The Haunting of Abigail Fisher: Race, Affirmative Action, and the Ghosts of Legal History

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THE HAUNTING OF ABIGAIL FISHER:
Race, Affirmative Action, and the Ghosts of Legal History

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Introduction: Racial Neutrality, Racial Scrutiny

“In matters deemed to concern civil and political rights, states over time came to regulate race relations by means of statutes that employed no express racial distinctions on their face. But when white plaintiffs challenge affirmative action policies that increase the institutional representation of minority groups, the Court has, with increasing insistence, warned that it will review and restrict the ambit of legislative action.”

“As Justice Souter noted at oral argument in VMI, because we do not stand ‘on the world's first morning’ with respect to sex distinctions, but rather at the close of millennia of subordination, continued separation of the sexes along the remedial lines suggested by Chief Justice Rehnquist cannot be free of a subordinating taint.”

In 2012, we do not stand “on the world’s first morning” with respect to race distinctions. We stand at a historical juncture that may soon be acknowledged in the newest affirmative action case pending before the Supreme Court, Fisher v. University of Texas. In Fisher, which will be decided at the end of the current term, plaintiff Abigail Fisher, applied to and was rejected from the University of Texas at Austin. She claims she was denied admission because she is white, while non-white students with lesser credentials were offered admission. Texas follows what is known as a ten-percent plan, where the top ten percent of each graduating class in the state is offered admission to the state college. It seems Ms. Fisher just missed this cutoff point. Though she has since graduated from another institution, she alleges a violation of her Equal Protection

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1 See, e.g., Reva Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, 49 Stan. L. Rev. 1111, 1148 (1997); Reva B. Siegel, “The Rule of Love”: Wife Beating as Prerogative and Privacy, 105 Yale L.J. 2117, 2178-87 (1996). “Efforts to reform a status regime bring about changes in its rule structure and justificatory rhetoric--a dynamic I have elsewhere called ‘preservation-through-transformation.’ In short, status-enforcing state action evolves in form as it is contested. In matters of racial and gender inequality, America of the late twentieth century may share more in common with America of the late nineteenth century than at first appears to be the case. All racial classification as segregation, affirmative action as segregation law views beyond its power to rectify. Thus, in Plessy, the Court contended that segregation did not connote inferiority, but conceded that if it did, it was inferiority of a sort that was beyond the power of law to rectify.” 49 Stan. L. Rev. at 1148.


3 Fisher v. University of Texas at Austin, 631 F.3d 213 (5th Cir. 2011), cert. granted, 132 S. Ct. 1536 (U.S. Feb. 21, 2012) (No. 11-345). A little about the case’s procedural history may be helpful. “The plan was upheld in U.S. District Court, and then on appeal by the Fifth Circuit. The en banc Circuit Court split 9 to 7 in refusing to reconsider the plan’s constitutionality.” http://www.scotusblog.com/?p=139196

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rights under the Fourteenth Amendment not to be disadvantaged by the state because of her race. ⁴

How did we get to where we are today with the Court’s treatment of race? As scholars such as Cass Sunstein and Reva Siegel have noted, Equal Protection constitutional analysis is often “aspirational” and thus ahistorical, repudiating the past and traditions that we now condemn. ⁵ Can the Court’s use of race in 2012, without explanation of its meaning, “be free of a subordinating taint”? To answer these questions, I look to our legal history to anchor today’s views on race into its legal and sociohistorical context. There are benefits to looking at the history of law to understand our modern conceptions and there is a “kind of skeptical or critical detachment that a historical understanding of our position affords.” ⁶ However, with the great power of retrospective legal analysis comes great responsibility. Once the history of a legal concept is known and understood, merely “having reasons for our interpretive choices is not sufficient; we must also take responsibility for their historical consequences.” ⁷ The lack of “responsibility for… historical consequences” in the Court’s discussion of racial categories is troubling.

In a way distinct from race-based decisions of the past, race in official governmental discourse now largely exists in negative space. In the last half-century, the Justices have rarely confronted issues of racial definition in their opinions. This reluctance to re-write race, coupled with what remains of our common law precedent and its rhetorical ghosts, has left us with a

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⁵ See 49 Stan. L. Rev. at 1146. “But, as Cass Sunstein has observed, equal protection doctrine assumes a distinctive stance toward the past. Rather than turning to the past as a source of authorizing ‘history and traditions,’ equal protection doctrine often repudiates traditional practices. In this area of constitutional law, the nation articulates its identity aspirationally, reasoning about the meaning of federal citizenship in terms that seek to transcend convictions and conventions of the past.
⁶ 49 Stan. L. Rev. at 1148.
⁷ Id.
constitutional jurisprudence constituted largely from post-Reconstruction white supremacy and its vestigial ideologies.

To better understand the modern framework of race the Court inherits in 2012, I analyze three distinct periods in American legal history. As will become apparent, the judiciary is not the only branch of government responsible for today’s treatment of race. Post-Civil War, both the executive and the legislative authorities crafted racial doctrine. I analyze President Johnson’s speech “Veto of the Civil Rights Act of 1866” and The Riddle of Hiram Revels, Congress’ treatment of the first seating of an elected black senator post-Civil War for the first period. These documents reveal that all branches of government have a hand in the crafting of race and its meaning for the polity. Next, in the Civil Rights era, fears of racial mixing led to strengthening of anti-miscegenation laws (laws prohibiting racial intermarriage) in an effort to keep distinct and separate these racial categories. I explore the anti-miscegenation cases Perez v. Lippold, Naim v. Naim, and Loving v. Virginia. In discussing why the races should or shouldn’t be kept apart through state interracial marriage prohibition, these opinions assessed aloud many unspoken assumptions about how we view race and why we do or do not believe in its categorization as an organizing principle for society. Loving also provided the backdrop for how race has been conceived ever since, the backdrop that helped give rise to the “colorblind” ideology of affirmative action cases. In the early 2000s, after Washington v. Davis confirmed that the Court cannot explicitly seek to remedy disparate impact when it comes to racial disparities, the overt discussion on race has been submerged into an ideological underground.\footnote{See 49 Stan. L. Rev. 1111.} I assess Parents Involved and Rice v. Cayetano, to understand the discussion of race in the 21st century – and how the Court approaches discussions of race that are not exactly black and white. Where does the Court find precedent, and when it is ill-fitting, how do they modify or utilize it to
come to a “just” result? These cases and documents tee up the racial approach we are likely to hear in Fisher. Post-Brown v. Board, few social or legal entitlements have been explicitly tied to racial categories. Now, the use of the word “race” has all but guaranteed legislation’s path toward unconstitutionality. It is this combined landscape which informs the Court’s discussion of affirmative action, one of the last arenas where the Court invites race and its discussion into its hallowed halls.

People and documents from these three historical moments together patch together the backdrop and thus craft the approach toward race the Court takes today. Throughout, race and racial difference is treated as something powerful and something to fear, yet the Court does not define what it is afraid of. With the ever-increasing population of Americans who identify as mixed-race, these Supreme Court decisions regarding race risk becoming farther from our “racial” reality. The Court should define what it means by race, and assert in explicit terms why it is still necessary to utilize these categories. Only then will the reasoning, or guiding ideologies, behind remedying racial disparities utilizing policies such as affirmative action be apparent. Without agreement to sharpen and reinvigorate an argument for why we still need affirmative action in 2012, the Court may move toward abandoning the use of racial categories in an official capacity altogether.

A discussion of abandoning the use of race will likely manifest in the Court’s vision of a colorblind society, as espoused by Justice O’Connor less than ten years ago in Grutter v. Bollinger. It is unclear what “colorblindness” would entail when we still experience disparity in many metrics of opportunity along racial and ethnic lines in the U.S. Until the Court explicitly addresses why race is still important, and how it intends to utilize it, decisions regarding “racism,” affirmative action, or the percent plans of public education, will become increasingly

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nonsensical. Legal history can teach us why discussion of race feels outdated as soon as it is handed down by the Court. Perhaps this is because racial categories are not natural, and over discussion of them feels a lot like discussing The Emperor’s New Clothes. Perhaps laying bare the inner workings of our racial ideological framework is jarring and alienating to us. As will emerge in this paper, the silence of the unwillingness to deeply untangle racial categories directly allows what the Court does not say too often to decide the case where race questions exist.

Sometimes silence booms loudly in the form of standing analysis – the refusal to hear a case for jurisdictional purposes which allows the Court not to decide a case on the merits. There has been discussion of standing in Fisher: applying this jurisdictional bar would be useful for deflecting a controversial social or political issue that the Court would prefer not to address. Similarly, standing allows the Court to avoid heading cases that seek to address harms that seem so large and ever-present that the Court would not know how to begin remedying them, like racism, or global warming. If disparities in public services, social entitlements, or economic opportunity are perceived as aligned with “racial” categories, this might seem to the Court like a problem with no remedy. In that instance, the Court determines it should not hear the case.

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10 See e.g., http://www.scotusblog.com/?p=139196. “In 1997, the Texas legislature reacted by enacting what is called the ‘Top Ten Percent Law.’ Under that, any Texas state university was required to admit automatically a student who had finished in the top ten percent of the class in a Texas high school. That part of the policy is still in effect today, and it accounts for a majority of actual admissions each year. The plan also had the practical effect of increasing minority enrollment more than that of white applicants.”

11 See generally Naim v. Naim, 197 Va. 80, 80, (1955) vacated, 350 U.S. 891, (1955) and adhered to, 197 Va. 734 (1956); Orr v. Orr, 440 U.S. 268, 272 (1979) (“We have on several occasions considered this inherent problem of challenges to underinclusive statutes . . . and have not denied a plaintiff standing on this ground.” (internal citations omitted).)

12 See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 5 (2004). (This case involved a parent’s right to sue under the First Amendment to prevent his child from saying the pledge of allegiance, a controversial first amendment issue. The Court said: “[W]e granted certiorari to review the First Amendment issue and, preliminarily, the question whether Newdow has standing to invoke the jurisdiction of the federal courts. We conclude that Newdow lacks standing and therefore reverse the Court of Appeals’ decision.”)

