his prison notebooks observed that "when the State trembled a sturdy structure of civil society was at once revealed. The State was only an *outer ditch*, behind which there stood a powerful system of fortresses and earthworks."[58] There is a similar story to be told about the overthrow of slavery in the United States: while slavery was overthrown as a structure of laws and official practices, the ideology that supported slavery was largely intact.

I need to make a point here about how this ideology seeps into the judicial process. Most people think of racism as something that involves decisions.[59] Gordon Allport, writing on the nature of race prejudice, stated

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51. 50 CONG. GLOBE, 42d Cong., 2d Sess. 242 (1871) (remarks of Sen. Hill).

52. *See supra* notes 27-28 and accompanying text (discussing the *Dred Scott* decision).

53. *See* 50 CONG. GLOBE, 42d Cong., 2d Sess. 242 (1871) (remarks of Sen. Sumner).

54. *See id.*

55. *Id.*

56. Jones, *supra* note 44, at 2330.

57. *Id.* (citing Civil Rights Cases, 109 U.S. 3 (1883)).

58. ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 494 (Q. Hoare & G. Smith trans., 1971) (emphasis added).

59. This is the central premise of the intent model in constitutional law. According to Professor Blumstein:

> [T]he nondiscrimination notion is a procedural concept assuring evenhanded treatment of similarly situated individuals . . . . [I]t is breached when similarly situated people are treated differently because of their race. *Such differential treatment has an essential ingredient of volition*, and a finding of unconstitutional discrimination therefore rests on a finding of intent.

James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purposes vs. Results Approach From the Voting Rights Act*, 69 VA. L. REV. 633, 643 (1983) (emphasis added). By "volition," Blumstein is referring to the exercise of will—the basic element of a conscious decision. *See id.*

that prejudice—racism—happens when an individual makes irrational inferences on the basis of the *neutral fact of race.*[60] I have spent at least fifteen years studying the concept of race. The culmination of my research is that, contrary to Allport's position, race has a meaning: it is simply a collage of stories, stereotypes, and ideology, almost always denigrating to blacks. The meaning of race in the nineteenth century was that "blackness" was a badge of difference and inferiority.[61] Taney was right on that point in terms of social views, though wrong I think on how blacks should be viewed in the eyes of the law.

As I have stated in my many articles and my recent book,[62] the problem of discrimination comes about when people mistake race, which is a fiction, for a fact.[63] Many writers have written that stereotyping is a problem of individuals acting based on unconscious biases.[64] This is not my approach. Racism is a social practice. Traditionally, it is not unconscious.[65] Judges

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60. *See* GORDON ALLPORT, THE NATURE OF RACE PREDJUDICE 261-81 (1954). Allport develops the hypothesis that racism is an irrational response to the neutral fact of race. He goes on to hypothesize that these attitudes flourish in a social environment of racial separation and ignorance. *See id.*

61. *See supra* notes 23-28 and accompanying text.

62. D. MARVIN JONES, RACE, SEX, AND SUSPICION: THE MYTH OF THE BLACK MALE (2005).

63. *See generally id.*

64. *Cf.* ALLPORT, *supra* note 60.

65. It is not unconscious,

> [a]t least not in a Freudian sense. The problem here is that the Freudian framework relies on the processes within the individual to explain behavior. As a structuralist, I don't believe this gives us a meaningful account of the problem. I see discrimination as a social and historical phenomenon linked to language. Langauge, in a structuralist sense, may also be thought of as "unconscious," but not in the way the conventional account has oversimplified it.
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> The . . . unconscious is therefore not so much that dark inner reservoir of desire and instinct which used to be our image of the Freudian *id,* occasionally breaking into the realm of consciousness or insinuating its way there through the disguises of dreams. Rather, it is an absolute transparency, an order which is unconscious simply because it is infinitely vaster than our individual minds, and because they owe their development to their positions within it.

Jones, *supra* note 24, at 446 n.35 (quoting FREDERICK JAMESON, THE PRISON HOUSE OF LANGUAGE 137-38 (1972)).

> It's wrong to think that the unconscious exists because of the existence of unconscious desire, of some obtuse, heavy caliban, indeed animal unconscious desire that rises up from the depths, . . . and has to lift itself to the higher level of consciousness. Quite on the contrary, desire exists because there is unconsciousness, that is to say, language which escapes the subject . . . and because there is always, on the level of language, something which is beyond consciousness . . . .

Id. (quoting Frederick Jameson, The Prison House of Language 137-38 (1972)). Proponents of affirmative action traditionally tried to justify it on the basis of societal discrimination. One reason

and others have openly and explicitly embraced racism as "reasonable."[66] We will see this in *Plessy*, where the Court was racist, and smugly so.[67] The operative element is race as a concept within our language and culture. Race is a web of cultural images, meaning, ideas and presuppositions. Our legal culture and our social culture are not distinct. Judges bring their images of black people with them into the courtroom. The characteristics of the fictional subject are conflated with the real person. Racism in law is primarily conflation, the inability to distinguish between the individual—who is "real"—and the racial image—which is imaginary. *Plessy* is a classic case.

