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Willful [Color-] Blindness: The Supreme Court's Equal Protection of Ascription

Aaron J Shuler, *University of Oregon*

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Aaron J Shuler¹

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INTRODUCTION: Rogers Smith's Multiple Traditions and James Baldwin's Ironic Innocence

Rogers Smith writes in *Beyond Tocqueville, Myrdal and Hartz: The Multiple Traditions in America* that American politics has been frequently described as being predominately shaped and defined by liberal democratic principles. Scholars from Hector St. John Crevecoeur in the eighteenth century to Harriet Martineau in the nineteenth to Gunnar Myrdal and Louis Hartz in the twentieth and up to the more recent work of legal scholars such as Kenneth Karst follow this basic model launched by Tocqueville's *Democracy in America*. Smith's Multiple Traditions view, however, asserts that "American politics is best seen as expressing the interaction of multiple political traditions, including liberalism, republicanism, and ascriptive forms of Americanism, which have collectively comprised American political culture, without constituting it as a whole."²

¹ Adjunct Professor of Law, Centro de Estudios, Madrid, Spain. Ph.D. student and Graduate Teaching Fellow, University of Oregon Department of Political Science. B.A., University of Wisconsin-Madison, 2000, J.D., University of Minnesota Law School, 2003, D.E.A., Universidad de Navarra, Pamplona, Spain, 2009.

² Rogers M. Smith, *Beyond Tocqueville, Myrdal and Hartz: The Multiple Traditions in America*. American Political Science Review, Vol. 87, No. 3, September 1993, p. 550.

Smith sees this blend of disparate traditions including illiberal ascriptive practices resulting in drastic, pervasive and persistent hierarchies that define American political culture. He takes issue with the narrow Tocquevillian conclusion that the United States was more egalitarian than Europe because it lacked the traditional ascriptive hierarchies of monarchy and hereditary, and highlights a United States that favored a minority of propertied white men at the country's inception and ascription based on race, sex and religion going forward. Moreover, these hierarchies were not sequestered among "the poor and uneducated white people in isolated and backward rural areas of the deep South"³ as asserted by Myrdal, but implemented and defended by "American intellectual and political elites elaborat[ing] distinctive justifications...based in inegalitarian scriptural readings, scientific racism of the "American school" of ethnology, racial and sexual Darwinism, and the romantic cult of Anglo-Saxonism in American historiography."⁴ As a result, "for over 80% of U.S. history, its laws declared most of the world's population to be ineligible for full American citizenship"⁵ and a firmly-entrenched hierarchy with white Protestant men sitting on the top justified with "credible intellectual and psychological reasons...based in nature, history, and God" prevailed.⁶

This essay seeks to apply Smith's thesis to the post-Warren Supreme Courts. Specifically, it will discuss how Smith's warning about "the possibility that novel intellectual, political, and legal systems reinforcing racial, ethnic, and gender inequalities might be rebuilt in America in the years ahead" is indeed at play in the Supreme Court's

³ Smith at 551.

⁴ *Id.* at 549.

⁵ *Id.*

⁶ *Id.* at 550.

Equal Protection doctrine.⁷ The Court’s focus on intent over impact and its “color-blind” approach to racial classifications in the era of subterranean prejudice and indifference or ignorance to inequality solidifies and perpetuates the hierarchies created by ascriptive forms of Americanism under the Court’s guise of liberal notions of “equal laws, not equal results.”⁸ In addition to Smith’s warning, the Court’s unwillingness to confront its complicity in the perpetuation of hierarchy recalls James Baldwin’s indictment of the “disavowal of domination,” an “ironic innocence” due not to “excusable ignorance but a blindness that is culpable because it is willful.”⁹

EQUAL PROTECTION AS ENTRENCHMENT: INTENT OVER IMPACT

The Equal Protection Clause of the Fourteenth Amendment was never as effective and exacting as its strongest proponents may have wanted it to be but it did enjoy qualified success after its ratification in 1868. It was most successful in striking down blatant, unexplainable on any grounds other than invidious discrimination in statutory language or application by State actors. It was far less capable of addressing barely subtle discrimination or outright hostility by pseudo-State actors that frequently fell outside of a scope that was quickly strangled after ratification.¹⁰ Thus the Equal Protection Clause was able to invalidate a facially-biased statute in *West Virginia v. Strauder*¹¹ that prohibited blacks from serving on juries, and a facially-neutral safety statute enforced every single time against Chinese Americans and only once against

⁷ *Id.*

⁸ *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), *discussed post* at 6.