13 See Lujan v. Defenders of Wildlife, 504 U.S. 555, 558 (1992) (This case involved the Endangered Species Act, large environmental issues, and whether plaintiffs who suffered the extinction of animals they study had standing. The Court said: “The preliminary issue, and the only one we reach, is whether respondents here, plaintiffs below, have standing to seek judicial review of the rule.”)
However, the Court should not attempt to define constitutionality with regard to people of different “racial” backgrounds without first defining 1) what those racial categories mean or are intended to convey; and 2) what the goal is of utilizing these racial categories.\textsuperscript{14} The Court has not done this, and all signs indicate it will not do so for a long time, if ever. It is possible that the changed composition of the Court since 2003, rather than any substantive new ideas about law, race, or how to discuss their interaction, will be the utmost influencing factor in the \textit{Fisher} decision.\textsuperscript{15}

Without a guiding ideology in place, such as dismantling racial categories to stop the subordination of African Americans as in \textit{Brown}, or forbidding the government to police racial boundaries as holder from white supremacist irrational fear and bunk science from \textit{Loving v. Virginia}, the 21\textsuperscript{st} century racial jurisprudence remains unclear. \textit{Loving} left us with our current vocabulary: we characterize race as immutable, but irrelevant. We have yet to see how this conception of race will morph next. One thing is clear, the word “diversity” as utilized in the last major affirmative action opinion by the Supreme Court in \textit{Grutter}, does not seem to encompass racial experience. “Diversity” – a term the Court uses but finds difficult to define – does not hint at alleviating ingrained socioeconomic disparities in the distribution of public resources that

\textsuperscript{14}UT tried to fight Fisher’s standing by asserting that Fisher has suffered no harm. However, as we saw in \textit{Strauder}, the Court has recognized psychological harms such as being treated differently solely because of race – although this type of harm is harder to quantify. \textit{See, e.g.,} http://www.scotusblog.com/?p=139196 (“University officials made a strenuous but unsuccessful effort to persuade the Supreme Court not to hear Fisher’s case. They noted that she had gone to college at another school, Louisiana State University, and had now graduated, so she would not again be seeking admission as a freshman at Austin. Moreover, the university’s lawyers contended that little was at stake in the case for Fisher, because she was seeking only $100 in refund of fees she paid when she applied for admission. The university could refund the fees, and make the case moot, the attorneys contended. Fisher’s lawyer, however, countered that she is still seeking nominal damages for the harms she claimed she suffered in being denied admission to the university.”)

\textsuperscript{15} \textit{See id.} (In discussing the changed composition of the Court since 2003: “The Fifth Circuit panel’s decision was based directly upon its understanding of what the Supreme Court had allowed in the Michigan Law School case in 2003. That case split the Court 5-4 on most of the key issues lending support to the use of racial diversity as a legal factor in college admissions. Only two of the five Justices in the majority on those issues — Justices Ruth Bader Ginsburg and Stephen G. Breyer — remain on the Court. Among the four dissenters at that time, three are still serving: Justices Anthony M. Kennedy, Antonin Scalia, and Clarence Thomas. New to the Court since then are Chief Justice John G. Roberts, Jr., and Justices Samuel A. Alito, Jr., Elena Kagan, and Sonia Sotomayor.”)
affirmative action was designed to remedy. A recalibration is necessary to infuse the Court with a guiding ideology that explains why affirmative action is still necessary in 2012. The reasoning the Court uses this year may be the same as it was in 2003 (diversity of classroom experience, training the next generation of leaders) or it may be different. When the Court has tried to move past race, and into different forms of diversity that are just as significant (Parents Involved) or ethnic characteristics (Rice v. Cavetano), it hit a wall its racial rhetoric was not able to mount. There may be a new set of racial questions, rendering race both mutable, and relevant. The Court will someday, perhaps not in 2012, but eventually, confront the shortcomings of the tools handed down through legal history. The substantive goals of affirmative action might shift over time and precedent may not easily bend to address evolving racial categorization problems. Thus, the reasons for using race must exist in relation to disadvantage or opportunity, or with the basic principles that underlie other efforts to ameliorate the harsh consequences of economic disparities. There may be no substantive goal, or any way to know when it has been achieved.

But until a guiding purpose is clarified, plaintiffs like Abigail Fisher, who was not someone affirmative action policies sought to assist, have reason to challenge race-conscious policies in public schools that remain unclear and that dance around the issues they were intended to address. It remains to be seen whether affirmative action will remain as the last bastion of explicit use of racial categories the Court still hears, and if so, how the Court utilizes this intersection of law and policy to continue to craft the way we view race into the next century.  

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16 Nancy Leong, Associate Professor of Law at University of Denver Sturm College of Law, has also noted that “diversity” is an ahistorical concept in her post “Is Diversity for White People?” http://prawfsblawg.blogspot.com/2012/05/is-diversity-for-white-people.html#more (“While the diversity rationale is ahistorical, the remedial rationale acknowledges history.”)

17 See e.g., Fisher v. UT, Brief for Appellants, supra at 49; Rachel F. Moran, Interracial Intimacy: The Regulation of Race and Romance, 163 (2001). There is evidence that we already exist in a world of racial confusion, a logistical nightmare for any system that tries to allocate benefits along racial lines. Appellants’ brief levels due process and equal protection violations when different racial groups, “Latino” are treated more favorably than “Asian” students in the admissions process at UT. It remains to be seen how mixed-race students (part-Latino and part-Asian, for
PART I: RACE IN THE RECONSTRUCTION ERA

Post-Civil War Reconstruction set into motion the modern conceptions of race we still hold today: especially the concepts of “blackness” and “whiteness.” It seems the remaining racial categories we recognize today emerged afterward as an attempt to fill in the interstitial space between these two colored paradigms.

Slavery was abolished by Lincoln in the Emancipation Proclamation in 1863 (in the Confederacy) and by the Thirteenth Amendment in the rest of states in 1865. The South was fearful of the new social order, as long-held beliefs about the established social hierarchy were thrown into disarray. Two governmental branches, neither of them judicial, contributed to the ossification of racial categories in this era. First, the Executive branch, through President Johnson in his speech “Veto of the Civil Rights Act of 1866” offered the presidential seal of approval of these concepts of race. Then, the Legislative branch, through senators in their discussion of the seating of the first elected black senator post-Civil War, Hiram Revels, again

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example) would be treated under a racial classification system such as this. This discussion is outside the scope of the current paper, but is something to consider for future applications of racial classification policy. Moran underscores the logistical problems with our racial identification system. In census taking, people and families who do not fit into an easily identifiable paradigm racially, are lumped into whichever group the algorithm designed to deal with this racial “problem” deems appropriate. It’s likely that the use of race in college admissions is moving along a similar trajectory. The racial systems we have overlaid our increasingly diverse society with long ago are no longer a tight fit with the lived experience of modern-day Americans.

18 The concept of blackness and whiteness also had roots in biblical literature utilized to justify African slavery. See Robin Blackburn, The Making of New World Slavery 312 (1997). “[T]he story of Noah’s curse, and the theory that blackness constituted the symbol of this curse, furnished justification for the permanent enslavement of blacks regardless of their faith or conduct.” However, history has revealed that a multitude of different justifications were used across time and space to justify slavery, and there was nothing inherent or consistent about biblical rhetoric which underlay all racial doctrine. “(the racial doctrine which saw African captives as made for slavery was the work of no one social category or European nation and continued to exhibit different patterns, interpretations.”) Id.

19 It is easy to valorize Lincoln, especially as compared to Andrew Johnson. However it is important not to misconflate attitudes toward slavery at the time with today’s views on race. Some distinctions might be helpful. Even though the Republicans would not be defined as racially enlightened according to today’s standards, there was a market difference in how Republicans and Democrats treated the formerly enslaved Africans. In his book, historian Eric Foner describes how “the Republicans did develop a policy which recognized the essential humanity of the Negro, and demanded him protection for certain basic rights which the Democrats denied him.” Eric Foner, Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War, 261 (1995).
sanctioned the new dialogue and categorization about race in American popular consciousness. These Reconstruction-era discussions solidified the relevance of racial status to membership in the polity, and signaled to the public that those who were not of “purely” European ancestry were inherently unable to participate fully in the new America.  

White Citizen/Black Man: President Andrew Johnson’s Veto of the Civil Rights Act (1866)

The president who took office right after Lincoln’s assassination: President Andrew Johnson embodied and expanded the fears of the white polity. Johnson utilized terms such as “white” and “black” in his official capacity as President during his speech, “Veto of the Civil Rights Act of 1866.” This served to ratify white supremacy as an acceptable and mainstream viewpoint in post-Civil War America. Johnson helped legitimize the usage of these terms in subsequent court opinions about race, and laid the foundation for their power as an ideological tool. A look back reveals that freed slaves were referred to as “freedmen” in the official literature about the new social group who needed assistance post-Emancipation. The more widespread usage of alternate terms to discuss freed slaves before the word “black” became solidified and acceptable indicates that this group of freed people was not initially or inherently conceived of as a racial group.  

Prior to Johnson’s speech in 1866, there is scant usage of the terms “white” and “black” in official legal documents. During slavery, “race” was not the sole factor or determinant of

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20 See Primus, supra at 8. “In his view, the American polity fundamentally excluded people of African descent, and that was that. At the glorious Founding, he reminded his colleagues, various laws held even free negroes far below the status of citizens, providing corporal punishment for those who traveled at night or who defamed white persons. Given this history and the uncontestable truth and authority of Dred Scott, Davis maintained that Revels could not then or ever be a citizen, much less a senator.”

one’s place in society. The salient categories were instead “slave” and “free” – and people of
different ethnic backgrounds comprised both groups. In fact, indentured servants of a variety of
backgrounds worked alongside enslaved Africans for much of early colonial history.22
Enslavement, and thus inferiority, was not in perfect alignment with people of African ancestry,
skin color, and was not a lifelong state of permanence.23 However, as slavery began to be more
and more aligned with Africanness, the racialization of “slave status” as a “black status” further
solidified. Historian Robin Blackburn said, “indentured slaves could and did claim protection
from the courts, appealing on the basis of their contract, which indicated general conditions of
service and its terminal date.”24 It could be argued that these legal protections and entitlements
which indentured (and non-lifelong slaves, often not of African origin) servants sought from the
courts were a large part (both economically and subconsciously) of what made them less
desirable than African slaves. There is documented reluctance or resistance to slavery by
freedom-loving European American colonists. However, the racialization of the African as
appropriate to slave status, what Blackburn describes as “the racial otherness of the African and
black removed any remaining scruples.”25 As blackness came to be aligned with “enslaved,”
whiteness came to be defined as “free,” and “citizen.” It is important to remember that this was
not always the case. Citizens of European ancestry did not self-identify as “white” in colonial
times.26 Johnson’s speech pushed this ideological framework forward, by aligning black with
“slave” and white with “free” – even after slavery had been abolished.

