Toward a Legal Genealogy of Color Blindness

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In the 2006 election, the American Civil Rights Coalition, working in conjunction with the American Civil Rights Institute, provided foundational strategic and institutional support for the Michigan Civil Rights Initiative. The polished campaign literature promoting the initiative featured photographs of a happy, integrated crowd of school children, a studious integrated cluster of college students perusing a laptop, and a preschool-aged African American girl and blond white boy sharing an ice cream cone (Appendix 1). The coalition fighting for the initiative received crucial support from the Center for Equal Opportunity, which describes its mission as “the promotion of colorblind equal opportunity and racial harmony” (Center for Equal Opportunity).

The initiative, which passed with 58% of the vote, banned affirmative action in Michigan. The coalition supporting it followed the rhetorical and organizational strategies that had proven successful in California in 1996 and Washington in 1998. The initiation of a campaign against affirmative action based in colorblindness had also prompted Florida Governor Jeb Bush in 1999 to introduce the One Florida plan, which severely limited the state’s capacity to engage in race-conscious remediation in education, contracting, and hiring. The primary advocates for these measures have been political and social conservatives, individuals and groups who reject the idea that attitudinal and institutional racism still require state correction and who generally oppose efforts to ground anti-subordination policies and practices in any state institution. As Thomas Keck and others have shown, the rhetorical trope of colorblindness is now associated strongly with racial conservatism, if not outright racism, due to its widespread use in efforts to render the state impotent in addressing racial discrimination (Keck 2006).

Contemporary colorblind rhetoric harks back to two main sources. The first is Supreme Court Justice John Harlan’s 1896 dissent in *Plessy v. Ferguson*, which marked the public initiation of the phrase itself. Harlan, objecting to the majority’s adoption of the separate but equal standard for reviewing state actions that differentiated between individuals on the basis of race, wrote “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law” (*Plessy v. Ferguson*, 163...
U.S. 537, 559 (1896)(Harlan, J., dissenting)). The second source is Martin Luther King, Jr.’s speech, “I Have A Dream”, delivered at the March on Washington in the summer of 1963. King stated, “I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character” (King 1963).

While the logic of the claims for using colorblindness to oppose racial reform is clear, the use of the words of John Harlan and Martin Luther King, Jr. to ground this standpoint is interesting. Other scholars have considered the context of each source and the political positions of the speakers, and largely have concluded that both Harlan and King would see the contemporary uses of their words as appropriations for agendas that would not fit with their analyses affirming the connection between racial subordination and the state. How, then, did colorblindness become the banner of a particular brand of racial conservatives who use it to promote retrenchment and retreat from what Reva Siegel terms the anti-subordination principle rooted in constitutional doctrine most famously by Brown v. Board of Education (Siegel 2004)?

How appears at first glance to be the crucial question in this inquiry. This paper will argue, however, that when is equally important. The when of colorblindness’ rise as a malleable concept available for appropriation turns out to be significant in situating the ideology as a legal avenue for resistance to egalitarian change, and the association of colorblindness with affirmative action has, I shall argue, made it difficult for contemporary scholars to grasp its full significance as an ideology, an ordering device, and a constitutional principle.

Answering this question can illuminate related questions about the right’s mobilization of a racial agenda to generate cultural and political change in response to the legal dismantling of the white supremacist regimes of the early to mid-twentieth century. Tracing colorblindness back to its early sources and uses grounds two significant insights. First, it enables the development of a dynamic theory of how racial discourse interacts with institutional change by focusing on the legal system as a crucial point of contact between culture and the state. This theory enables a deeper understanding of how racial formation occurs on the state, as opposed to the movement, side of the coin and the case of colorblindness demonstrates how racial formation can begin as a project that is simultaneously cultural and state-based. It also provides a clearer explanation for how racial orders are constructed through the building of discursive associations facilitated through the exploitation of nodes of conflict in the courts.
Second, it shows that, contrary to common beliefs about the rise of colorblind conservatism, the building blocks of these arguments were assembled in the 1960s – they were already available before the first legal controversies emerged over affirmative action, and have been largely invisible (except for Siegal’s work) because they were built in the state courts. The use of colorblindness as a rhetorical and ideological challenge to affirmative action is not the result of growing conservative discomfort with racial progress resulting in backlash (see, e.g., Lowndes 2008). Rather, it reflected a conscious strategy having its genesis largely in legal struggles over desegregation and supremacists’ efforts to generate an ideological standpoint with legal legitimacy from which to resist change.