The *Plessy* case[68] involved an 1890 Louisiana statute that required railroads to segregate passengers on the basis of race.[69] Because this was a Louisiana state law, state action was clear. The Court accepted that a prima facie case of discrimination had been made out and framed the issue in terms of reasonableness.[70] *Plessy* answered this challenge to blatant discrimination explicitly, with racial ideology. Recall that the issue in *Plessy* was simply whether the racial discrimination required by the Louisiana statute was reasonable.[71] The Supreme Court's answer was, of course it is.[72] The Court simply assumed that racial distinctions are natural and therefore beyond the reach of legislation:[73]

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions

societal discrimination is rejected as a justification is that it is in tension with the Freudian and individualistic conception of discrimination. *See id. Cf.* Charles R. Lawrence III, *The Id, The Ego, and Equal Protection Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

66. Reasonable racism is the view that the stereotypes are true. Examples include: blacks are prone to crime, blacks are inferior in intelligence, etc. In my book I argue that the post-civil-rights-era resegregation and the ideology of black inferiority are intertwined: it is the result of a breakdown of consensus that had tentatively existed in the *Brown* era. *See* JONES, *supra* note 62. Examples of "reasonable" racism today include: racial profiling by police; the disparate portrayal of black and white victims of Hurricane Katrina; the claim by Richard Sander that gaps in test scores reflect systematic inferiority of blacks as a class, *see* Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004) (blaming test scores on cultural peculiarities, specifically poor parenting); Bill Cosby's embrace of stereotypes of the black poor; and the neoconservative claim that the underclass are to blame for their own conditions. These are all examples of a burgeoning resurgence of classic essentializing of blacks.

67. *See infra* notes 68-75, 80-81 and accompanying text.

68. Plessy v. Ferguson, 163 U.S. 537 (1896).

69. *Id.* at 537.

70. *See id.* at 549-50.

71. *Id.* at 550.

72. *Id.* at 550-51.

73. *Id.* at 551-52. The Court explicitly held that it is natural and within the police powers of the state to regulate race, and implicitly held that it is unnatural for the Federal Government, by means of the Equal Protection Clause, to intervene in the state's regulatory scheme. *Id.*

> based upon color, . . . but, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security.[74]

Race is so natural a difference that it is, in context, as reasonable to segregate cars on a train as it is to segregate the sexes in public bathrooms. While *Plessy* did not explicitly characterize these natural racial differences, the meaning of segregation both in *Plessy* and the many instances of state sponsored segregation to follow was that blacks occupied a lower place—a lower caste if you will—than whites.

> Radicals readily recognized . . . that blacks were already practically . . . segregated, but to Radicals the laws were useful in showing explicitly and blatantly the power of whites. They were tokens of hard and present truths and signs of things to come—of the surety of white supremacy and the futility of black resistance.[75]

Dubois, in *Black Reconstruction*, went so far as to characterize the primary function of segregation as a system that paid whites in the wages of race-based privilege, white privilege if you will.[76] This framework of racial segregation as natural was knotted together with the correlative idea that the citizenship rights of blacks naturally did not extend to the social realm. The social realm was a private sphere beyond the reach of federal civil rights protections.

As Jack Balkin wrote, "[c]ivil and political equality were guaranteed, but social equality was still different, because a person's social status among

74. *Id.* at 544.

75. JOEL WILLIAMSON, THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION 225 (1984).

76. W.E. BURGHARDT DU BOIS, BLACK RECONSTRUCTION IN AMERICA, 1860-1866 (Free Press 1998) (1935). White privilege is the pervasive, structural, and generally invisible assumption that white people define a norm and black people are "other," dangerous, and inferior. Sylvia Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 604 (2003).

his or her fellow citizens is formed by private interactions in a private sphere of association."[77]

Not only does *Plessy* say that segregation is natural, but there is also the notion that the subordination of blacks is inevitable because of their inferiority. Thus, Justice Harlan, though dissenting, states, as if in unison with the Court on the issue of inferiority, "[t]he white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage."[78] Of course, if whites are the naturally superior race, not only are whites absolved from moral responsibility—their superior position in society is inevitable—but also *blacks are the cause for their own degradation.* The fault is in their gene pool. Thus, another star in this constellation of concepts is social Darwinism.

In one case, *Plessy* knots together the philosophy of Joshua Hill,[79] which paints civil rights protections as an encroachment or imposition on a sphere of autonomy preserved to the individual,[80] with the philosophy of *Dred Scott*, which had originally held blacks to be inferior,[81] and the philosophy of social, or really racial, Darwinism.