22 Robin Blackburn details this process in The Making of New World Slavery (1997). He notes: “to begin with they
made little of the distinction between servants and slaves, putting the two to work side by side. But as the scale and
intensity of plantation labour grew, African slaves were preferred to servants.” Id. at 315.
23 See, e.g., Blackburn, supra at 307-68 (“Racial Slavery and the Rise of the Plantation”); American Slavery,
American Freedom at 316-337 (“Toward Racism”).
24 Blackburn, supra at 320.
25 Blackburn, supra at 324.
26 See Blackburn, supra at 251. Blackburn notes that “in colonial legislation of this period servants were usually
described not as whites but as Christians, to distinguish them from Indians and Africans, who were sometimes
In a speech of 4,354 words, Johnson speaks consistently in racial terms, utilizing distinct colors to describe formerly enslaved (“freedmen”) and never enslaved peoples. The usage of these terms is not parallel. Johnson uses the word “race” or “races” nineteen times, but uses the word “white” thirteen times and the word “black” seven times. Johnson uses the term “white race” three times, “negro” four times, “black race” twice, “mulatto” twice and “black man” once. Tellingly, the term “white citizens” is used three times and “white person” is used twice, but terms “black person” and “black citizen” are never mentioned. The “person” and “citizen” descriptors are reserved for the Anglo-Americans, with whom Johnson allies himself.  

Some background about Andrew Johnson may contextualize his mindset and views. Prior to his presidency, Johnson was a southern senator, “a Tennessee conservative, who often at odds with southern planters as a class, supported their traditional southern values on race and power.”  

It begins to make sense that Johnson bemoaned the release of formerly enslaved African Americans into a social and economic sphere shared with southern whites like him. Post-Civil War, the formerly enslaved were not supposed to be beholden to the South’s stance on slavery any longer, however, the new federal seat of authority, after the assassination of Lincoln, was filled by a southern senator whose “racial prejudice[s]” were “so virulent that they ruled his judgment.”

lumped together in the category ‘all servants not being christians’, though this was inaccurate, since some of the latter had been baptized, either in African or America, and thought of themselves as Christians.”

27 This is a theme I’ll return to when I discuss the seating of the first elected African American senator, Hiram Revels in Richard Primus’ account.


29 Gordon-Reed, supra at 112. “black empowerment and participation in the American system was a nightmare scenario for Andrew Johnson. ‘This is,’ he said, ‘a country for white men, and by God, as long as I am President, it shall be a government for white men.’”

30 Id. at 113.
Johnson’s speech substantively rejected the Reconstruction thrust toward enlarging rights for formerly enslaved people. However, symbolically, the speech did much more. Despite widespread faith that he might support the Bill, “when the bill passed, Johnson vetoed it in language so strong that it made clear the president would never support any legislation that aided the freedmen.”31 An analysis of the language of the speech, delivered on March 27, 1866 in Washington, D.C. illuminates the symbolic power of this message from the president of the post-bellum union.

On its very basic level, the bill Johnson vetoed sought to clarify the ever-confusing precedent of Dred Scott v. Sandford by granting federal citizenship rights to all Americans, no matter their background or former slave status.32 Johnson found this appalling, and bemoaned that this citizenship “provision comprehends the Chinese of the Pacific States, Indians subject to taxation, the people called Gipsies, as well as the entire race designated as blacks, people of color, negroes, mulattoes, and persons of African blood.” 33 In 1866, Johnson is not yet referring to any of these other non-white groups as races, except for “the entire race designated as blacks” which contemplates all those “persons of African blood.” Johnson reinvigorates the discussion of “race” and “blood” as indicative of the intrinsic differences of “Chinese” “Indians” “Gipsies” and “people of color” from the white citizen for whom and to whom he speaks.

There have been arguments that Johnson’s reluctance to grant rights to the freedmen was guided by his views on federalism. States should determine which rights to dole out and that the federal government should stay out of it. Johnson pondered “the grave question” of “where eleven of the thirty-six States are unrepresented in Congress at the time, it is sound policy to

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31 Id. at 128.
32 See Dred Scott v. Sandford, 60 U.S. 393 (1856), the (now infamous) pre-Civil War case in which, among other things, Judge Taney declared that no person of African descent could ever be a citizen of the United States.
33 See Lillian Foster, Andrew Johnson, president of the United States: his life and speeches, 264-80 (1866).
make our entire colored population, and all other excepted classes, citizens of the United States.”

Granting citizenship to freed slaves, as well as the other ethnic groups Johnson mentions would be included would violate the concept that “persons who are strangers to and unfamiliar with our institutions and laws, should pass through a certain probation” before they are granted citizenship. It is telling that Johnson considers all freed slaves “strangers to and unfamiliar with [American] institutions and laws.” For those formerly enslaved people, their familiarity with American institutions and laws would to the contrary, be extremely robust, although antithetical to the interests of former slave holders. Johnson believes that by making freedmen citizens, the bill “proposes a discrimination against large numbers of intelligent, worthy and patriotic foreigners, and in favor of the negro, to whom, after long years of bondage, the avenues to freedom and intelligence have just now been suddenly opened.” The “negro” must be viewed in contrast to the foreigners, who are “intelligent, worthy, and patriotic.” Unlike those foreigners, the “negro,” the American who has been betrayed by his own countrymen, cannot possibly be considered “worthy” of the benefits of citizenship, ironically because of the “bondage” inflicted upon him by his own government.

Similarly, Johnson criticizes the ability of the federal government to prevent the states from discriminating on the basis of race. He objects to the bill which would grant to formerly enslaved peoples the “full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.” This is what Johnson views as the “perfect equality of the white and colored races” that is “attempted to be fixed by a Federal law.”

\[\text{Id.}\]

See, e.g., Michael Martinez, Carpetbaggers, Cavalry, and the Ku Klux Klan: Exposing the Invisible Empire During Reconstruction, 37 (2007). “Citing fears of racial intermarriage and expressing his beliefs that blacks lack an adequate understanding of ‘the nature and character of our institutions,’ he echoed a widespread feeling…that Negroes simply were inherently inferior to whites.”

\[\text{See Foster, supra.}\]
These arguments about the forcing of “equality” echo throughout the next two hundred years’ discussion of race. Johnson laments that this Bill would not permit “any State [to] exercise any power of discrimination between different races.” Johnson then cites areas where it has “it has frequently been thought expedient to discriminate between the two races” such as policing slavery and inter-marriage between Africans and ‘whites.’ Johnson fears losing these social regulations.

Not only does Johnson’s speech bolster the entitlements of the white citizen, but in doing so he also strengthens the ideological hold of the “black man.” It is important to shed modern conceptions of racial categories to fathom the impact of utilizing these terms in 1866. At this time, “black” was not commonly used to describe someone of African ancestry. By using the “black race” as a descriptor and attempting to seamlessly reclassify all “freedmen” and women as members of the “black race,” Johnson makes a potent ideological move, especially for a president immediately post-Civil War and post-Emancipation. Deftly, President Johnson then imbues the “black race’ and the “black man” with qualities for the “white citizen” to fear. Johnson takes particular issue with the second portion of the Bill, which aimed “to afford discriminating protection to colored persons in the full enjoyment of all the rights secured to them by the preceding section.” Johnson mentions that federal law’s jurisdiction over state courts would remove state’s control over crime, by preventing “different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment of crime, whereof the party shall have been duly

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37 See “Johnson’s Veto of the Civil Rights Act of 1866” in Vol. 1 Melvin I. Urofsky and Paul Finkelman. Documents of American Constitutional and Legal History: From the Founding to 1896, 502 (3d ed. 2008). “It means an official offence, not a common crime, committed against law upon the person or property of the black race. Such an act may deprive the black man of his property, but not of his right to hold property.”

38 Id. “It follows that if in any State, which denies to a colored person any one of all these rights, that person should commit a crime against the laws of a State—murder, arson, rape, or any other crime—all protection and punishment, through the courts of the State, are taken away, and he can only be tried and punished in the Federal courts.”
convicted, or by reason of his color or race, than is prescribed for the punishment of white persons.” This provision seeks to eradicate differing “punishment” in criminal court merely on account of previously enslaved status, as a proxy for “color or race.” In decrying the federalism conflict this poses, Johnson mentions casually three crimes -- “murder, arson, rape” – as examples that the “black man” would likely commit that the citizen should fear. These are three very local, intimate crimes, and Johnson instills fear that criminals of this type would be extended protections. Johnson fears that if a local official, “refuse[d] the exercise of the right to the negro; [his] error of judgment, however conscientious, shall subject [him] to fine and imprisonment.” Johnson protects the right of local authorities to offer “different punishment... or penalties” by reason of color.

Today’s fears of “reverse racism” that underlie the claims in Fisher were likely sown with the help of Johnson’s speech. Johnson helps create the posture of many of today’s race cases, pitting white against black, the always-free against the formerly enslaved. Johnson claims that the Civil Rights Act would “establish for the security of the colored race safeguards which go indefinitely beyond any that the General Government has ever provided for the white race”

39 See Kwando M. Kinshasa, Black Resistance to the Ku Klux Klan in the Wake of Civil War, 131 (2006). (“By the spring of 1866, President Johnson’s attempt at restoration was dramatically more pro-southern than what many northern Republicans could tolerate... he then revealed deeply felt southern sympathies by vetoing the Freedmen’s Bureau Bill... and the March 13 Civil Rights Act that nullified the Dred Scott decision of 1857. These presidential decisions thereby decisively indicated his intentions to support southern whites whose interest would be directly threatened by any congressional acts supporting the Freedmen’s enfranchisement. Johnson made it clear that he was very much a Tennessee conservative, who often at odds with southern planters as a class, supported their traditional southern values on race and power.”)

40 See, e.g., Rachel F. Moran, Rethinking Race, Equality, and Liberty: The Unfulfilled Promise of Parents Involved, 69 Ohio St. L.J. 1321, 1322-74 (2008) (discussing Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978)). “This characterization of municipal officials suggested the kind of solidarity and oppositional politics associated with a fear of ‘reverse discrimination’ rather than with a ‘nation of minorities’” and “[Bakke] alleged that the school’s practice of setting aside seats for underrepresented minorities was a form of ‘reverse discrimination’ that violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause. In effect, Bakke was calling on the Court to reject the executive branch’s efforts to inject anti-subordination practices into higher education. If the Court acceded, it would revert to the pre-Brown doctrine in college admissions cases, making clear that race-conscious remedies were reserved for rectifying past institutional discrimination and that the Constitution was otherwise colorblind.”
(emphasis added). Johnson goes further to claim that “the distinction of race and color is by the bill made to operate in favor of the colored against the white race” (emphasis added). Johnson argues that a measure aimed to grant basic citizenship rights and protection against racial violence by local officials still attempting to install “slavery-lite” through the Black Codes. Johnson argues that the newly freed slaves, who six years prior had no legal rights whatsoever, and were treated as chattel, mere property and not human in the eyes of the law, is operating “in favor of the colored race against the white race.” In his speech, Johnson turns slavery’s historical reality on its head, and favors instead the building of a white-race centered fear of black empowerment. The irony was that the Civil Rights Act of 1866 was proposed and passed in large part in reaction to the Black Codes recently implemented in the South. These Codes have been described as a re-institution of slave-status for those of African ancestry, and were instituted by senators emboldened by the newly instituted President Johnson’s pro-southern slaveholder stance.