This paper will proceed first by explaining the approach by situating contemporary colorblindness briefly and arguing that an investigation of early struggles over colorblindness can produce insights into the relationship between the building of racial ideologies and the development of legal norms and principles. In setting up this approach, I draw from Reva Siegel’s work on the shift from anti-subordination principles to colorblindness, but also on Omi and Winant’s work concerning racial formation. The concrete argument reviews early uses of colorblindness in the courts, showing that it began to turn up earlier than most analysts have searched for it. This genealogy lays bare a conflict over colorblindness that, when properly situated in historical context, can explain how this concept became linked with conservatism and generated limiting principles in legal struggles of the late 1960s, several years before the affirmative action battles reached the federal courts. I underline the cultural significance of this struggle with a preliminary analysis of the rhetorical structure of Martin Luther King, Jr.’s “I Have A Dream” speech and its appropriation for the service of colorblindness.

The paper closes with a discussion of how these developments came together to ground a full-blown legal and state-based conception of colorblindness, which could then be mobilized for cultural and political and ultimately more legal change. Tracing the genealogy of colorblindness reinforces Omi and Winant’s analysis of the dynamic process of racial formation, but suggests that the state and social movements are not monolithic entities acting upon and responding to each other. This analysis also underlines the power of discourse as it is mobilized through legal and constitutional avenues to link implicitly to the US’s liberal political culture’s attachment to justice and fairness as abstract principles.
Situating Contemporary Colorblindness

As noted above, the observation that “Our constitution is color-blind” dates back to *Plessy v. Ferguson*. The idea of colorblindness did not originate with Justice Harlan, however. He seems to have taken it from the brief filed on Homer Plessy’s behalf. Plessy’s representative before the high court, novelist and attorney Albion Tourgée, had been an abolitionist before the Civil War and an advocate for African American equality afterward. In his argument against the capacity of police power to encompass segregation legitimately, Tourgee wrote: “Instead of being intended to promote the general comfort and moral well-being, this act is plainly and evidently intended to promote the happiness of one class by asserting its supremacy and inferiority of another class. Justice is pictured blind and her daughter, the Law, ought at least to be color-blind” (Aleinikoff 1992: 970; see also Kull 1992: 119-121). Harlan’s adoption of the phrase situated it in a related context, using it to deny the existence of a “superior, dominant, ruling class of citizens.” Harlan’s explication presented the proposition that “all citizens are equal before the law” and chided the majority for allowing the states “to regulate the enjoyment by citizens of their civil rights solely upon the basis of race” (*Plessy v. Ferguson*, Harlan, dissenting, at 559). While this language could be taken to encompass an insistence that the state ignore race for all purposes, most left commentators have insisted that the reader continue to Harlan’s next words, which correctly predict: “In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott Case*” (Id.). As Aleinikoff notes, the reference to *Dred Scott* underlines Harlan’s point that the Reconstruction Amendments were fundamentally about generating durable institutional change that would guarantee both access to full citizenship rights to African Americans and power to the national government to extend and defend this access (Aleinikoff 1992: 970).

The phrase went relatively unrecognized until, as Siegel notes, the NAACP picked up the concept and included it in their brief before the Court in *Brown v. Board of Education*, along with several other arguments. The Court declined the invitation to rest their ruling on this basis, however, instead going with a context-sensitive analysis of the message sent by segregation, in effect echoing and augmenting Harlan’s analysis in his *Plessy* dissent (Siegel 2004: 1480). Kull and Siegel note scattered uses of colorblind principles to ground various elements of the judicial campaign to dismantle Jim Crow in the 1960s (Kull 1992: 160-81). But the major public debates over the use of colorblindness in the legal community took place next around the US Supreme
Court’s affirmative action jurisprudence beginning with *Bakke* in the late 1970s. By the time of its use in these cases, it had emerged as a doctrinal principle largely used to counter affirmative action plans, and advocates for state-level referenda and initiatives against affirmative action have used it in this way as well. This history, as I discuss below, suggests that the critical transformation of colorblindness to conservative ideology took place in the early 1970s.

Balkin and Siegel argue that Harlan and King both simultaneously incorporated two visions of racial reform in their formulations: an anti-subordination formulation rooted in the state’s responsibility for enforcing the constitutional mandate of equal citizenship and a colorblindness formulation that criticized the state’s efforts to enforce policies based in racial classification (Balkin 2001: 11). The distinction between these two formulations was not evident, however, either in 1896 or in 1963. Rather, both Siegel and Balkin claim that the two formulations co-existed in the early years of the civil rights movement, separating in the late 1960s over continuing struggles over desegregation and ultimately ending up in opposition to each other in the context of issues like affirmative action and consideration of race in drawing voting district lines (Balkin 2001: 11-13; Siegel 2002; Siegel 2004).