Individualism, liberty, and white privilege are combined in one constellation of values. This is what I call "equality as imposition." The function of this framework was to portray black rights claims as unnatural and contrary to the basic ideals of this country, and to portray blacks as undeserving of judicial intervention. Their equality claims thus represent an imposition. It was this notion of equality that upheld segregation from 1896 to 1954.

Brown[82] clearly rejected segregation, but on what theory it did so is not clear. Our current debate about affirmative action is about the interpretation of *Brown*. What theory of equality did *Brown* embrace? Many scholars argue *Brown* was premised on a substantive theory of equality, and on a concern about conditions of blacks as a group. There are two branches of this theory. The effects model looks at the causal nexus between race and conditions in society.

On point, the Court noted that "[t]o separate [the black students] 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

77. Jack M. Balkin, *Plessy, Brown, and Grutter: A Play In Three Acts*, 26 CARDOZO L. REV. 1689, 1700 (2005).

78. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

79. *See supra* notes 44-52 and accompanying text.

80. *See supra* notes 44-52 and accompanying text.

81. *See supra* notes 23-28 and accompanying text.

82. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

their hearts and minds in a way unlikely ever to be undone."[83] To underscore the Court's concern with social outcomes or social effects, the Court went on to cite social science research that documented the harm of segregation to black children or blacks as a group.[84] This type of argument still exists in Title VII law, nominally. Under this theory blacks should not suffer any form of oppression or be made to suffer because they are black. Intent is not the issue under this model: impact is.

Some commentators go further to argue that we must not only be concerned about the social impact of present policies, but that we have an affirmative duty to eliminate racial caste. Thus, Cass Sunstein states, "the anticaste principle forbids social and legal practices from translating highly visible and morally irrelevant differences into systematic social disadvantage."[85] Also, Owen Fiss stated, "what is critical . . . is that the state law or practice aggravates (or perpetuates?) the subordinate position of a specially disadvantaged group."[86] In addition, according to Dorothy Roberts, "the anti-subordination approach considers the concrete effects of government policy on the substantive condition of the disadvantaged."[87]

I think this is the heart of *Brown*. This concern with "them," with black children, with the plight of innocent victims, with social "impact," and with arguably the issue of caste, places *Brown* squarely in the framework of equality as "redemption," an expansive notion of equality.

An interpretive corollary here is that the *Brown* case flowed from a legal realist understanding that history, specifically the sordid history of segregation, must inform our reading of the constitution. Of course, the same opinion can be read narrowly. I think a narrow reading would be

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83. *Id.* at 494.

84. *Id.* (*citing* K. B. Clark, EFFECT OF PREJUDICE AND DISCRIMINATION ON PERSONALITY DEVELOPMENT (Midcentury White House Conference on Children and Youth, 1950); WITMER KOTINSKY, PERSONALITY IN THE MAKING (1952), c. VI; Deutscher and Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. PSYCHOL. 259 (1948); Chein, *What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?*, 3 INT. J. OPINION AND ATTITUDE RES. 229 (1949); THEODORE BRAMELD, *Educational Costs*, IN DISCRIMINATION AND NATIONAL WELFARE (MacIver ed., 1949), 44-48; EDWARD FRANKLIN FRAZIER, THE NEGRO IN THE UNITED STATES 674-681 (1949); and GUNNAR MYRDAL, AN AMERICAN DILEMMA (1944)).

85. Sunstein, *supra* note 32, at 2411.

86. Fiss, *supra* note 32, at 157.

87. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1453-54 (1991); *see also* Catherine A. MacKinnon, *Not a Moral Issue*, *in* FEMINISM UNMODIFIED 146 (1987); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659; David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99 (1986).

wrong, but there is a slender reed of language for conservatives to hold onto. The Court stated:

> 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.[88]

Thus, conservatives argue that *Brown* is about the permissible boundaries of government decisions. Edwin Meese states, "if we can preserve the even-handed decisions through which the Supreme Court has moved us toward a color-blind society, then we really will have approached a new frontier in civil rights and in overall prosperity."[89] In effect, *Brown* creates a line beyond which government may not go, and a class of considerations that are impermissible for government to use. Richard Posner contends "that the proper constitutional principle is . . . *no use* of racial or ethnic criteria to determine the distribution of government benefits and burdens."[90]

This focus on decisions is knotted together with the premise that equal protection rights are personal or individual rights—a counterpoint to a focus on groups. Individuals have no history as such. It follows that by focusing narrowly on the parties before the court, the conservatives find that historical context and social outcomes are irrelevant. Equality is reduced normatively to a concern about specific identifiable decisions. This precisely fits the narrative that black claims for group rights are unnatural and challenge the foundations of a liberal legal system, which is based on the rights of the individual. This is "equality as imposition." Richard Delgado talks about "imposition" as a political narrative.[91] He describes the narrative eloquently:

> We march, link arms, and sing with the newcomers, identifying with their struggle. At some point, however, reaction sets in. We decide the group has gone far enough. At first, justice seemed to be

88. *Brown*, 347 U.S. at 494 (quoting the lower court's decision in the Kansas case).