Johnson closes the speech by stating that, in the spirit of his “lamented predecessor” Abraham Lincoln, he will “cheerfully co-operate with Congress in any measure that may be necessary for the preservation of civil rights of the freedmen.” However, concerning the very bill in front of him passed by two houses of Congress that seeks to do that very thing, a “measure... necessary’ for the preservation of civil rights of the freedmen,” Johnson aggressively vetoes. He declares, due to various “details of the bill [that] are fraught with evil” he is “compelled to withhold [his] assent.”

41 Gordon-Reed, supra at 116. “The most conservative element came to power and enacted statutes, the notorious ‘black codes,’ to regulate the lives and behavior of blacks. Their whole purpose was, in the words of one observer, ‘getting things back as near to slavery as possible.’”
42 Gordon-Reed, supra at 128. “The deep irony of their faith is that this bill had become necessary in large part because Johnson’s early pro-white southern stance had emboldened the white South to pass the black codes that sought to reinstate slavery in the South in all but name…”
43 See Foster, supra at 279.
Although he utilizes federalist rhetoric to justify his veto, all of Johnson’s justifications are saturated with racial animus. Utilizing states’ rights could be seen as either masking his deep-seated racism, or as an opportunity to apply his racism in a manner acceptable and seen as independent of race, as race-neutral. This is an example of Reva Siegel’s “preservation through transformation.” Johnson could not openly declare his vitriol for the “rights of the freedmen” so instead he couched his hateful views on discussion of states’ rights that tried to pass as ideologically neutral. In fact, quite the opposite is true. By enshrouding his racism in federalist rhetoric, he buried it in an ideological underground, and insulated it from critique for the time being, a time-capsule of white supremacy that has emitted its fumes throughout the following centuries. Historian Annette Gordon-Reed has noted that “Johnson’s racial views heavily determined what rights he wanted to preserve for the states” and that he mostly “feared a federal government so large that it could interfere with white supremacy.” Johnson feared that if “Congress can abrogate all State laws of discrimination between the two races, in the matter of real estate, of suits, and of contracts generally, Congress may not also repeal the State laws as to the contract of marriage between the races?” Johnson would be horrified to find out that indeed the power of the “State laws as to the contract of marriage between the races” would not enjoy unadulterated power without interference by the federal government.

Johnson sought to prevent formerly enslaved Americans with African ancestry, now more easily identified as “black” through their skin color and “race,” from achieving basic gains. Johnson viewed any freedmen’s gains as a threat to the racial hierarchy atop which sat him and

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44 See 49 Stan. L. Rev. 1111.  
45 Gordon-Reed, supra at 102.
his white comrades. To have this divisive, racial hatred, couched in a concern for federalism and constitutional authority to a population already betrayed by its government and its law, sanctioned Johnson’s viewpoints, and codified the experience of “black” and “white” people in the new America.

**Black Senator/Black Citizen: Hiram Revels and Congressional Race Construction (1870)**

Richard Primus’ law review article details a curious event in legal history – what he calls “The Riddle of Hiram Revels.” Revels was a man of African descent elected to the senate in 1870. However, according to *Dred Scott*, which had not been overturned, Revels had not been a citizen long enough to be seated as a senator, as the infamous decision held that people of African descent could not be citizens under the Constitution. How the Civil War had or had not changed the Constitution was at the forefront of this debate.

In discussing whether an African American senator who was democratically elected be seated post-Civil War in light of *Dred Scott*, and the limitations on “black” citizenship, the legislators deeply held race-based constitutional interpretation was on display. As with President Johnson’s rhetoric, the ideas utilized in the debate were not about legal precedent or authority, but conveyed the era’s normative or observed logic of racial ideas. At the time, those

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46 *Id.* at 113. “…even if it meant risking political ruin, he was not going to go along with a plan of Reconstruction that took one iota of white supremacy away from the South, the region of his birth. When that is understood, his entire course of action between 1865 until the end of his presidency becomes explicable.”


48 *Id.* at 14. “In setting forth views about whether Revels was or was not the equal of a white man, or whether negroes as a class should be accepted or reviled, or even about whether Revels himself should be classified as black, the senators often proceeded without parsing constitutional language or prior constructions of legal authority. They argued from their substantive convictions about issues of race. But they did not argue only from that set of first-order convictions. Although it was from start to finish a fight about race, the debate over Hiram Revels was also a fight about the constitutional significance of the Civil War. In particular, it was a fight about the extent to which a
new regime had superseded the Constitution of 1787.”
Americans with African origin were deemed incapable of being in positions of power, especially in governmental positions.  

Citizenship, rather than a mere legal status, was conceived of as membership in the polity. This citizenship status, full membership in American life, was something that the southern legislators were very reluctant to allow formerly enslaved people to access. In discussing whether he could be seated, legislators positioned Revels on an axis with “Africanness” on one end and “Europeanness” on the other to determine his worthiness. As we saw with President Johnson’s speech, the established constitutional order, even post-Civil War, rests on a white supremacist racial hierarchy. As the Revels’ debate on the senate floor demonstrated, there was an inherent tension between the American/European commitment to freedom and the challenges this racial hierarchy posed to established concepts of democracy. Ultimately, the constitutional theories of the southern senators were so bound up in racist rhetoric that it was very difficult to disentangle their analysis with their personal and deeply held views about the place of formerly enslaved peoples, identifiable by their skin color, in American society.

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49See Foner, supra at 264. This view had been commonly held by voters for some time, and accusations of racial impurity were utilized as a political smear tool. Foner writes, “During the campaign of 1860, Democrats spread the rumor that the Republican vice-presidential candidate, Hannibal Hamlin, was a mulatto.”

50See Primus, supra at 15. “If a new order would repudiate the old one, the key element of that repudiation would concern the old regime’s sanction for slavery, caste distinction, and other official disadvantages visited upon black Americans. His chief concern was to preserve the prewar racial hierarchy to the greatest extent possible, even after the Reconstruction Amendments. Not coincidentally, no senator of either party articulated conflicting views on the issues of race and revolution. Nobody argued that Africans were tainted lower beings but that as a matter of the proper understanding of the constitutional regime, they were now eligible to sit in the Senate. Conversely, nobody argued that every man was the equal of every other, regardless of race, but that the positive law simply did not permit Revels to be a citizen or a senator.”

51See Blackburn, supra at 322. “This tension began long before during the rise of the slave trade, and continues to this day in discussions of access to education, but limits on the utilization of racial categories to achieve it. See, e.g., “African slavery in the Caribbean brought out the crippling racial qualification of the popular European attachment or aspiration to personal freedom.”

52See Primus, supra at 19. “That need not mean that they were not in good faith about their constitutional theory—more probably, it would mean that their constitutional theory and their racial theory were in fact the same, or at least substantially interdependent. Vickers refused to decouple the issues.”
Hiram Revels was eventually seated, not due to any easily explicable legal analysis or precedent. The constitutional debate his seating sparked teaches much more about views on race at the time, than it does about constitutional interpretation. The law’s treatment of race, since 1870 at least, has rested largely on broader normative principles, coupled with an awareness of their pervasive power and widespread social consequences. The technical lawyerly analysis adhered to in other areas of law, even other areas of constitutional interpretation, gives way in the discussion of race. The stakes feel too high.53

PART II: CIVIL RIGHTS NOT SOCIAL RIGHTS: ANTI-MISCEGENATION LAW IN THE MID 20TH CENTURY

“Disputes over the legality of miscegenation laws illustrated that distinctions between civil and social rights were not fixed, but instead were forged in the struggle over the scope of Reconstruction legislation.”54

“And when Democrats accused them of favoring the intermixing of the races, Republicans responded that keeping the races separate by barring slavery from the territories would prevent this very intermixing. Said a leading Iowa Republican, ‘It is the institution of slavery which is the great parent of amalgamation. Gentlemen need not fear it from those opposed to that institution.’”55

A look at the language choices utilized by both litigants and judges in anti-miscegenation cases of the mid-twentieth century sheds light on the accounts of racial meaning that pervade judicial opinions to this day. Loving v. Virginia, which in 1968 eradicated state anti-

53 Id. at 15. “And as this Part shows, the Senate could have settled the issue either for or against Revels on technical and lawyerly grounds. As both the content of the Senate’s conversation and the intense national attention paid to the affair indicated, however, much larger things were at stake, and in keeping with that deeper reality, the Senate mostly conducted the debate at the level of broad principles. Moreover, the sense that a technical or lawyerly solution to the Revels problem would be unsatisfying or even disingenuous is one that most twenty-first Americans are likely to share with their nineteenth-century predecessors. Almost all modern Americans will take the view, as a bottom-line matter, that Revels should have been seated.90 And if we are properly self-aware, we will recognize that that view derives from large normative principles rather than from whatever technical legalisms we can develop to ‘solve’ the problem.”
54 49 Stan. L. Rev. at 1123.
55 Foner, supra at 266.
miscegenation statutes as unconstitutional also set firmly in place an ideological framework that has since formed the backdrop of all subsequent race-related decisions.