⁹ George Shulman, *American Prophecy*, (University of Minnesota Press, 2008) p. 143, discussing James Baldwin, *The Fire Next Time in The Price of the Ticket: James Baldwin Collected Non-Fiction, 1948-1965* (New York: St. Martin’s Press, 1985) p. 335-36.

¹⁰ 13th and 14th Amendments not meant to redress “ordinary civil injuries.” *Civil Rights Cases*, 109 U.S. 3, 24 (1883).

¹¹ 100 U.S. 303 (1880).

eighty Caucasians in *Yick Wo v. Hopkins*,¹² while it was unable to reach discrimination in public accommodations if committed by private actors in the *Civil Rights Cases*.¹³

In the twentieth century, victories against overt racial segregation laws were achieved in *Buchanan v. Worley*¹⁴ and *Shelley v. Kraemer*,¹⁵ and the Warren Court reversed the Taney Court's *Plessy v. Ferguson*¹⁶ decision to invalidate de jure—and at least attempt to address de facto segregation—in schools and the ascriptive bonanza that “Separate but Equal” was in *Brown v. Board of Education*.¹⁷ As the Civil Rights movement gained traction and public sympathies turned against overt racial discrimination, the Equal Protection clause continued to be limited but effective at removing explicit animosities, leading to the motivations of ascriptive systems going more subterranean. To be useful going forward, Equal Protection would not be needed so much to confront the fading existence of facially-biased legislation that constructed hierarchies, but instead would have to be able to ferret out “sophisticated doctrines of racial inequality [that] were dominant in American public opinion”¹⁸ in order to dismantle them.

The Burger Court's doctrinal announcement in *Washington v. Davis*¹⁹ delivered anything but the tool to dismantle hierarchies.²⁰ *Davis* involved a test given by the

¹² 118 U.S. 356 (1886).

¹³ 109 U.S. 3 (1883).

¹⁴ 245 U.S. 60 (1917), striking down a Louisville ordinance seeking to maintain completely segregated neighborhoods, albeit under the guise of “the civil right of a white man to dispose of his property.” *Buchanan* at 81.

¹⁵ 334 U.S. 1 (1948).

¹⁶ 163 U.S. 537 (1896).

¹⁷ 347 U.S. 483 (1954).

¹⁸ *Smith* at 555.

¹⁹ 426 U.S. 229 (1976).

²⁰ *Davis*' precursors came five years earlier and two years after Justice Warren left the Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) when the Court limited its Equal Protection inquiries to de jure segregation instead of persistent de facto disparities. See also *Miliken v. Bradley*, 418 U.S. 717 (1974).

District of Columbia to prospective police officers that ended up disqualifying four times as many black applicants as their white counterparts. Justice White found that tests that resulted in a disparate impact were not unconstitutional even when the tests bore a tenuous relationship with the ability to perform the job in question so long as the test administered was not given in pursuance of a racial animus.²¹ While the animus may not have been as overt as Henry Cabot Lodge’s literacy tests in 1896 that were ostensibly only concerned with intellectual merit but worked to exclude “the Italians, Russians, Poles, Hungarians, Greeks and Asiatics, thereby preserving the quality of our race and citizenship,”²² the District of Columbia’s test was similarly proffered as a way to ensure strong communication skills in the police ranks but clearly served to exclude blacks from the force.

In Smith’s metaphor, although Civil Rights campaigners, some Johnson Administration legislation and a few Supreme Court decisions “work[ed] to erode [the steep] mountains [of hierarchy] over time, broadening the valley, many of the peaks prove[d] to be volcanic, frequently responding to seismic pressures with outburst that