89. Edwin Meese III, *Civil Rights, Economic Progress, and Common Sense*, 14 HARV. J.L. & PUB. POL'Y 150, 156 (1991).

90. Richard Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 22 (1974).

91. Delgado & Stefancic, *supra* note 45, at 1026.

> on their side. But now we see them as imposing, taking the offensive, asking for concessions they do not deserve. Now they are the aggressors, and we the victims . . . . We decide the group is asking for "special" status. We find their demands excessive, tiresome, or frightening.[92]

In the story of the Amistad, the sailors sailed back and forth between Africa and America.[93] Like the Amistad, the discourse of equality has swung back and forth between these two constellations of values. During the period following *Brown* these two constellations of values seesawed back and forth.

For example, in 1972 the Court decided *Griggs v. Duke Power Co.*,[94] which was premised largely on the anti-caste principle that one cannot perpetuate segregation.[95] But the Supreme Court cases since 1988 have fallen into line: they may all be grouped around this post-civil rights narrative. This new narrative of imposition is merely a variation on the themes articulated first by Joshua Hill,[96] and later by *Plessy*.[97]

Let us start with the *Croson* case.[98] First, the Court emphatically limited the unit of inquiry to the individual, concluding that the Fifth and Fourteenth Amendments protect *persons*, not *groups*.[99] Thus all governmental action based on race—a *group* classification—should be subjected to detailed judicial scrutiny to ensure that the *individual* right to Equal Protection has not been infringed.

Individuals have no group history. The minorities argued that strict scrutiny should not apply the same way when blacks are involved because of their unique experience with slavery and segregation. The Court in *Croson* rejected this context-specific application of Equal Protection in favor of a Universalist view.[100] "There is only one Equal Protection Clause. It requires every state to govern impartially. It does not direct the courts to

92. *Id.* (footnote omitted).

93. *See* William G. Ross, *The Legal Career of John Quincy Adams*, 23 AKRON L. REV. 415, 446-47 (1998).

94. 401 U.S. 424 (1971).

95. *See id.*

96. *See supra* notes 44-52 and accompanying text; Jeffrey Rosen, *The Color-Blind Court*, 45 AM. U. L. REV. 791, 800 (1996).

97. *See supra* notes 68-75, 79-80 and accompanying text.

98. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989).

99. *See supra* note 13 and accompanying text.

100. *See Croson*, 488 U.S. at 494.

apply one standard of review in some cases and a different standard in other cases."[101]

The Court's rejection of historical context surfaced again at another stage of the Court's analysis. Having found strict scrutiny appropriate the Court then had to decide what constitutes a justification. The City of Richmond argued that "societal discrimination," that is the historic and present injustice blacks face or the unlevel playing field justified affirmative action.[102] Continuing its arc of individualism and particularity, the Court found these appeals to social and historical context either irrelevant or beyond the ken of courts to address.[103] "Justice Powell contrasted the 'focused' goal of remedying 'wrongs worked by specific instances of racial discrimination' with 'the remedying of the effects of societal discrimination, an amorphous concept of injury that may be ageless in its reach into the past.'"[104]

Social Darwinism crept in again. The Court suggested that statistical disparities, by themselves, mean nothing:

> The city and the District Court also relied on evidence that MBE membership in local contractors' associations was extremely low. Again, standing alone this evidence is not probative of any discrimination in the local construction industry. There are numerous explanations for this dearth of minority participation, including . . . both black and white career and entrepreneurial choices.[105]

Effects, social outcomes, and results didn't matter; it was simply a question of whether the decisional process was fair no matter the outcome. This is purely procedural equality.

A corollary here is that the court was skeptical of whether the necessary causal link between race and disproportionate exclusion was present; instead, it could have been blacks' own fault: "[T]he 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their

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101. *Id.* at 514 n.5 (Stevens, J., concurring) (quoting Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring)).

102. *Id.* at 470.

103. *Id.* at 507.

104. *Id.* at 496-97.

105. *Id.* at 503.

representation in the local population."[106] "Blacks may be disproportionately attracted to industries other than construction."[107]

In its ahistorical approach, its individualism, and its social Darwinism, *Croson* mirrors the constellation of concepts framed by *Plessy*.[108] And it also hints, in the spirit of *Plessy*, that the problem of blacks may be natural; maybe they would rather play basketball than be entrepreneurs.