Martin Luther King, Jr.’s speech took place before the major controversy over affirmative action had erupted in legal and cultural circles; King was hoping in part to spur Congress to pass the first major round of legislation targeting racial discrimination since Reconstruction. King’s speech, taken in the context of the 1963 March on Washington, presented an image of an integrated and egalitarian community based in common brotherhood and situated itself against separatism and gradualism (Vail 2006: 57). The original plan for the March would have emphasized economic and social issues, but the involvement of the NAACP, the Southern Christian Leadership Conference (under King’s aegis), and the Student Nonviolent Coordinating Committee shifted civil rights to the forefront (Id.). King “primed the pump” for the speech with the widely disseminated *Letter from a Birmingham Jail*, which introduced many of the themes of “I Have A Dream” to a broad, national audience (Vail 59-60). Notably, while much of the language and structure of the *Letter* previewed “I Have A Dream”, the language of content of character did not. When King referred to his children in the *Letter*, it was to describe the pain of explaining segregation to them and seeing them incur psychic injuries of bitterness and resentment toward whites for the practice (King 1963b).
King’s invocation of the dream that his children be judged not by the color of their skin but by the content of their character came in the climactic dream segment of the speech. As David Bobbitt notes, this section of the speech corresponds with redemption, “an elevated plane of meaning in which images of dreams and mountains are used to communicate a transcendent vision of equality, fulfillment of national promise, and secular/spiritual redemption” (Bobbitt 2004: 83-84). The dream sequence presents six individual dreams, one of which includes the character content language. The character content dream comes between two dreams of historical transcendence that refer specifically to the struggle against segregation and state-sponsored mass resistance:

I have a dream that one day even the state of Mississippi, a state sweltering with the heat of injustice, sweltering with the heat of oppression, will be transformed into an oasis of freedom and justice. . . . I have a dream that one day, down in Alabama, with its vicious racists, with its governor having his lips dripping with the words of "interposition" and "nullification" -- one day right there in Alabama little black boys and black girls will be able to join hands with little white boys and white girls as sisters and brothers [King 1963b].

The speech then proceeds to the mountain imagery that closes it.¹ The context and mixed references to public subordination and private violence against African Americans and their allies link in with a thematic of black victimization and undifferentiated white guilt that belies later uses of the speech to support a transcendent vision that forgets this history.

Nonetheless, the speech presents a particular vision of guilt for racial discrimination, purification through the crucible of the civil rights movement, and a final redemption of integrated and egalitarian Christian brotherhood (Bobbitt 2004). This vision, the dream in particular, has become “a cultural ideograph that stands for the vision of an America of racial harmony and justice (Id. at 102). While the transcendent and redemptive imagery at the end of the speech was not time-bound, the structure incorporated a tripartite progression from guilt, through purification, to redemption.² The progression produces a certain irony for some interpreters who accept the frame in its entirety, trapping oppressors and the oppressed in a

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¹ Bobbitt reads this section as “mov[ing] out of historical time and the sociopolitical realm and into mythic time and the supernatural realm (Bobbitt 2004: 83). One should note, however, that when King turns from exhorting freedom to ring from the mountains of the north and west to the south, he specifically mentions Lookout Mountain in Tennessee and Stone Mountain in Georgia, the birthplaces of the first and second Ku Klux Klan respectively.
² Bobbitt reads the speech through a Burkean framework in making this observation, incorporating an assumption of Heidegger’s ontological guilt as applied specifically to white Americans.
choice between a relationship of guilt/victimization and an unmet need for the oppressors to receive absolution on the one hand or an embrace of redemption through the victims’ rejection of the role and granting of absolution (Id. at 110-11). Absolution could be achieved through the active and concrete amelioration of the material and political conditions of oppression, but this amelioration is not the primary goal of the social change sparked by moderate reform. Instead, the focus is, as Derrick Bell and other critical race theorists have suggested, upon assuaging white guilt (Bell 1992).