²¹ *Davis* stands in stark contrast to *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), a Title VII case invalidating employer-administered tests without any “business necessity” that disproportionately excluded black workers from promotions. Justice White’s *Davis* opinion expressly declined to adopt the “more rigorous standard” announced in *Griggs*. Both Title VII and the Fourteenth Amendment were passed in response to racial hierarchy yet Justice White was “not disposed to adopt” the more probing judicial standard that contemplated how ostensibly neutral legislation in the present maintains the invidious laws of the past. The Court’s convoluted distinctions between the two standards used for cases arising from the Civil Rights Act of 1964 and the Equal Protection Clause continued throughout the 1970’s in cases such as *Pasadena v. Spangler*, 427 U.S. 424 (1976) and *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979). The Roberts Court’s decision in *Ricci v. DeStefano*, 129 S.Ct. 2658 (2009), in which the Court ruled that the Title VII rights of nineteen whites and one Hispanic were violated when New Haven threw out tests that disqualified every black employee for a promotion for fear of facing a Title VII lawsuit...from the black employees along with its decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007) *discussed post* at 19, and its revisit to *Grutter v. Bollinger*, 539 U.S. 309 (2003) *discussed post* at 19, may finally clear up the confusion in favor of banning the use of race altogether. See also Richard Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HVLJ 493 (2003), for an admirable attempt at clearing up the Supreme Court’s muddled distinctions between its Title VII and Equal Protection doctrines.

²² Smith at 560.

harden[ed] into substantial peaks once again.”²³ The Court’s announcement in *Davis* that the impact of a law or State practice, however racially disparate it may be, is subordinate to its intent, was a volcanic reaction by the Burger Court in the Nixon era to be replicated by Reagan’s Rehnquist Court and Bush’s Roberts Court that would prove to be a hardening of racial hierarchy.

The Court’s Equal Protection doctrine continued to contract and harden in *Arlington Heights v. Metropolitan Housing Corp.*²⁴ *Arlington Heights* concerned a suspect denial to rezone a residential property from single detached homes to multi-unit buildings that would have housed lower to middle income families in a predominately white Chicago suburb. Forty percent of the residents that would have been eligible to live in the multi-unit buildings were black despite comprising only eighteen percent of the area’s population.²⁵ The Court relied on *Davis* to deny the Equal Protection challenge,²⁶ finding that State action disproportionately affecting a [racial] group was not enough absent an invidious intent or purpose.²⁷ A disparate impact could be “an important starting point” to prove an Equal Protection violation but it was not enough in light of the [race] neutral reason of protecting the property values of those already living in the area in single family residences,²⁸ a familiar echo from *Buchanan’s* 1917 ruling

²³ Smith at 555.

²⁴ 429 U.S. 252 (1977).

²⁵ *Id.* at 259.

²⁶ The Court’s myopic constitutional approach in *Davis* and continued in *Arlington Heights* under its intent over impact doctrine was rejected on remand in favor of *Griggs’* more searching statutory inquiry under the Fair Housing Act that invalidated the zoning denial for the constructive violation of civil rights in housing that it was. *See Arlington Heights*, 558 F.2d 1283 (7th Cir.1977).

²⁷ *Id.* at 265.

²⁸ *Id.* at 266.

removing a segregation ordinance that interfered with “the civil right of a white man to dispose of his property.”²⁹

The Court further explicated its fixation on intent over impact two years later in *Personnel Administrator of Massachusetts v. Feeney*.³⁰ Justice Stewart explained that neutral laws with disparate impacts could only be invalidated if the impact “can be traced to a discriminatory purpose.”³¹ He acknowledged that unconstitutional purposes *could* have been at work in *Davis* and *Arlington Heights* against groups that had been historically discriminated against, as was a possibility in *Feeney*. However, Equal Protection only guaranteed “equal laws, not equal results.”³² Justice Stewart even went as far as to hold that mere intent as volition or intent as awareness of consequences was not enough to prove an Equal Protection violation. State actors were free to implement policies that they knew would burden historically disadvantaged groups so long as there was no “discriminatory purpose,” as opposed to an acceptable awareness of a disparate effect. This required that the State actor chose a policy “because of, not merely in spite of, its adverse effects upon an identifiable group.”³³ This decision for Justice Stewart was as simple as did they or did they not, writing that “discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not.”³⁴

²⁹ *Buchanan* at 81, *see ante* at Note 13.

³⁰ 442 U.S. 256 (1979). *Feeney* involved hierarchy based on gender, which is beyond the scope of this essay. Nevertheless, its discussion of *Davis* and *Arlington Heights* is illuminating. Moreover, there are few better examples of how well the *Davis* doctrine of intent over impact preserves hierarchy considering that Massachusetts’ automatic preference for veterans all but inevitably excluded women because 98% of veterans were male—a well preserved vestige of gender hierarchy initially defended by elite scholarship.

³¹ *Feeney* at 272.

³² *Id.* at 273.

³³ *Id.* at 279.