Hopwood v. Texas[109] flowed directly from *Croson*. Prior to *Hopwood*, *Regents of University of California v. Bakke*[110] had been the law. *Bakke* recognized diversity as a compelling justification for affirmative action.[111] But *Croson* limited race conscious measures to specific instances of identified, i.e. proven, discrimination.[112] Race, as a rule, was both an irrelevant an impermissible consideration. *Hopwood* fell into line with *Croson*, holding that "[t]he use of [race] even as part of the consideration of a number of factors, is unconstitutional."[113]

Grutter[114] was hailed as a victory[115] simply because it reversed *Hopwood* and restored the *Bakke* "permission." The case arose when the University of Michigan School of Law rejected Barbara Grutter, a white female with a 3.8 grade point average and a 161 LSAT score.[116] She argued she was denied admission because race, rather than her objective qualifications, was a "predominant" factor in her non-selection.[117] She challenged not only the policy at the University of Michigan's law school, but also the long standing precedent in *Bakke*.[118] The 1978 decision in *Bakke*, written by Justice Powell, famously held that while all race-conscious programs were subject to strict scrutiny and required, *inter alia*, a compelling justification, the need for diversity in admissions justified the

106. *Id.* at 507.
107. *Id.* at 503.
108. *See supra* notes 79-80 and accompanying text.
109. 78 F. 3d 932 (5th Cir. 1996).
110. 438 U.S. 265 (1978).
111. *Id.*
112. *Croson*, 488 U.S. at 505.
113. *Hopwood*, 78 F.3d at 945-46.
114. 539 U.S. 306 (2003).
115. *See, e.g.*, Michelle Adams, *Radical Integration*, 94 CAL. L. REV. 261 (2006); *see also* Elaine Jones, *Luck Was Not a Factor: The Importance of a Strategic Approach to Civil Rights Litigation*, 11 ASIAN L.J. 290 (2004).
116. *Grutter v. Bollinger*, 539 U.S. 306, 316.
117. *Id.* at 317.
118. *Id.* at 323; Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

consideration of race.[119] *Grutter* is widely touted as a victory because it rejected the "heresy" of *Hopwood* and affirmed that Powell's decision was the law; it affirmed a qualified right of even state-run law schools to consider race under the auspices of "diversity."[120]

The starting point in locating *Grutter* within the heaven of our constitutional discourse is to appreciate the tension between diversity and affirmative action.

Blacks' claims to affirmative action are claims generally for compensatory justice, and are arguably reparational. These are historically grounded, backward looking, and focused on the harm experienced by blacks. They seek to end "second class citizenship." This is an extension of the constellation of values traced by Lincoln in the nineteenth century.[121]

Diversity represents a rejection of all historically grounded injustice claims, as well as all appeals to social engineering. "We are not social engineers," Chief Justice Roberts wrote in *Seattle*.[122] Diversity has its roots in liberal individualism, and the need of the individual for an environment in which there can be a robust exchange of ideas. Diversity is a concession from within the framework of "imposition"; it allows blacks in but only to the extent it serves the goals of white privilege.

As Charles Lawrence has stated, the "diversity defense" of affirmative action is, in effect, conservative.[123]

> The liberal or "diversity" defense articulates its purpose as "forward-looking" . . . it begins with an implicit denial of the defender's . . . responsibility for past or contemporary racism. The university seeks to prepare its students for future . . . leadership in a racially diverse society and expresses no interest in reparations. By looking only forward, it avoids . . . admission . . . of . . . past discriminatory practices, even when that discrimination is de jure and of relatively recent vintage. This denial . . . reiterates "the big lie," the anti-affirmative action argument that pretends that white supremacy is extinct and presupposes a color-blind world.[124]

This is *Grutter*'s starting point.

Grutter mirrors *Croson* in its hierarchy of values. It is in the first instance a quintessentially individualistic opinion prizing individualized determinations and railing against any program that distributes benefits on

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119. *Bakke*, 438 U.S. at 330.
120. *Grutter*, 539 U.S. 306.
121. *See supra* notes 30-33 and accompanying text.
122. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 127 S. Ct. 2738, 2779 (2007).
123. *See* Lawrence, *supra* note 1, at 932.
124. *Id.* at 953-54.

the basis of membership in a group. Once again the court adopted the perspective of Justice Powell.[125] "In Justice Powell's view, when governmental decisions touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest."[126]

The reference to the individual invokes the social contract and the very foundations of the liberal legal system as a barrier: preferential treatment on the basis of race is an impermissible end.

As in *Croson*, the Court appealed to a lofty universalism at the expense of taking into account the lived experience of black people for purposes of determining how strictly the Equal Protection Clause should be applied.[127] The Court repeated Powell's aphorism that "there are not two equal protection clauses."[128] Universalism erases the uniqueness of blacks' lived experiences. Through this universalism, as in *Croson*, the Court equated affirmative action programs with the segregated schools in *Brown*. Barbara Grutter's injury from the University of Michigan's use of race is just as serious as the injury to Linda Brown. For blacks, discrimination can be a soul-murdering, scaldingly humiliating experience. I wonder if Barbara Grutter went to get counseling.