Another problem with this trap is that it generates resentment among the oppressors when the need for absolution is not met, and the victims are placed between their passive, apolitical roles as victims and their framing as practitioners of ressentiment. The dream sequence became the paradigmatic expression of civil rights, but this paradigm’s incorporation of a victim-oppressor dialectic provided a readily useable framework for analysts ranging from Thomas and Mary Edsall to James Sleeper to attribute the political retreat from liberative visions in the 1960s to backlash against black overreaching (Bobbitt 2004). The identification from most quarters of the dream sequence as the dominant vision, however, suggests that the backlash narrative does not find its roots in reactions to black power demands, but in resistance against the overarching framework of ontological guilt adopted (and aggressively adapted) from King’s analysis. Indeed, Bobbitt emphasizes how the dream speech, both in its form and context as delivered in 1963 in Washington, and in its received and mythologized presence afterward, excluded alternative radical and empowerment-based visions of racial justice (Id. at 111).

The trip from “I Have A Dream” to conservative invocations of colorblindness was not one that King or his allies would willingly have taken. The King who condemned “vicious racists” was also the King who demanded remediation and transformation for the ultimate cause of justice, not only to perform the third act of a redemptive play designed to make whole the American body politic. But the dream’s transcendental and partially timeless nature rendered it accessible as the core for a new broad national consensus legitimizing and taming the black struggle for a historically situated and responsive justice; this process transformed the black struggle for situated justice (what Siegel terms anti-subordination) into a universalized struggle for equality in which all can participate and which is broadly malleable in the absence of

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3 Joseph Lowndes makes this argument in significantly more detail, showing the cultural and political roots of the backlash narrative as a consciously constructed phenomenon in his forthcoming book, *The Southern Origins of Modern Conservatism* (Yale University Press, 2008).
historical and political context. These factors contributed to the identification of the dream segment with the speech itself, the stripping away of the historical and political critique of racism in King’s expression of the dream, and the simultaneous identification of the dream with the civil rights struggle and its rise to prominence as a new racial hegemony (Omi & Winant 1994).

The legal and cultural worlds operated on parallel tracks, but intersected at times. King could be seen as the moderate liberal center of the civil rights movement, soon to ground a growing national consensus around the dismantling of Jim Crow. The NAACP represented the moderate liberal legal center of the movement, promoting equality but still selecting cases carefully to avoid issues that, in these lawyers’ perceptions, might ultimately derail the movement. Just as King rejected black nationalism and black separatism, the NAACP steadfastly refused to litigate the question of antimiscegenation laws in the 1940s and 1950s, and the ACLU provided primary support for the suit resulting in the legitimation of interracial marriage in Loving v. Virginia (Wallerstein 2003). Likewise, the NAACP held off on litigating against overt racism among labor unions until fairly late in the game, working persistently to mediate and resolve conflicts over race through engagement with union leaders (Frymer forthcoming). It is thus perhaps not coincidental that the NAACP Legal Defense Fund’s principal brief in Anderson v. Martin, filed two days before the March to argue for the invalidation of a Louisiana statute requiring the public racial identification of candidates for office, relied extensively upon the principle of colorblindness and invoked Harlan’s language (Kull 1992: 166).

Given these starting points, we can see how it might be useful to explain the transformation of Harlan’s and King’s words from criticisms of the concrete racial subordination embedded in law and culture in the 1890s and 1960s to an endorsement of a thinly neutral conception of equality that repulses efforts toward racial remediation. This explanation can simultaneously situate the rise of colorblindness as a rhetorical and political strategy for the right through its mobilization in the courts in the 1960s.

Making Racial Change: Theory and Method

Scholars in multiple disciplines have sought to understand how state actors and state institutions become invested in particular understandings of race and the state’s obligation to manage it. A full discussion of this topic is beyond the scope of this paper, but within political
science, this project is pursued primarily through the approach of American political development. This emerging literature sees race as a constructed phenomenon and addresses how race functions as an ideology, but emphasizes how the construction of race and the implementation of racial ideologies happen over time through the actions of state institutions and those working within them. The analysis often also incorporates the role of social movements as catalysts in this process.

Outside of political science, Michael Omi and Howard Winant’s work on racial formation provides a useful starting point for the inquiry. They present a general model of racial formation, but focus on the transition between the civil rights movement and the rise of racially based conservatism, showing how movement politics contributed to cultural transformations that ultimately resulted in the state’s reworking and endorsement of new racial hegemonies. The theory of racial formation lays out the cycling process of movement mobilization, engagement with the state, and institutionalization. Movements, in their theory, generate new ideological conceptions of race that challenge the dominant racial hegemony embedded in culture and expressed through state institutions. Through engagement with the rest of society and the state, movements generate pressures on the existing hegemonic structure, which may bend to allow access or ultimately transformation. When the state responds by adopting pieces of the movement’s ideology, the hegemonic conception of race is transformed, and the movement’s ideological interventions are woven into new practices and expressions that form the grounding for a new and temporarily stable racial hegemony (Omi & Winant 1994).