³⁴ *Id.* at 277.

While Justice Stewart acknowledged the possibility that ascriptive Americanism *could* be at work in the present, and that it *had* been at work in the past, he was unwilling or unable to bridge the past to the present. His demand for a discernible intent to discriminate not only failed to reckon with how unequal results reaffirm hierarchies constructed in the past, but he also gave license to invidious actors to continue to construct hierarchies, the reconstituted hierarchies Smith warns about,³⁵ so long as their motives were sufficiently surreptitious and opaque.

The Court further declaimed responsibility for engaging an exacting eye to discern racial bias in the past or present in *McKleskey v. Kemp*.³⁶ *Kemp* examined the state of Georgia's statutory scheme for capital punishment. While facially neutral, a comprehensive study found that Georgia's application of the death penalty resulted in black defendants accused of killing white victims being 4.3 times more likely to be sentenced to die than if the victim had also been black. The study, controlling for 230 variables that could have explained the disparate application on non-racial grounds, also reported that black defendants were more likely to be executed than white defendants.

Nevertheless, the Court required not only that a specific intent to discriminate as opposed to impact be demonstrated, but also that the defendant show both a specific racial animus directed toward him and that that animus resulted in a discriminatory impact on him. Citing *Feeney*, the Court concluded that in order to establish a violation of Equal Protection, the defendant would have had to have convinced the Court that the

³⁵ See *ante* at Note 6, "novel legal systems reinforcing racial...inequalities might be rebuilt in America in the years ahead." Smith's warning came in 1993, likely cognizant of the Burger Court's reconstruction *vis a vis* its intent focus, and the Rehnquist Courts' color-blind approach to proactive State measures to address past discrimination discussed herein.

³⁶ 481 U.S. 279 (1987).

state of Georgia enacted or maintained its statutory scheme in furtherance of a racially discriminatory effect.

DISAVOWAL *VIS A VIS* IRONIC INNOCENCE

The Court's fixation on present intent betrays an unwillingness to consider Faulkner's aphorism that "[t]he past is never dead, it's not even the past."³⁷ It also evokes Baldwin's discussion of "ironic innocence." Justices White, Powell³⁸ and Stewart have knowledge of the rigid racial ascription constructed that resulted in severe and pervasive inequality in employment and housing and the kangaroo courts used to consistently deny black defendants due process. A failure to acknowledge how that inequality persists in the present by disregarding the disparate impacts that manifest from ostensibly neutral State action in the present is to be complicit in the perpetuation of hierarchy.

To Baldwin, the "nation was founded in genocide and slavery, whose ideals have never been practiced, or have been practiced only in exclusionary ways."³⁹ It is a "tragic story in which a nightmarish racial past imprisons everyone in barren repetition."⁴⁰ Baldwin addresses what the Court's Equal Protection jurisprudence will not: a "hear no evil, see no evil" approach to legislative intent in the present ignores "the persistence of racial domination among whites who celebrate democratic ideals, and the traps that white supremacy creates for those marked as black."⁴¹ Participation in this barren repetition—to ignore how education and employment inequalities constructed through ascription in the past manifest in a drastically uneven playing field in the present, even under uniform

³⁷ *Requiem for a Nun*, Act I, §3 (1951).

³⁸ Justice Powell wrote the majority opinion in *Arlington Heights* and *Kemp*.

³⁹ Shulman p. 142.

⁴⁰ *Id.*

⁴¹ *Id.*

rules—works to continue to “destroy hundreds of thousands of lives and [the Court] do[es] not know it and do[es] not want to know it.”⁴² While ostensibly serving the democratic ideal of equal laws, “it is not permissible that the authors of devastation should be innocent. It is the innocence that constitutes the crime.”⁴³

The Court has full knowledge of the Black Codes, Jim Crow and the “inegalitarian scriptural readings, the scientific racism of the American school of ethnology, racial Darwinism and the romantic cult of Anglo-Saxonism in American historiography”⁴⁴ that implemented the steep racial hierarchy operating in the United States. To be blind to how that hierarchy operates presently in education, employment and all other facets of American life “is culpable because it is willful,” because what is at issue “is not a lack of knowledge but a ‘refusal to acknowledge’ the reality of others and [the Court and States’] conduct toward them.”⁴⁵ This “disavowal of domination is the innocence [Baldwin] denounces as criminal. Innocence means refusing not only to acknowledge the other but to acknowledge that [the Court] enacts this denial; it is disowning ([its] connection to) social facts [it] in some sense know[s], such as the exercise of power, the practice of inequality, or their benefits.”⁴⁶

The Court’s ironic innocence in refusing to acknowledge how the neutral intent of the present ratifies the invidious intent of the past is a Court that is “professing but violating democratic norms,”⁴⁷ maintaining an ascriptive form of Americanism under the guise of a liberalism that refuses to acknowledge its complicity in the preservation of that

⁴² *Id.*, citing *The Fire Next Time* p. 334.