But *Grutter* is more conservative in its reasoning than this. The central figure in the framework of "imposition" is the figure of the innocent white victim. As Joshua Hill had posed the figure of the white property owner dispossessed from his "parlor" because of intrusive civil rights laws,[129] the court in *Grutter* posed the figure of the innocent white victim. Such

125. Professor Levine argues that O'Connor goes beyond Powell's "educational value" rationale. "O'Connor . . . said that developing good citizens is a benefit that flows from affirmative action and fits within a university's social role. All of this goes beyond the 'educational benefits of diversity' interest articulated by Powell that supposedly is all that O'Connor 'endorse[d].'" *See* Joshua M. Levine, *Stigma's Opening:* Grutter*'s Diversity Interest(s) and the New Calculus for Affirmative Action in Higher Education*, 94 CAL. L. REV. 457, 470 (2006). Nonetheless, the great thrust of O'Connor's argument frames affirmative action as something justified by its benefit to whites and the larger society as opposed to something focused on addressing social wrongs suffered by blacks. The common theme here and with O'Connor's explicit reference to harming innocent whites is that it studiously ignores black historical experiences as irrelevant.

126. *Grutter*, 539 U.S. at 323.

127. *See supra* notes 101-02 and accompanying text.

128. *Grutter*, 539 U.S. at 323 ("Justice Powell began by stating that '[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.'" (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90 (1978))).

129. *See supra* notes 44-45 and accompanying text.

measures would risk placing unnecessary burdens on innocent third parties "who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered."[130]

Michigan does retain its diversity program but at the expense of affirming the narrative of imposition that was the very spirit of *Plessy*. The coup de grace is the recent Seattle case.[131] The Seattle case exposes the exact core of the explosive affirmative action debate. The stakes are so high in that case because of the stark pattern of resegregation that is emerging fifty years after *Brown*.

> American schools are still nearly as segregated as they were 50 years ago. Almost three-quarters of African-American students are currently in schools that are more than 50% black and Latino, while the average white student goes to a school that is 80% white, according to a 2001 study by the National Center for Education Statistics. Similarly, a 2003 study by the Civil Rights Project at Harvard found that 27 of the nation's largest urban school districts are 'overwhelmingly' black and Latino, and segregated. The percentage of white students going to school with black students is "lower in 2000 than it was in 1970 before busing for racial balance began" . . . .[132]

This pattern of resegregation did not just happen. It flowed directly from the mischief of Rehnquist Court decisions since the late 1980s.[133]

The Rehnquist Court issued a trilogy of opinions[134] that severely limited

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130. *Grutter*, 539 U.S. at 324 (quoting *Bakke*, 438 U.S. at 310).

131. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 127 S. Ct. 2738 (2007).

132. Juan Williams, *The Legacy of Little Rock*, TIME, Oct. 1, 2007, at 61.

133. Lia B. Epperson, *True Integration: Advancing Brown's Goal of Educational Equity in the wake of Grutter*, 57 U. PITT. L. REV. 175, 176 (2005).

134. *Id.* The first case was *Board of Education v. Dowell*, 498 U.S. 237 (1991).

> In *Dowell*, the Court held that once a "unitary" system could be established, a federal court's desegregation order should end, even if this meant a resegregation of schools. The Court held that school boards need only show they complied in "good faith" and that "the vestiges of past discrimination had been eliminated to the extent practicable."

Epperson, *supra* note 133, at 185 (footnotes omitted). The second shoe to fall was *Freeman v. Pitts*, 503 U.S. 467 (1992).

> [T]he Court held that once a district complied with a portion of a desegregation order, a federal court should cease to monitor that portion and remain involved only as to those aspects of the plan that have yet to be achieved. This allowed for the piecemeal dismantling of desegregation orders across the South.

Epperson, *supra* note 133 at 185 (footnotes omitted). *Missouri v. Jenkins*, 515 U.S. 70 (1995), was the capstone of the trilogy.