In the early anti-miscegenation case of Green v. State (1877), the court found that Congress did not intend the Civil Rights Act of 1866 to overturn anti-miscegenation laws—"56 Miscegenation was a term coined in the during Reconstruction to ridicule the Republican’s efforts at racial equality. Both political parties, however, utilized the absurdity of interracial mixing as a rhetorical tool to humiliate the other. One scholar notes that “when southern democrats coined the term miscegenation to ridicule the quest for racial equality during Reconstruction, Republicans chided their opponents for implying that cross-racial sexual liaisons were even tempting.”57 A contextualized look at this time confirms that the eradication of slavery did not mean for most Americans the extension of full “social rights” to former slaves. In fact, as another example of Reva Siegel’s “preservation through transformation,” the extension of “civil and political rights” to African Americans in many ways helped instead foster and grow the fear of social “amalgamation” that led to the eventual stiffening of anti-miscegenation statutes.58

Thus, formal “civil rights” and “anti-miscegenation” law were long deemed able to co-exist by those of all political affiliations. The persistence and strengthening of anti-miscegenation laws after the Civil War lent credibility to the idea that formal equality and social equality were very different things. The persistence of anti-miscegenation laws long into the 20th century is a reminder that “Reconstruction was limited in its reach” and prohibitions on racial

56 Moran (2001) supra at 77.
58 See Siegel, supra at 1120. “African-Americans from slavery entailed equality in civil and political rights; but most white Americans who opposed slavery did not think it’s abolition required giving African-Americans equality in ‘social rights.’ Social rights were those forms of association that, white Americans feared, would obliterate status distinctions and result in the ‘amalgamation’ of the races.”
mixing in sex and marriage revealed “that marriage and family law offered a way to preserve the color line despite a requirement of formal equality…”\textsuperscript{59} Barriers and restrictions on interracial sexual and marital choice were a way to prevent the dissolution of racial categories.

White supremacist rhetoric remained in the anti-miscegenation judicial challenges of the mid-twentieth century, as judges utilize language of Christianity and fear of the other to bolster “scientific” claims about race.\textsuperscript{60} The Civil Rights era brought challenges to these legal, and ultimately social, structures. In \textit{Loving v. Virginia}, when the Supreme Court finally took on a state anti-miscegenation statute and declared it unconstitutional, it acknowledged the motivation of white supremacy underlying these racial segregationist statutes. Although the Court does not utilize this term often, its logic, which has transformed into white privilege, has been preserved and underlies affirmative action challenges to this day (arguably now in the role of the litigant, suing and invoking the rhetoric of President Johnson asserting unequal treatment.)

Three cases between 1948 and 1967, \textit{Perez v. Lippold}, \textit{Naim v. Naim}, and \textit{Loving v. Virginia}, lend insight into the racial backdrop of the mid-twentieth century. These cases have shaped the subsequent turn of the century cases about racial meaning, up to the present day. All three cases involve “interracial” couples, and whether statutes prohibiting marriage between each couple should have legal force.

The ideological seeds of racial difference and sexual anxiety were sown by invoking Christian biblical rhetoric of blackness. Historian Robin Blackburn notes, that “as with later racial discourses, the legend of the curse of Noah, as constructed or reconstructed . . . was to be

\textsuperscript{59} Moran (2001), supra at 78.
\textsuperscript{60} See Blackburn, supra at 69. As historians have noted, however, even the Christian record is not uniform, and is mixed on its analysis of blackness and sin. Blackburn notes this contradiction: “the colour black was often linked to sin by theology, but this did not rule out the occasional valorization of black Africans.”
replete with signs that it was linked to sexual anxiety and notions of purity and danger.”

These notions of “purity” and “danger” that were infused into popular rhetoric in the Reconstruction era, continued to live underground, as the framework that continued to justify the separation of the races through anti-miscegenation statutes that prohibited the racial mixing of “non-whites” with the “white race.”

Unlike the discussions of race utilized by Johnson and Hiram Revels’ contemporaries, judges by the mid-20th century had couched their discussion of race into what seemed more neutral terms. In retrospect, these opinions may seem hateful, but recall that before Brown v. Board in 1955, the “separate but equal” logic of Plessy still reigned. Thus, the “separation” of races was not considered inherently suspect, either as legal or as a normative matter. Cases of this era justify separation of the races based on the strands of good citizenship and preservation of the polity that Johnson and Revels helped establish. As with the congressional debate over the seating of Revels, the analysis of the benefits and evils of anti-miscegenation laws largely “proceeded without parsing constitutional language or prior constructions of legal authority.”

Rather, from the forward-looking views of race espoused by Justice Traynor in Perez, to the prohibition of miscegenation rhetoric of Naim v. Naim, to the foregone proclamation in Loving, judges, aware of the broad social stakes of their legal decision-making, instead “argued from their substantive convictions about issues of race.” Similarly, the expansion of racial categories from black and white (in Johnson’s and Revels’ day), to include Mongolians, Malays, and all other “non-white” populations, helps undergird the eventual Supreme Court proclamation in

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61 Blackburn, supra at 72.
62 Primus, supra at 14.
63 Id.
64 See Moran (2001), supra at 31. She assesses the history of the anti-miscegenation laws once they expanded beyond limiting intermarriage of whites with African Americans. “the delegates proposed an 1878 constitutional amendment to restrict intermarriage of Chinese and whites: ‘the intermarriage… “ The California civil code was amended in 1880 to prohibit the issuance of marriage licenses authorizing the union of ‘a white person with a negro, mulatto, or Mongolian.’
Loving: “The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.”

An Intermixed State: Traynor and Perez v. Lippold (1948)

Perez v. Lippold, an early anti-miscegenation case, presents a circumstance where breaking free of precedent, especially when it comes to broad social norms was deemed necessary. The case, a mandamus proceeding, involved a couple, Andrea Perez, a “white person” and Sylvester Davis, “a Negro” who sought “to compel the county clerk of Los Angeles County to issue them a certificate of registry . . . [and a ] license to marry.” The case was heard in bank in California’s highest state court, The Supreme Court of California, at a time when Chief Justice Traynor was innovating, some say deviating from precedent, in various areas of law.

At this time, family law, including the law of marriage, was viewed as entirely a state matter. This classification, at least on the surface, shifted the racial issues from the federal stage to the state’s domain. Traynor, perhaps partly in anticipation of the official dismantling of government segregation which was to follow a few years later in Brown v. Board, explained

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66 Sometimes cited as Perez v. Sharp or Perez v. Mooney, 32 Cal. 2d 711 (1948).
67 See Moran (2001), supra at 84-88. Interestingly, Perez was Mexican American, today would likely be considered “Hispanic” or “Latino” but in 1948 was considered “Caucasian” under the race rubric of the time period. People of “Spanish” descent (including Mexican Americans) were categorized as Caucasians for purposes of racial analysis. This provides yet another historical indication that these categories are fluid and socially and historically constructed, rather than immutable, natural, fixed, or scientific.
68 See Perez v. Lippold, 32 Cal. 2d 711, 712 (1948). “Petitioner Andrea Perez states that she is a white person and petitioner Sylvester Davis that he is a Negro. Respondent refuses to issue the certificate and license, invoking Civil Code section 69, which provides: ‘no license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race.’”
69 Some of the legal innovations produced by the California Supreme Court under Traynor include creating strict liability for products in Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal. 2d 453 (1944) as well as paving the way for no-fault divorce in Perez, supra. These shifts in law were criticized at the time but have since been adopted in other jurisdictions.
anti-miscegenation laws restricting marriage between white and non-white individuals as “a segregation statute.”\textsuperscript{70} Traynor stated, “[s]ince the essence of the right to marry is freedom to join in marriage with the person of one’s choice, a segregation statute for marriage necessarily impairs the right to marry.”\textsuperscript{71} Traynor also laid bare that the California statute was premised on an assumption shared by all courts: the racial inferiority of all people to “Caucasians.” Traynor admits that the discussion of race, even among the judiciary, often falls into the paradigm noted by Primus: it “need not mean that they were not in good faith about their constitutional theory—more probably, it would mean that their constitutional theory and their racial theory were in fact the same, or at least substantially interdependent.”\textsuperscript{72} Traynor admitted that in 1948, “[m]any courts in this country have assumed that human beings can be judged by race and that other races are inferior to the Caucasian” and that “[r]espondent's position is based upon those premises.”\textsuperscript{73}

The respondent “grounds similar to those set forth in the frequently cited case of Scott v. State\textsuperscript{74}:

‘The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full blood of either race.’

Traynor rejects this widely cited vitriolic justification for “prohibition of miscegenation” invoked by the respondent. Instead, Traynor utilizes what he views as concrete data to debunk this mythical “unnatural” science claim. He states that “[m]odern experts are agreed that the progeny of marriages between persons of different races are not inferior to both parents . . . even

\textsuperscript{70}See id. at 713. Continual amendment to include more racial groups needs to control/corral racials groups. “Since 1872, Civil Code section 60 has been twice amended, first to prohibit marriages between white persons and Mongolians . . . and subsequently to prohibit marriages between white persons and members of the Malay race . . .” (internal citations omitted).
\textsuperscript{71} Id. at 717.
\textsuperscript{72} 119 Harv. L. Rev. at 1702.
\textsuperscript{73} 32 Cal. 2d at 720-21.
\textsuperscript{74} 39 Ga. 321, 324 (1869).
if we were to assume that interracial marriage results in inferior progeny, we are unable to find any clear policy in the statute against marriages on that ground.\textsuperscript{75}

Traynor then addresses what he finds most confounding about anti-miscegenation statutes by asking what simultaneously seemed like an obvious and a confounding question: How does racial segregation policies deal with mixed-race people? In 1948 Traynor states that “there are now so many persons in the United States of mixed ancestry” and “already many of the progeny of mixed marriages have made important contributions to the community.”\textsuperscript{76} At a time when most states did not discuss “the progeny of mixed marriages” in any language, Traynor was forging forward to assess the incongruities of this legislation. Traynor tries to explain how the race lines that are draw by the statutes (white, Mongolian, Malay, etc) coupled with the allowance of mixture among non-white populations, is nonsensical. The argument “that the miscegenation laws prohibit inter-racial marriage because of its adverse effects on the progeny is belied by the extreme racial intermixture that it tolerates.” This “intermixture” has produced a population that does not fit neatly into the racial categories that overlay them, and Traynor explores all the complications that categorization based on “race” will produce in a diverse “intermixed” state.


\textit{Naim v. Naim} was decided in 1955 by the state of Virginia. Eleven simple words convey the purpose of the suit: “Suit to annul marriage of a white person and a Chinese.”\textsuperscript{77} The pair had left the state of Virginia to be married in North Carolina three years prior, and the relationship had soured. Mrs. Naim sought to annul the marriage on the grounds that it was void because it

\textsuperscript{75} 32 Cal. 2d at 720-21.
\textsuperscript{76} 32 Cal. 2d at 727.
197 Va. 80 at 80.
violated the anti-miscegenation statutes of Virginia, and the lower court agreed. Mr. Naim appealed.  