⁴³ *Id.*

⁴⁴ Smith at 549.

⁴⁵ Shulman at 143.

⁴⁶ *Id.*

⁴⁷ *Id.*

ascription. Justice Stewart’s insistence that Equal Protection demands only “equal laws, not equal results,” serves to deny the existence of white supremacy, which means denying the meaning of our history, the impact of [the Court’s intent over impact doctrine], the truth of [the Court and the ostensibly neutral legislators’] intentions, and the reality of those that we racialize.”⁴⁸ The doctrine as expressed is an “affirmation of racial equality that nevertheless disavows the very historical conditions and contemporary practices that continue to reproduce racial stratification.”⁴⁹

EQUAL PROTECTION AS INVERSION: [COLOR-] BLINDNESS

While the Court’s intent over impact doctrine entrenches and perpetuates ascription through indifference or willful ignorance, its color-blind companion in Equal Protection prohibits benign attempts by States to acknowledge and dismantle hierarchies. The post-Warren Courts have met State programs seeking to proactively address acute disparities in areas of life previously foreclosed to racial minorities with increasing opposition. They have done so by applying the doctrine of strict scrutiny—a heightened level of skepticism created to shield racial minorities historically discriminated against from hostile legislation⁵⁰—to any law contemplating any race regardless of an ascriptive past. Under these constructions of the Equal Protection doctrine, intent is relevant but the validity of the legislation varies depending on its relationship to racial minorities: if the law is indifferent to them and the resulting disparate impact they feel it is nevertheless valid, whereas if the law seeks to aid them it is invalid. Such is the inversion of a

⁴⁸ Shulman at 143.

⁴⁹ Joseph Lowndes, *The Past and Future of Race in the Tea Party Movement*, (forthcoming), citing Lawrie Balfour, *The Evidence of Things Not Said: James Baldwin and the Promise of American Democracy* (Ithaca: Cornell University Press, 2001).

⁵⁰ See Footnote 4, *U.S. v. Carolene Products*, 304 U.S. 144 (1938).

doctrine passed to protect and assist black Americans accomplished by the Burger, Rehnquist and Roberts Courts.

In *Wygant v. Jackson Board of Education*⁵¹ the Court struck down a policy of preferential protection against layoffs for minority teachers. In sustaining a white teacher's Equal Protection attack on the Board of Education's policy of preferring to retain minority teachers, Justice Powell emphasized that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination."⁵² He cited Equal Protection cases invalidating the facially-ascriptive anti-miscegenation laws of Virginia and restrictive covenant laws of Missouri enacted to maintain rigid racial hierarchies as foundational precedents to strike down a State's effort to maintain racial minorities in an educational workforce that had lacked such representation because of previously constructed ascription.⁵³

Justice Powell rejected addressing if not atoning for past societal discrimination as a sufficient basis to discriminate based on race unless the specific entity using race in the present could be shown to have specifically created the disparity in the past that it was now seeking to alleviate.⁵⁴ He was not adequately convinced of a connection in *Wygant*.⁵⁵ Instead, in reasoning again reminiscent of Baldwinian disavowal, Justice Powell asserted that "there are numerous explanations for a disparity between the percentage of minority students and minority faculty, *many* of them unrelated to

⁵¹ 476 U.S. 267 (1986).

⁵² *Wygant* at 273.

⁵³ *Id.*, citing *Loving v. Virginia*, 388 U.S. 1 (1967), *Shelley v. Kraemer*, 334 U.S. 1 (1948).

⁵⁴ *Citing Hazelwood School District v. U.S.*, 433 U.S. 267 (1977).

⁵⁵ Nor was he interested in the School Board's offer to establish a specific connection after finding that regardless of specific past discrimination, the preferential layoff remedy was too broad. *Wygant* at 278.

discrimination of any kind,”⁵⁶ a statement betraying his knowledge that there are discriminatory factors at play in the disparity (using the incomplete term “many” and not the complete term “all”), and a refusal to acknowledge those factors by doing anything about their operation.