> [T]he Court established the requirement that lower courts must specify exactly what educational deficits are traceable to segregation and discrimination, and what results will be required as proof that the deficits are remedied. If such specification is absent, *Jenkins* gives courts the license to return school districts to local control, thus allowing

the circumstances, means, and duration of desegregation remedies, stated its desire to end federal court supervision, and invoked the common mantra of restoring control to local school systems. The lie behind this glorification of local control is similar to the Court's embrace of "color blindness" in many other contexts. It is a standard that treats whites and blacks as if they were similarly situated and ignores the history of segregation and its vestiges that have been such unique and intrinsic threads in the American tapestry. This form of local control allowed segregation to flourish in the era before *Brown*, and has done so again in the decade since these decisions.[135]

The only tool schools have left after this trio of cases is the tool of voluntary affirmative action.[136] As Ted Shaw stated:

> What these school districts were trying to do was overlay on all that choice the imperative to maintain some diversity or some degree of integration. You know, all that's left of *Brown v. Board of Education*, for the most part, is voluntary integration, and days of mandatory busing are all but over.[137]

The absence of alternatives is particularly clear in the Seattle and Louisville cases. Both areas have a troubled history with respect to segregation:

> In both Seattle and Louisville, the local school districts began with schools that were highly segregated in fact. In both cities plaintiffs filed lawsuits claiming unconstitutional segregation. In Louisville, a federal district court found that school segregation reflected pre-*Brown* state laws separating the races. In Seattle, the plaintiffs alleged that school segregation unconstitutionally reflected not only generalized societal discrimination and residential housing patterns, but also *school board policies and actions* that had helped to create, maintain, and aggravate racial segregation. In Louisville, a federal

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documented inequities to persist.

Epperson, *supra* note 133at 186 (footnotes omitted).

135. *See* Epperson, *supra* note 133

136. *See In Landmark Ruling, Supreme Court Strikes Down Voluntary Desegregation in Public Schools*, DEMOCRACY NOW, June 29, 2007, http://www.democracynow.org/2007/6/29/in_landmark_ruling_supreme_court_strikes [hereinafter DEMOCRACY NOW].

137. *Id.*

> court entered a remedial decree. In Seattle, the parties settled after the school district pledged to undertake a desegregation plan.[138]

However, over the years Louisville was found unitary[139] and so by the time of the lawsuit both cities were innocent of formal, or *de jure*, discrimination. Without this factual predicate voluntary integration was the only game in town. Voluntary integration took place in Seattle and Louisville schools, where race was used as a tie breaker.[140] At schools where the racial imbalance was "out of whack," the school boards voluntarily allowed race to "break the tie" between students in the same district.[141]

Ironically, in *Seattle* there was even a question of busing children away from their own neighborhoods. As Ted Shaw stated:

> These cases out of Seattle, Washington and Louisville, Kentucky didn't involve white parents who were suing because they were being sent to schools further away from home. There were broad choice elements, where students were choosing schools within their districts on a number of factors: the programs that were at those schools, the reputations of the schools.[142]

With the last hope—the last tool of desegregation at stake—the issue turned on whether the use of race was seen as remedial or as an act of discrimination.[143]

In which category to put the affirmative action in this case depends on our understanding of what segregation is. If segregation is racial imbalance, the schools in Seattle and Louisville were resegregating and there was a basis to argue for a remedy.[144] However, if segregation is racial imbalance combined with the proven sanction of law, then there was no such proof.[145] The debate is over defining the harm of segregation. This takes us back to

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138. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 127 S. Ct. 2738, 2802 (2007) (Breyer, J., dissenting).

139. *Id.* at 2740. In 2000, the district court that entered that decree dissolved it, finding that Jefferson County had "eliminated the vestiges associated with the former policy of segregation and its pernicious effects," and thus had achieved "unitary" status. Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358, 360 (W.D. Ky. 2000).

140. *Seattle*, 127 S. Ct. at 2747-50.

141. *Id.*

142. DEMOCRACY NOW, *supra* note 136.

143. *Seattle*, 127 S. Ct. at 2752.

144. *Id.*

145. *Id.*

the divide between effects and intent,[146] universalism versus context,[147] true equality or equality discerned through the narrative of imposition.[148]

In *Seattle*, the Supreme Court placed its sanction on the view that the harm is the tainted decision.[149] "[T]he harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that the Constitution is not violated by racial imbalance in the schools, without more."[150] The Court went on to make this point as sharp as a razor: "It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954."[151] The Court concluded: "[a]t most, [the present] statistics show a national trend toward classroom racial imbalance. However, racial imbalance without intentional state action to separate the races does not amount to segregation."[152]

Using the Court's analysis, the dissent criticized that the Court was "feeling confident that, to end invidious discrimination, one must end *all* governmental use of race-conscious criteria."[153] The Supreme Court justified this formal reading on the grounds that it is necessary to prevent a floodgate of affirmative action:

> Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that "at the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."[154]

Once again the individual, read here as the innocent white victim, stands on the tension bridge between where we are and a future of social justice.