Several years after Perez, but before any federal precedent had been decided on the constitutionality of anti-miscegenation statutes, the Naim court harkened back to much of the racial rhetoric invoked by President Johnson post-Civil War. Perhaps this is because Virginia was a large slaveholding colony and the composition of its citizenry was much more dominated by the “black/white” rhetoric of the postbellum South. Picking up not far from where the southern senators in Hiram Revels’ proceedings left off, the judge in Naim deemed that separation of the races was justified by many considerations: preservation of “blood,” percentages, ineligibility of citizenship, claims to history, God and morality, preservation of the social order, racial integrity, Christian civilization, peace, preventing corruption, protecting public health and morals, good citizenship, and public welfare. The ideas of good citizenship being restricted to white (never-enslaved) persons echoes Johnson’s views on how to preserve the racial hierarchies of the postbellum South.  

Naim petitioned the Supreme Court to determine whether the anti-miscegenation statute violated the Fourteenth Amendment. For various contested and contestable reasons, the Court

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78 Id. at 81. “This is an appeal from a decree of the court below holding the marriage between the appellant and the appellee to be void under § 20-54 of the Code of Virginia, 1950, which is part of ‘An ACT to preserve racial integrity,’ enacted by the General Assembly and approved March 20, 1924 (Acts 1924, ch. 371). The material facts are not in dispute. The suit was brought by the appellee, who is a white person, duly domiciled in Virginia. The appellant is a Chinese and was a non-resident of the State at the time of the institution of the suit. On June 26, 1952, they left Virginia to be married in North Carolina. They were married in that State and immediately returned to Norfolk, Virginia, where they lived together as husband and wife. It is conceded that they left Virginia to be married in North Carolina for the purpose of evading the Virginia law which forbade their marriage.”

79 Id. citing Ex Parte Kinney. 3 Hughes 1, 14 Fed.Cas. 602, 3 Va. Law J. 370. Cases such as Kinney discussed anti-miscegenation laws as necessary “to impose such restraints upon the relation as the laws of God, and the laws of propriety, morality and social order demand, has been exercised by all civilized governments in all ages of the world.”
refused to decide Naim for want of a federal question, and did not take up the constitutionality of state anti-miscegenation laws until almost twelve years later in Loving v. Virginia.  

**Immutable But Irrelevant: Race after Loving v. Virginia (1968)**

Loving v. Virginia was the case the Supreme Court ultimately utilized to declare that state anti-miscegenation laws violated the Equal Protection clause of the Fourteenth Amendment. Much has been written about the significance of the Loving decision and I will not rehash it all here. For purposes of my discussion, I believe the most important thing about Loving is its treatment of race and it’s shaping of subsequent discussions of race in case law. Loving is cited for many propositions, including for today’s debate on the constitutionality of same-sex marriage. However, I concur with Rachel Moran’s view that “[a]s part of the jurisprudence that dismantled this official racial hierarchy, Loving stood for a new proposition: Race is immutable, but it is a biological irrelevancy…”

This “immutable” and “irrelevant” view of race espoused by the Court in Loving haunts affirmative action jurisprudence. By viewing race as “immutable” in its discussion, the court gives it more power – it is fixed and cannot be changed, even by viewing it or talking about it differently. Racial difference, as we currently understand it, was framed as something that is here to stay (even though statistics and census data belie this assumption), and even though Mildred

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80 There are competing views as to why the Court did not use Naim as an opportunity to declare anti-miscegenation statutes unconstitutional, but instead waited until Loving v. Virginia, twelve years later, to do so. That debate is outside the scope of this paper.

81 See Moran (2001), supra at 102. "Ironically, Loving piqued researchers’ interest in interracial marriage at the same time that it made the phenomenon harder to study than ever before. In the spirit of colorblindness, a number of states eliminated racial identifications from their marriage statistics after 1967."

82 There is a new book coming out on the subject in June of this year by Cambridge University Press, edited by Kevin Noble Maillard and Rose Cuisin Villazor entitled Loving v. Virginia in a Post-Racial World: Rethinking Race, Sex, and Marriage (June 30, 2012).

83 Moran (2001), supra at 112.
Loving herself was mixed race, of partial Native American and African American ancestry.\textsuperscript{84} Secondly, \textit{Loving} instructs that we must simultaneously believe that race is irrelevant. Race is to be a permanent, and immutable, fixture of our social lives, yet it must have no significance, positive or negative, beyond this fact. \textit{Loving}'s view of race creates a double bind – simultaneously mandating the acceptance of, and disavowal of, racial difference. Thus, to acknowledge race is to make it “relevant” but to ignore it is to be blind to the “immutable” race characteristics among us. The law’s view of race, inherited from and informed by \textit{Loving}, carries the court through the cases that approach race in the turn of the 21\textsuperscript{st} century. With the increasing mixed race population, it is unclear whether this concept will shift to “mutable, but irrelevant” or arguably less likely but more reflective of lived experience, to “mutable and relevant.”

\textbf{PART III: RACING THE 2000s: SOCIAL SEGREGATION AND THE SUNSET OF RACE}

After the Court conveyed that race is both “immutable” and “irrelevant,” the Court decided \textit{Washington v. Davis} which held that "a law or other official act, without regard to whether it reflects a racially discriminatory purpose, [will not be] unconstitutional solely because it has a racially disproportionate impact."\textsuperscript{85} Racially discriminatory purpose, or “intent,” was thus required to prevail on a Fourteenth Amendment racial discrimination claim. The coupling of

\textsuperscript{84} As I hope this paper has highlighted, it is difficult to “prove” someone’s racial heritage. However, many recent sources have identified Mildred Jeter Loving as of “African American and Rappahannock Native American descent.” See, e.g., African American Registry at http://www.aaregistry.org/historic_events/view/mildred-jeter-loving-love-will-find-way; http://www.biography.com/people/mildred-loving-5884. But see 388 U.S. at 2. The \textit{Loving} opinion identifies “Mildred Jeter, a Negro woman, and Richard Loving, a white man” and subsequent news coverage has likely utilized the court opinion as its source of official information about Mildred’s ethnic heritage. In Ms. Loving’s obituary, The New York Times cited her as, “Mildred Loving, a black woman.” See Douglas Martin, \textit{Mildred Loving, Who Battled Ban on Mixed-Race Marriage, Dies at 68}, \textit{N.Y. Times}, May 6, 2008 at http://www.nytimes.com/2008/05/06/us/06loving.html.

\textsuperscript{85} See 426 U.S. 229 (1976).
these two decisions effectively closed the door on school desegregation that had been undertaken since Brown v. Board. These two cases set the stage for the conflict in Parents Involved in Community Schools v. Seattle School District No.1, and arguably Fisher.

But as we have seen, and as Reva Siegel argues, the meaning of Equal Protection has evolved over time.\textsuperscript{86} Rather than starting from a neutral baseline of racial equality when assessing affirmative action, I agree with Siegel that “the Court's current interpretation of the Fourteenth Amendment continues to authorize forms of state action that contribute to the racial and gender stratification of American society.”\textsuperscript{87} When the Court presents the history of racial status regulation as a “history of racial classifications,” it can equate racial classifications used to promote integration with racial classifications used to promote segregation, and equate regulation seeking to alleviate racial stratification with regulation seeking to perpetuate racial stratification.”\textsuperscript{88} This is a large part of what underlies the Court’s affirmative action analysis and confusion.

**Beneficent or Malicious: Race in *Parents Involved* (2007)**

Seattle’s public schools had never been segregated pre-Brown v. Board, and thus no remedial purposes could be invoked for its taking race into account in its distributions of students to local schools. In *Parents Involved*, the Court affirmed a long-brewing conception: that “racial classifications are pernicious.”\textsuperscript{89} The utilization of racial categories in any decisions by a governmental body, including a school or district, was only justified to “remedy constitutional

\textsuperscript{86}Stan. L. Rev. at 1130. “[C]ore convictions about the meaning of equal protection can and do evolve over time.”

\textsuperscript{87}Id. at 1131.

\textsuperscript{88}Id. at 1142.

\textsuperscript{89}As the Court recently reaffirmed, “‘racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.’” *Parents Involved in Cnty. Sch. v. Seattle Sch. Dist.* No. 1, 551 U.S. 701, 720 (2007) (internal citations omitted).
wrong.” The classification of racial categories as “pernicious” submerges the various ways that race is used in state action below the surface. After Washington v. Davis, it is difficult to envision on what “other basis” the use of race in public schools would be deemed permissible.

In analyzing how a school admissions system that takes race into account functions, the Court talks of race as either used “beneficently” or “maliciously.” These views seem to take into account solely whose perspective is being considered in its application. In the view of the Court, there is no way race can be used neutrally. What is the view of race this thought envisions? If race is merely ancestral background channeled into simplistic organizing principles, is there not a way it can be used merely for organizational purposes? This rhetoric assumes that utilizing race at all means there are winners and losers. The view of race as “immutable” and “irrelevant” from Loving remains, but has morphed into viewing its application as creating “beneficent” or “malicious” results, depending on which plaintiff feels he is being harmed by its usage.

The plurality opinion, like most modern court opinions which deal with race issues, does not address what the state’s role should be in approaching its intervention in a racialized legal past. Justice Breyer’s dissent posits that “the plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity because of their race.” Breyer envisions a much more active role for the state in remedying its past wrongs – but the

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90 Id. at 721. “Once Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis.”
91 49 Stan. L. Rev at 1143-44. “The governing equal protection framework identifies race- and gender-conscious remedies as pernicious “discrimination,” while deflecting attention from the many ways that the state continues to regulate the social status of minorities and women, thereby constructing discrimination against minorities and women as a practice of the (distant) past. The social position of minorities and women thus appears to be a legacy of past discrimination–or the product of culture, choice, and ability–while the state’s continuing role in shaping the life prospects of minorities and women disappears from view.”
92 Justice BREYER's dissent candidly dismisses the significance of this Court's repeated holdings that all racial classifications must be reviewed under strict scrutiny . . . arguing that a different standard of review should be applied because the districts use race for beneficent rather than malicious purposes. 551 U.S. at 741 (internal citations omitted).
93 Id. at 787-88.
Court makes clear in Parents Involved it believes it now having a greater interest in staying out of, rather than enforcing racial policies. This view likely discounts the role of animus and prejudice in decision-making in all areas of law, which is personal and not systemic, and thus not easily remedied by utilizing the democratic system.

The Court discusses the competing goals of racial balancing and diversity as different and distinct, without giving a working or precise definition of each. Extrapolating from what little the Court does say on the subject, racial balancing seems to involve looking at the “racial demographics” of each area as what “drives the required ‘diversity’ numbers” in taking race into account in school assignment. However, the Court expresses the “validity of [its] concern that racial balancing has ‘no logical stopping point.’” Does the alternative “diversity” rationale, or having an “undefined” number of meaningful representatives of different racial groups have a “logical stopping point” either? The Court prefers an “undefined ‘meaningful number’ necessary to achieve a genuinely diverse student body” as compared to “a defined range set solely by reference to the demographics of the respective school districts.” This undefined and amorphous metric of “diversity” is preferable to any “defined range,” or concrete vision of what “taking race into account” should mean. It is difficult to explain why the Court is so wedded to an “undefined” view of race over a “defined” one.