The Court struck down another affirmative action plan seeking to award thirty (30) percent of sub-contracting work for contracts between a city and general contractors to minority-owned companies three years later in *City of Richmond v. J.A. Croson Co.*⁵⁷ Justice O’Connor took issue with States undertaking remedial measures to address past discrimination because the Fourteenth Amendment was meant to be a constraint on State power.⁵⁸ Her opinion invalidated the city of Richmond’s plan because it could not demonstrate to a convincing degree that it had a history of discrimination against African Americans specifically within the construction industry. To consider past discrimination in general “would be to open the door to competing claims for remedial relief for every disadvantaged group.”⁵⁹

Justice O’Connor emphasized that the Fourteenth Amendment guarantees that Equal Protection shall not be denied to *any person*, that “preferential programs may only reinforce common stereotypes” and thus “the standard of review under Equal Protection is not dependent on the race of those burdened or benefitted.”⁶⁰ “The mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry.”⁶¹ Legislation with an intent to dismantle racial hierarchy would therefore be

⁵⁶ *Wygant* at 276 (emphasis added).

⁵⁷ 488 U.S. 469 (1989).

⁵⁸ *Id.* at 490-91.

⁵⁹ *Id.* at 505.

⁶⁰ *Croson* at 494.

⁶¹ *Id.* at 495.

afforded the same heightened scrutiny as the ascriptive laws that create it because otherwise “race will always be relevant in American life, and the ultimate goal of eliminating entirely from governmental decision-making such irrelevant factors as a human being’s race will never be achieved.”⁶²

Justice Scalia wrote separately to concur that all racial classifications regardless of benign or invidious intent required strict scrutiny, which when applied to race should next to always be fatal⁶³ regardless of how well correlated a specific invidious and pervasive practice of discrimination in the past was to a remedial plan in the present. He cited Justice Harlan’s *Plessy* dissent for the notion that “our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”⁶⁴ While Justice Scalia left the door open a crack for federal remedies, he agreed to curtailing States’ rights in addressing past discrimination because “the Civil War Amendments were designed to take away all possibility of *oppression* by law because of race or color, and to be limitations on the states.”⁶⁵

Justices O’Connor and Scalia distinguished the limited power of States to address racial hierarchies relative to the federal government in *Wygant* and *Croson*. They justified their distinctions based upon the Fourteenth Amendment’s intent to curb the power of States to trample the civil rights of black Americans. However, Justice O’Connor’s majority opinion also required that the entity seeking to remediate past discrimination demonstrate a specific history of discrimination against a specific racial minority in a specific industry. Read together then, the Court rationalizes reducing the

⁶² *Id.*

⁶³ Or “strict in theory, fatal in fact.” *Croson* at 552 (Marshall, J., dissenting), (citations omitted)

⁶⁴ *Croson* at 521, citing *Plessy v. Ferguson*, 163 U.S. 537, 539 (1896) (Harlan, J., dissenting).

⁶⁵ *Croson* at 522, citing *Ex parte Virginia* 100 U.S. 339 (1879) (emphasis added).

power of States to dismantle hierarchies in the present because the Fourteenth Amendment was ratified to stop States from constructing them in the past. Conversely, the federal government—albeit an entity certainly far from having clean hands—is given the most power in the present to remedy past discrimination because it did less discriminating in the past. With this exercise in federalism, the Court’s inversion of power and privilege, and culpability and responsibility, is complete. As Darren Lenard Hutchinson writes:

[B]y design or effect, the Court equality doctrine reserves judicial solicitude primarily for historically privileged classes and commands traditionally disadvantaged groups to fend for themselves in the often hostile majoritarian branches of government. In its equal protection decisions, the Court has effectively inverted the concepts of privilege and subordination; it treats advantaged classes as if they were vulnerable and in need of heightened judicial protection, and it views socially disadvantaged classes as privileged and unworthy of judicial solicitude. This paradoxical jurisprudence reinforces and sustains social subjugation and privilege.⁶⁶

The Court reiterated its unwillingness to distinguish between hundreds of years of laws that sought to burden racial minorities and recent attempts to lessen the burdens of those ascriptive practices in *Adarand v. Peña*.⁶⁷ It also ended its brief flirtation⁶⁸ with allowing the federal government more latitude in addressing dismantling hierarchy by extending its application of strict scrutiny for all races for any intent to federal programs because “the Fifth⁶⁹ and Fourteenth Amendments to the Constitution protect *persons*, not *groups*,” and thus the need for a “detailed judicial inquiry to ensure that the *personal*

⁶⁶ *Unexplainable on Grounds other than Race: The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, U.Ill.L.Rev. 615, 618 (2003).