But the individual constructed by the Supreme Court is incredibly ahistorical. In *Brown*, everyone agreed black children were stigmatized by the segregation laws. This was the point of the Kenneth Clark doll

146. *See supra* notes 85-87 and accompanying text.
147. *See supra* notes 101-06, 128-29 and accompanying text.
148. *See supra* notes 45-47, 80-81, 91-92, 96-97, 130 and accompanying text.
149. *Seattle*, 127 S. Ct. at 2752.
150. *Id.* (quoting Milliken v. Bradley, 433 U.S. 267, 280 n.14 (1977)).
151. *Id.* at 2767.
152. *Id.* at 2769.
153. *Id.* at 2833 (Breyer, J., dissenting).
154. *Id.* at 2757 (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995)).

study[155]—black children were made to feel inferior, and it was on this basis that the Court overruled *Plessy*:[156] "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 ever to be undone."[157]

The Court left no doubt who "them" is: "[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children."[158] In the face of this uncontested history, the Court now frames the issue as if the race of the children in *Brown* was irrelevant.

"Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons."[159] As the Court revises *Brown* it becomes incoherent. Of course the race of the children mattered—it was *black* children who were made to feel inferior. As Justice Stevens wrote in his dissent:

> This . . . reminds me of Anatole France's observation: "The majestic equality of the law, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread." THE CHIEF JUSTICE fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools.[160]

The crowning point that confirms this pattern is the Court's skepticism, not only about intent, but the causal nexus: whether the racism of past segregation has anything to do with the escalating racial isolation of today. This is critical because even if you assume it is only state sponsored segregation that matters, not imbalance in itself, there is a thin line between "accidental" isolation of blacks and intentional segregation. The threshold question is: did race cause the isolation? The Court never asks the question. Justice Thomas simply shrugs, as if this were simple, assuming that when state sponsored segregation occurs there is usually a statute around. This reductionism reflects the social Darwinism of the twenty-first century.[161] Racial isolation may be as extreme as it was in 1950, and despite the resemblance of this to apartheid, this is okay. I am reminded of Professor

155. Brown v. Bd. of Educ., 347 U.S. 483, 494-95 n.11 (1954).
156. *Id.*
157. *Id.* at 494.
158. *Id.*
159. *Seattle*, 127 S. Ct. at 2768.
160. *Id.* at 2798 (Stevens, J., dissenting).
161. *See supra* notes 78, 106 and surrounding text.

Bryan Fair's aphorism that while the problem of the twentieth century was the problem of the color line, the problem of the twenty-first century is the problem of color-blindness.[162]

III. CONCLUSION

It's gone. Not just affirmative action—the dream that we could achieve an integrated society through the law. Everything we marched for. Everything we fought so hard for in court.

The patterns of resegregation in law school and in public schools cascade over our society like a rogue wave of injustice. Moreover, we lack the tools, within the current constellation of constitutional discourse, to do anything about it. True equality is as removed from us as the speeches of Lincoln and Johnson and the quietly overruled decision of *Brown*.

We learn from the work of anthropologist Clifford Geertz that it is for each generation to define the meaning of "we the people" and to determine the spirit of the age.[163] Orfield asks in effect, "What is the spirit of our age? Is it the spirit of *Brown* or is it the ghost of *Plessy*?"[164]

From *Plessy* to *Croson*, from *Croson* to *Grutter*, and from *Grutter to Seattle* there is a mirroring of constitutional concepts: "*Brown* was not about the harm to the hearts and minds of black children"; it was about the rights of colorless individuals. "Universal values preclude claims of black historical injustice." "The integrative ideal is no justification for social engineering at the expense of the innocent white victim." The existence of racial isolation does not matter. The fact that policies perpetuate racial caste does not matter. The only thing that matters to the Court is the abstract formalism of getting rid of race as a criteria. Since results do not matter, the Court does not explain why racially isolated schools typically produce poor outcomes for the students. Is it that there is an unstated assumption that these outcomes for blacks are natural or inevitable? I can still hear Lincoln's

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162. *See* Bryan K. Fair, *Been in the Storm Too Long, Without Redemption: What We Must Do Next*, 25 S.U. L. Rev. 121, 124 (1997) ("[I]n race matters, the problem of the Twenty-first century will be the problem of colorblindness—the refusal of legislators, jurists, and most of American society—to acknowledge the causes and current effects of racial caste and to adopt effective remedial policies to eliminate them."); *see also* W.E.B. DU BOIS, THE SOULS OF BLACK FOLK vii (2d ed. 1953) (1903) ("[T]he problem of the Twentieth Century is the problem of the color-line.").

163. *See generally* Clifford Geertz, *Thinking as Moral Act: Ethical Dimensions of Anthropological Fieldwork in the New States*, *in* AVAILABLE LIGHT: ANTHROPOLOGICAL REFLECTIONS ON PHILOSOPHICAL TOPICS 21-41 (2000) (claiming that thinking cannot be abstracted from action, and rejecting the idea of "objective knowledge").

164. *See* Orfield, *supra* note 19.

words echoing down the corridors of history: "As I would not be a slave, so I would not be a master . . . . Whatever differs from this . . . is no democracy."[165]

What happened to that? What happened to the spirit of *Brown*?

165. *See supra* note 30 and accompanying text.