The Court gives a final blow to the remedying of residential segregation, as reflected in public schooling, in saying that there is no use trying to correct for residential segregation by

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94 49 Stan. L. Rev. at 1143, “The Court then began to use doctrines of heightened scrutiny to review and restrict race-based remedial regulation-- insisting that affirmative action policies could not rectify ‘societal discrimination’ or promote proportional representation or otherwise engage in what some have called ‘social engineering.’” Note how justifications for constitutional restrictions on affirmative action resemble the nineteenth-century claim that civil rights measures should not legislate ‘social equality.’

95 551 U.S. at 726-7.

96 Id. at 731.

97 Id. at 729.
utilizing race-conscious policies in public schools. “Seattle contends that its use of race helps to reduce racial concentration in schools and to ensure that racially concentrated housing patterns do not prevent nonwhite students from having access to the most desirable schools.”98 This justification was found to be without merit, potentially a foreboding sign to the University of Texas ten-percent admissions plan which seems to at least attempt to remedy residential segregation.

The ghost of President Johnson haunts this Court opinion as well, through its critique of the “crude racial categories” of “white” and “non-white.” The Court accuses the district of “fail[ing] to make an adequate showing” by “fail[ing] to explain why, in a district composed of a diversity of races, with fewer than half of the students classified as ‘white,’ it has employed the crude racial categories of ‘white’ and ‘non-white’ as the basis for its assignment decisions.” The district “does not explain how, in the context of its diverse student population, a blunt distinction between ‘white’ and ‘non-white’ furthered these goals.”99 The undefined language of “diversity” as a legitimate use of race does not coalesce well with the “crude” and “blunt” categories of “white” and “non-white” – the ways of thinking about the American citizenry that has been at work for more than 150 years. Any discussion of “white” students, whiteness, or white privilege is glaringly absent from the Court’s analysis, except to say the district is already sufficiently diverse, since “fewer than half of the students classified as white.”

Here is where we get a more fully defined view of what the “colorblind ideology” espoused by the Court. The Court tries to further downplay race’s meaningfulness by saying, “[t]he enduring hope is that race should not matter” but “the reality is that too often it does.”100 It

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98 Id. at 725.
99 Id. at 787.
100 Id.
is unclear what the court means by this and whose “enduring hope” is it that “race should not matter.” It is hard to tell whether this is a dream that all people should be treated absolutely alike, in which case these seems to only be an “enduring hope” for white people, or those tired of doling out benefits based on racial difference. Or does this mean that race is “immutable” but “irrelevant” in that it exists, but that it should not “matter” for any entitlements, benefits, or differential treatment? Either way, it seems this “colorblind” vision is not the “enduring hope” for those who feel the legal and economic infrastructure of society has marginalized them to less than full participation in democratic entitlements such as public schooling for children.

The Court criticizes the white/nonwhite view of race utilized by the school district as nonsensical to goals of diversity, but does not question the value of the other racial categories in the same way. The Court’s opinion in fact reifies these categories by utilizing them to reveal how absurd white/nonwhite analysis is. The Court does not question how utilizing categories such as “African-American,” “Latino,” “Asian-American,” and “Native-American” in addition to “white” achieves the same absurdity in trying to reach “broad diversity,” a concept, presumably related to race but not defined either by the School District or the Court.

A most curious exploration of the District’s decision-making hints at the breaking down of racial categories to identify students. The Court notes that “Joshua McDonald's requested transfer was denied because his race was listed as ‘other’ rather than black, and allowing the transfer would have had an adverse effect on the racial guideline compliance of Young Elementary, the school he sought to leave.” As Traynor spoke about almost sixty years earlier

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101 “But under the Seattle plan, a school with 50 percent Asian–American students and 50 percent white students but no African–American, Native–American, or Latino students would qualify as balanced, while a school with 30 percent Asian–American, 25 percent African–American, 25 percent Latino, and 20 percent white students would not. It is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is ‘broadly diverse,’” Id. at 724.

102 Id. at 728.
in Perez, the racially ambiguous, mixed-race, or the individual who chooses to identify as racially “other” breaks down the system of classification and distribution. The cases at the turn of the twenty-first century must thus address these “others,” who don’t fit neatly into existing racial paradigms, as all involved seek to maximize their entitlements and benefits under law.


Rice v. Cayetano presents a unique opportunity to probe the Court’s discussion of race beyond the black/white paradigm that usually foregrounds such discussion. Decided in 2000, the case involved a constitutional challenge to a Hawaii statute which sought to limit voting rights for the Office of Hawaiian Affairs according to status as “native Hawaiian” or “Hawaiian.” In the statute, “native Hawaiian” is defined as “as descendants of not less than one-half part of the races inhabiting the Hawaiian Islands prior to 1778.” The record revealed that even this definition of Hawaianness “reflect[ed] a compromise.” In 1920, the legislation’s sponsor supported special benefits for “all who have Hawaiian blood in their

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105 A brief sketch of the case may be of use. (“The Hawaiian Constitution limits the right to vote for nine trustees chosen in a statewide election. The trustees compose the governing authority of a state agency known as the Office of Hawaiian Affairs, or OHA . . . The agency administers programs designed for the benefit of two subclasses of the Hawaiian citizenry. The smaller class comprises those designated as “native Hawaiians,” defined by statute, with certain supplementary language later set out in full, as descendants of not less than one-half part of the races inhabiting the Hawaiian Islands prior to 1778 . . . The second, larger class of persons benefited by OHA programs is ‘Hawaiians,’ defined to be, with refinements contained in the statute we later quote, those persons who are descendants of people inhabiting the Hawaiian Islands in 1778 . . . The right to vote for trustees is limited to ‘Hawaiians,’ the second, larger class of persons, which of course includes the smaller class of ‘native Hawaiians.’ . . . Petitioner Rice, a citizen of Hawaii and thus himself a Hawaiian in a well-accepted sense of the term, does not have the requisite ancestry even for the larger class. He is not, then, a ‘Hawaiian’ in terms of the statute; so he may not vote in the trustee election. The issue presented by this case is whether Rice may be so barred. Rejecting the State's arguments that the classification in question is not racial or that, if it is, it is nevertheless valid for other reasons, we hold Hawaii's denial of petitioner's right to vote to be a clear violation of the Fifteenth Amendment.”) Rice v. Cayetano, 528 U.S. 495 (2000) (internal citations omitted).
106 Id. at 533 n.8.
106 Id. at 499.

107 Id. at 533 n.8.
veins,” and plantation owners thought that only “Hawaiians of pure blood” should qualify for special treatment under the statute.\(^{108}\) The plaintiff claimed this scenario constituted “an explicit, race-based voting qualification.”\(^{109}\) However, the statute does not refer to “race” or Caucasian/White, African American/Black, Hispanic/Latino, Asian/Pacific Islander, or Native American – terms that were in the year 2000 commonly utilized as racial categories. Instead the statute attempts to define what it means to be Hawaiian, a unique ethnic and cultural ancestral group that pre-dated America’s annexation of it into the union. The court rejects this self-definition, overlaying it with its own racial categories, and grouping Hawaiians in with Native Americans to smoothen the analogy.

How do Hawaiians compare to Native Americans? Even if they are analogous in some way, it is not clear who this categorization would benefit. The Court says that even though the Hawaiians were once autonomous, the identification of “Hawaiian” is still racial in nature. The Court then compares Hawaiians with the treatment of tribal distinctions of Native Americans. The Court discusses an oft relied-upon case called *Morton v. Mancari*.\(^{110}\) The Court says that “Mancari . . . presented the somewhat different issue of a preference in hiring and promoting at the federal Bureau of Indian Affairs (BIA), a preference which favored individuals who were ‘one-fourth or more degree Indian blood and ... member[s] of a Federally-recognized tribe.’”\(^{111}\) It is hard to see the Court’s logic here: the Hawaiians at issue too were once autonomous and ruled separately from the U.S. government. They were not “Federally-recognized” because we annexed them and turned Hawaii into a state and appointed new governmental posts. Nonsensically, with regard to Native Americans, the Court held that it was permissible to have

\(^{108}\) Id.
\(^{109}\) Id. at 498.
\(^{111}\) Id. at 519.
this “one-fourth or more degree Indian blood” threshold for preference in Bureau of Indian Affairs hiring and promotion. Although that classification had a “racial” component as much if not more than the Hawaiian statute at issue in Rice, the Court found it important that the preference was “not directed towards a ‘racial’ group consisting of ‘Indians,’ ” but rather “only to members of ‘federally recognized’ tribes.” In this sense, the Court held, “the preference [was] political rather than racial in nature.” The Court, however, does not define what makes a “preference” political rather than racial in nature.

Then the Court alludes to ancestry but does not explain its connection to race. The Court acknowledges that “ancestry” is part of “race” – but does not say what else must be included to make a category “racial.” The Court makes clear that it is the “ancestral inquiry” that is forbidden – for “the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve.” The Court seamlessly jumps from discussing “ancestral inquiry” to labeling that necessarily a “racial classification” – which is prevented in voting by the Fifteenth Amendment. But the Court never defines what an “ancestral inquiry” is. Instead, the Court bases its discussion on the Reconstruction-era amendments’ purpose, and in doing so, distances itself from its current act of racial category creation.

The Court warns against using the law as “the instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions.” This vague oblique reference to past racial discrimination does not ground us in the evils we are seeking to remedy by applying equal

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112 417 U.S. at 553 n.24.
113 Id. at 519-20.
114 Id. at 517.
115 49 Stan. L. Rev. at 1146. “The act of repudiating past practices can exculpate present practices, if we characterize the wrongs of the past narrowly enough to differentiate them from current regulatory forms.”
116 Id.
protection analysis in the same way 150 years after the Civil War, in an island halfway to Japan. By precluding discussion of what race is, and what ancestry might mean for Hawaiians, the Court lays a Reconstruction framework on a very different set of circumstances.