⁶⁷ 515 U.S. 200 (1995).

⁶⁸ See e.g. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-65 (1990) (applying intermediate scrutiny to race-conscious federal program).

⁶⁹ In order to apply *Brown*’s holding that Separate but Equal violates the Equal Protection Clause of the Fourteenth Amendment to the federal government and Washington, D.C. schools, *Bolling v. Sharpe*, 347 U.S. 497 (1954), “discovered” a companion Equal Protection Clause in the Fifth Amendment to apply against federal action.

right to equal protection of the laws has not been infringed.”⁷⁰ Differentiating between invidious and benign classifications “does not square” with the Court’s longstanding central understanding of Equal Protection, because “a free people whose institutions are founded upon the doctrine of equality should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons.”⁷¹

Justice Scalia concurred again to stress that the concept of “either a debtor or creditor race” is alien to “the Constitution’s focus upon the individual,” highlighting the Equal Protection’s prohibition against States denying to “*any person* the equal protection of the laws.”⁷² The concept of “racial entitlement” found in benign State practices “preserves for future mischief the way of thinking that produced race slavery, race privilege and race hatred.” It is a flawed approach because “[i]n the eyes of government, we are just one race here. It is American.”

WILLFUL BLINDNESS

The post-Warren Courts’ color-blind doctrine is an exemplary companion to its intent over impact approach within Equal Protection. Intent is the focal point in both doctrines, but as noted above, laws intending to aid racial minorities will be struck down while laws without a clearly discernible intent to burden yet nevertheless with a burdensome impact will be preserved. The two comprise a formidable intellectual trend within the American political and legal systems that reinforce racial inequalities.⁷³

⁷⁰ *Adarand* at 227 (emphasis in original).

⁷¹ *Id.*, citing *Hirabayashi v. U.S.*, 320 U.S. 81 (1943), a case *upholding* the constitutionality of racial curfews.

⁷² *Adarand* at 239 (Scalia, J., concurring). Similarly, Justice Thomas wrote that “benign prejudice is just as noxious as discrimination based on malicious prejudice.” *Adarand* at 241.

⁷³ *See again* Smith at 550.

Color-blindness, for all of its irony, is nevertheless aptly named, and may exhibit Baldwin's concept of disavowal of domination through willfully blind practices even better than the Court's unwillingness to address impact. The irony is thicker, and the blindness even more willful, because while intent over impact results in the Court passively allowing the perpetuation of ascription, color-blind strict scrutiny requires a willful, proactive obstruction of attempts to dismantle hierarchy.

Not only is the color-blind doctrine a willful attack on State efforts to dismantle the hierarchies they created, but the building blocks utilized to mount the attacks and preserve ascription are the very cases that were initially used to dismantle them. Justice Powell commandeered precedents that struck down racial segregation in marital and real estate contracts to invalidate a contract seeking to avoid continued segregation in education. Precedents are also stripped of context and purpose and refashioned in not just a disavowal of history but an inversion. Justice O'Connor plucks a platitude about only using race for compelling purposes from a case justifying racial curfews in order to strike down efforts to address why there is a dearth of black representation in the seat of the Old Confederacy's construction industry. The absence of a specific documented history of discrimination against racial minorities in the construction industry in Richmond to her is thus explained by a *lack* of discrimination and not complete foreclosure to that industry based on race that would have precluded even the chance of having a business to be discriminated against in the first place.

Justice Scalia's use of Justice Harlan's *Plessy* dissent is perhaps even more illustrative of disavowal because it is comprehensively "innocent" of precedent, history and intent. Whereas Justice Harlan dissented alone in furtherance of a color-blind

Constitution against the majority's endorsement of an illusory equality that specifically contemplated the separation of two distinct races, Justice Scalia re-imagined the majority's illusion while inverting Justice Harlan's doctrine in the creation of a race that neither one conceived of: the American race. Moreover, Justice Scalia disavowed a constitutional history of systematically discriminating against racial minorities because of their status in that *group* in favor of a willfully innocent celebration of a conjured record of constitutional protection for individuals regardless of racial group. Along with erasing distinctions between white and black in favor of a newly recognized "American" race, he also bludgeoned benign practices and race hatred into one monolithic mischievous concept of racial entitlement that the Constitution would not tolerate.

CONCLUSION

Like the Gilded Age and the Progressive Era before it, "intellectual systems and political forces defending racial inequalities"⁷⁴ have increased in the post-Civil Rights Era with the Burger, Rehnquist and now Roberts Courts' use of Equal Protection. While the intent behind a system to effectuate "Conservative desires [to keep] blacks in their place" with "complex registration systems, poll taxes, and civics tests" was "little masked in the heyday of Jim Crow,"⁷⁵ the post-Warren Courts' Equal Protection doctrine requires intent to be surreptitious enough to not be discernible. Facially neutral statutes can ostensibly comport with liberalism's promise of "equal laws if not equal results" while historically revisionist platitudes about free people in our nation's equal institutions⁷⁶ and our "one American race" scrub the past of ascription to place the blame for unequal results elsewhere.

⁷⁴ Smith at 563.

⁷⁵ *Id.* at 561.

⁷⁶ *Adarand* at 227.

Inequality is conceded by intent only/color-blind practitioners, but a nascent anti-subordination jurisprudence started by the Warren Court soon gave way to the anti-classification approach that stabilizes change, neutralizes efforts to dismantle hierarchy and instead perpetuates ascription.⁷⁷ The Court has steadily moved away from race-conscious laws, reconstructing if not new systems of hierarchy, at least a doctrine that maintains it by favoring the laissez-faire approach of self-help to combat inequality.⁷⁸ Most of the Warren Court's precedents attempting to confront both de jure and de facto inequality have been eroded or outright overruled. The Roberts Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1*⁷⁹ effectively supplied the last nail in *Brown's* coffin, announcing that efforts to ameliorate drastic racial imbalances firmly in place that replicate hierarchy over time and space was not the way to confront discrimination, but instead the solution lie in refusing to confront it at all. Rivaling Justices Powell, O'Connor and Justice Scalia in myopic obtuseness, Justice Roberts concluded his *PICS* opinion striking down efforts to integrate Seattle schools with the would-be dictum: "the way to stop discrimination based on race is to stop discriminating based on race."⁸⁰

Justice Roberts' restrained incrementalist approach likely led to him employing one of the Court's few precedents that permitted the use of race as a tool to dismantle educational ascription in *PICS* to distinguish why diversity's role was not constitutionally

⁷⁷ For a thoughtful analysis discussing the Court's preference for an anti-classification approach over an anti-subordination principle in the interest of institutional stability, see Stuart Chinn, *Race, the Supreme Court, and the Judicial-Institutional Interest in Stability*, 1 *Journal of Law and Commentary* 95 (2011).

⁷⁸ Smith at 563, referencing Richard Epstein, Thomas Sowell, Booker T. Washington and color-blind jurist Clarence Thomas.

⁷⁹ 551 U.S. 701 (2007).

⁸⁰ *Id.* at 748.

recognized in high schools like it had been for higher education in *Grutter v. Bollinger*.⁸¹ While his restraint led to him using the differences in one race-based policy to strike down another instead of ending them both, his Court's granting of certiorari in February of 2012 to hear *Fisher v. University of Texas at Austin*⁸² reviewing *Grutter* may spell the end for efforts to dismantle racial hierarchy in education five years later.

With the exception of attempts by the Warren Court to break the “barren repetition of a nightmarish racial past,”⁸³ the Burger, Rehnquist and Roberts Supreme Courts have employed novel conceptions of an Equal Protection Clause ratified to aid newly freed slaves to instead “reinvigorate (or at least preserve) the hierarchies [esteemed (or tolerated) by Americans] in modified form.”⁸⁴ The clause has largely not, as Cass Sunstein has asserted, looked forward to dismantle engrained prejudices,⁸⁵ but instead maintained them by enabling Justices to disavow a history based on color in order to repeat it.

⁸¹ 539 U.S. 309 (2003).

⁸² 631 F.3d 213 (2011).

⁸³ Shulman at 142.

⁸⁴ Smith at 558.

⁸⁵ Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U.Chi.L.Rev. 1161 (1988).