The Court does not define whose “particular ancestry is disclosed by their ethnic characteristics and cultural traditions.” Whose “ancestry” is “disclosed”? What is an “ethnic characteristic”? As with the seating of Hiram Revels, the Court does not connect these ideological dots for us through reasoned lawyerly analysis, as is the norm in its non-race-related opinions. Instead, the Court quickly jumps to a familiar quote from Hirabayashi v. U.S., a canonical constitutional law case about the constitutionality of the curtailment of Japanese American citizens’ rights during internment.\textsuperscript{117} The Court critiqued “[d]etention on account of ancestry.”\textsuperscript{118} It is not easy to see the relevance of Japanese internment on account of ethnic ancestry to the constitutionality of a statute that benefits native Hawaiians. But the Court relies on the leap from ethnicity to race, from island to island, and does little to fill in the rest. The Court never explains how the Hawaii statute at issue, which seeks to preserve cultural autonomy of the Hawaiian islands by distributing additional benefits through ethnic heritage, is to be measured utilizing this paradigm.\textsuperscript{119} The Court cites Hirabayashi, which stands for that internment on account of ancestry is wrong, and leaves it at that.

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\item \textsuperscript{117} The Court cites to Hirabayashi v. United States, 320 U.S. 81, 100 (1943). “Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.”
\item \textsuperscript{118} Id. at 108.
\item \textsuperscript{119} For the Court’s justification in utilizing strict scrutiny for all race-based classifications made by government, even for benefits, see Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), “the Federal Government's practice of giving general contractors on Government projects a financial incentive to hire subcontractors controlled by ‘socially and economically disadvantaged individuals,’ and in particular, the Government's use of race-based presumptions in identifying such individuals, violates the equal protection component of the Fifth Amendment's Due Process Clause.”
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This mode of analysis tracks closely with the analysis employed in affirmative action decisions of the 2000s. The Court is unsure how to determine whether a statute that distributes burdens is the same as a statute that distributes benefits, and it is unsure about how to begin an analysis which would seek to do so.\textsuperscript{120} Instead, the Court determines that “ancestral tracing…creates] a legal category which employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name.”\textsuperscript{121} Thus, these statutes’ qualifications are automatically considered “race-based.”\textsuperscript{122} The Court glosses over the fact that “native Hawaiians” – as it is defined in the statute – consist of people of many “races” – as defined by “legal category.” In the statute, “Hawaiian” was a shorthand for those who lived on the island at the time it lost its cultural autonomy. The Court says these “inhabitants shared common physical characteristics” and “by 1778 they had a common culture.”\textsuperscript{123} Is this what determines a racial group? However, the Hawaiians were distinct from other Polynesian peoples.\textsuperscript{124} Thus, defining what makes a “native Hawaiian,” the legislature was in fact trying to distinguish the Hawaiian people from others of their “race.” The state attempts to explain this distinction between what their statute sought to do, and the overlay of our constitutionalized vision of race. They sought to “treat the early Hawaiians as a distinct people, commanding their own recognition and respect” rather than as part of a polyglot racial group.\textsuperscript{125}

“The State maintains this is not a racial category at all but instead a classification limited to those whose ancestors were in Hawaii at a particular time, regardless of their race . . . The State points to theories of certain scholars concluding that some inhabitants of Hawaii as of 1778 may have migrated from the Marquesas Islands and the Pacific Northwest, as well as from Tahiti . . . Furthermore, the State argues, the restriction in its operation excludes a person whose traceable

\textsuperscript{120} See Leong, supra.
\textsuperscript{121} 528 U.S. at 517.
\textsuperscript{122} Id.
\textsuperscript{123} Id. at 514-15.
\textsuperscript{124} Hawaii Senate Journal, Standing Committee Rep. No. 784, at 1354 (“Modern scholarship also identified such race of people as culturally distinguishable from other Polynesian peoples”).
\textsuperscript{125} 528 U.S. at 514-15.
ancestors were exclusively Polynesian if none of those ancestors resided in Hawaii in 1778; and, on the other hand, the vote would be granted to a person who could trace, say, one sixty-fourth of his or her ancestry to a Hawaiian inhabitant on the pivotal date . . . These factors, it is said, mean the restriction is not a racial classification.”

The Court “reject[s] this line of argument” with no further explanation. We have to read between the lines to see the similar such cases that might come before them with different facts. Once more, the Court looks to its interpretation of Reconstruction-era laws for guidance. The Court explains that, “[i]n the interpretation of the Reconstruction era civil rights laws we have observed that ‘racial discrimination’ is that which singles out ‘identifiable classes of persons ... solely because of their ancestry or ethnic characteristics.” It is telling that the salient example of “racial discrimination” according to the Court occurred over 150 years ago, and they apply their “interpretation of it” from a 1980s opinion to the current scenario. But the Court does not explain why “singling out ‘identifiable classes of persons…. solely because of their ancestry” is necessarily “racial” or wrong. The Court does not trace its logical reasoning for applying the logic of race to a statute solely based on ancestry or ethnicity. Admittedly, ancestry is not race. The Court makes it clear that it understands this leap, when it says “Ancestry can be a proxy for race. It is that proxy here.” Necessarily a proxy means there is a gap between the proxy and that which it is determined to stand for. It is hard to imagine what stands between ancestry and race other than the Court’s own definitions, handed down through precedent.

The Court comes closest to explaining its own logic, or lack of it, in the following passage:

“One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the

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127 528 U.S. at 514.
unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.”128

According to the Court, race “demeans the dignity and worth of a person to be judged by ancestry instead of by his own merit and essential qualities.” This means that race, as the Court understands it, is necessarily separate from one’s “essential qualities.” But it is hard to imagine how “ancestry” is not one of a person’s “essential qualities.” If the Court believes a person has essential qualities at all, it seems hard to disentangle one’s ancestry from what these would be. Any other definition of “essential” stripped of ancestry would necessarily be a person stripped of all ethnic, cultural, and ancestral markers. In essence, this is what we have created ideologically as the “white citizen.” This view of the “white citizen,” emerging from Johnson’s corpse and morphed to fit our changing ideological aspirations, is a neutral, non-ethnic body, characterized and characterizable only “by his own merit.” The Court treats its view that utilizing race in any way “demeans the dignity and worth of a person.” This view reflects a unique positionality: a disembodied voice that often remains unexamined, the voice of a person who does not feel demeaned by race, speaking about others who they conceive of being demeaned by its usage.

Conclusion: Racial Pride, Racial Relevance

The Court discounts the shared sociocultural experience of racism and racial politics to Americans who view race, and ancestry, as a source of strength and resistance. The Court, for example, lacks the voice of an empowered minority. A good example is in the African American community. Scholar Rachel Moran notes that “the sense of solidarity that comes from the shared experience of racism is so great that [a black men] refers to other black men as ‘brothers’.”129 In the eyes of many in the black community, as well as among other racial and ethnic minorities,

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128 Id. at 517.
129 Moran (2001), supra at 182.
including people of mixed-race, “the sense of familiarity and connection associated with
blackness provides a sense of community worth keeping, even if it originated as a response to the
hardships of racial exclusion.” 130 This pride in oneself and one’s ancestry is born out of a racial
discourse that is embarrassing for the Court, and for we as Americans, to face. But this racial
pride is a far cry from the “racial pride” relied upon for the constitutionality of anti-
miscegenation statutes in Naim v. Naim. 131 The statute in Rice sought to maintain the “distinct”
culture of the Hawaiian people, worthy of “recognition and respect.” 132 And the Court “reject[ed]
this line of argument.” It seems the Court simply did not understand how race, the beast birthed
out of slavery and its aftermath, the hallmark of American embarrassment, could serve as a
source of “recognition and respect.” But the Hawaiians were not a race; it is the Court that turned
them into one.

Ironically, the same logic that oppressed the “races” perpetuated by the Court’s logic has
served to strengthen and fortify these communities. In spite of the fact that many racial identities
“originated as a response to the hardship of racial exclusion,” it can be said that “they cultivated
their own distinctive characteristics and culture and developed their own peculiar genius.” 133 In
the shadow of state-sponsored segregation, “ancestry” and community has thrived as a great
source of identity and pride for many Americans. The Court’s assumption that race, in any of its
uses and iterations, necessarily “demeans the dignity and worth of a person” fundamentally
misunderstands and recasts the experiences of non-white racial minorities. The view of race the
Court espouses, much like a colorblind ideology formed in Loving, that race is “irrelevant,”

130 Id.
131 See 197 Va. at 756. “We find there no requirement that the State shall not legislate to prevent the obliteration of
racial pride, but must permit the corruption of blood even though it weaken or destroy the quality of its citizenship.
Both sacred and secular history teach that nations and races have better advanced in human progress when they
cultivated their own distinctive characteristics and culture and developed their own peculiar genius.”
132 528 U.S. at 514-15.
133 Id.
disavows and downplays the very real everyday consequences under which that those who are not privileged by our white/non-white paradigm have shaped their identities. To erase this narrative by paving over 150 years of racially motivated decision-making by all three branches of government is to unmake the identities of the victims of racism.

Rice v. Cayetano lays bare the Court’s inability to investigate race at its core. The Court instead relies on centuries-old notions, and leaves unquestioned its current view of what race really means or should mean going forward. The Court treats race as an inconvenience, rather than a potential source of empowerment, developed through years of oppression and marginalization by a dominant ideology of white supremacy. However, the Hawaiian backdrop is interesting precisely because the history of racial mixing on the islands should in fact undermine any attempt at clear-cut racial analysis. In 2012, it is likely that “[t]he debate over multiracialism indicates that the distinction between race and ethnicity is being challenged…”134 If the 2012 census is any indication, there has been “ongoing uncertainty about whether the government should engage in racial recordkeeping and, if so, how it should be done.”135 This brings us to the present-day.

When Abigail Fisher is bringing her case, we are left with the paradigms about utilizing race in governmental decision-making from Parents Involved, Rice, and Grutter, informed by the backdrop of Loving and the rhetoric of the Reconstruction era. It seems the Court’s usage of race projects fear of its usage, without regard for its potential for positive (assistance in educational admissions) or for negative reasons (anti-miscegenation statutes). The view of race as

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134 Moran (2001), supra at 162.
135 Id. at 170.
“irrelevant” undermines and belies the usage of race for positive reasons embodied by many Americans today.

It is unclear how the changed composition of the Court since Grutter was decided in 2003 will impact its analysis of the use of race. From my analysis, I hope it is evident that at its core, “the Court has left the process of defining race to a system that mixes scientific expertise and bureaucratic management with demographic politics.”\textsuperscript{136} It is crucial to recognize that underlying this analysis is a history of white supremacy and racial oppression, ratified by the Executive and the Legislature after the Civil War, with its fundamental premises largely left unquestioned by the Courts since then. It remains to be seen whether, in light of an increasingly mixed-race American populace, the Court will be forced to tackle “the process of defining race” once and for all.

\textsuperscript{136} Id.