Omi and Winant explain the rise of conservative retrenchment on race through this model. In their view, the state adopted a normative position in favor of equality through the pressure of the civil rights movement; this position contributed to the elimination of formal de jure racial discrimination in state practices and policies. The consensus solution closed down both overt appeals to racism and for the reintroduction of segregation as well as the black power movement as a legitimate alternative to mainstream civil rights. This victory of a liberal agenda on race created an incentive for the articulation of a new racial project, arising from the right, to challenge the cultural and state-based consensus won through movement politics in the civil rights era. The result of this new racial project, again achieved through movement politics, was colorblind conservatism. In Omi and Winant’s terms, colorblind conservatism has not yet fully transformed the state, but it has become a significant limiting factor on the scope of egalitarian
racial reform as well as grounding arguments for state retrenchment that sometimes succeed (Omi and Winant 1994).

These insights speak to the political science literature on race and political development by complicating and refining King and Smith’s racial orders thesis. King and Smith, in their 2005 article “Racial Orders in American Politics,” argue that political struggles over race can be mapped through recognition of two competing racial orders, generally one seeking movement toward a substantively egalitarian ideal and the other supporting racial ascription in some form. These orders, they elaborate, then structure major swaths of political controversy, even when the controversies do not directly involve race. The article traces the competition between these orders through American history, noting the moments of transformative change when the orders themselves are in flux (King and Smith 2005). Their theory attributes change in the orders to the shifting nature of coalitions around race and the configurations of particular groups of institutional stakeholders around the competing orders (Id.).

In the contemporary era, they identify the competing orders as a racially transformative egalitarian order and an antitransformative order. The transformative order seeks change to address the material inequalities based in race, and mobilizes state actors and institutions to promote this change. The antitransformative order opposes explicit efforts to reduce racial inequality and resists the use of state-based resources to promote equalization (Id. at 9). The antitransformative order, King and Smith explain, incorporates the civil rights consensus even while resisting further equalization through the vehicle of colorblindness: “Rhetorical allegiance to egalitarian ideals has become de rigueur—even though that often means reinterpreting civil rights slogans such as ‘color-blindness’ and ‘equality of opportunity’ to justify resistance to changes in unequal racial statuses” (Id.). This stance leads King and Smith to identify the antitransformative order with colorblindness and to identify it affirmatively as character consciousness (King and Smith, Hard Cases).

Despite my criticisms, one benefit of both of these theories is that they understand colorblindness and other racial ideologies as ideologies subject to processes of construction and change. This distinguishes them from theories arising primarily from legal scholars who argue over the significance and meaning of colorblindness as detached from its articulation as a historical phenomenon. Andrew Kull’s controversial book The Color-Blind Constitution argues for the endorsement of colorblindness as the core principle of the equal protection clause’s
jurisprudence on race and describes what he sees as a continuous history of the principle’s use for achieving racial justice. Colorblindness in his analysis, however, is a fixed and universal practice that averts the dangers of judicial activism or alternatively, inappropriate judicial acquiescence to legislative recognitions of race (Kull 1992). This analysis necessarily relies upon a static, universal, and ahistorical conception of race in back of the color to which the law should supposedly be blind. This conception of race ignores the historical relationship between race and the state as a dynamic co-constructive process, illustrated by multiple studies of different American historical periods.

How, though, does the process of racial formation work in dialogue with the state, and how do racial orders transform? King and Smith’s theory does not provide a means of understanding how change occurs other than noting that racial coalitions can be destabilized through members’ defections to the opposing order. Further, the duality of the orders, while useful in understanding partisan competition, allow little room for understanding the influence of broader cultural phenomena (for instance, black power) that do not map readily into the binary (see, e.g., Singh 2004). While Omi and Winant do have a theory to explain racial transformation, their account does not adequately interrogate the role of the state, which appears as a passive and undifferentiated target for movements. While the state is in dialogue with movements in their theory, it is largely reactive to social movements, and the interpenetration of movements and the state goes unrecognized.

One way of considering how cultural struggles over race translate into political agendas and change is to consider the law as a site for discursive interchange and development. This approach is particularly apt for understanding some elements of racial transformation in the post-
Brown era, as Brown has come to serve as an aspirational icon of the constitutional principle of racial egalitarianism. As Siegel notes, Brown itself can most readily be read as rooting the constitutional principle of anti-subordination as the core of the equal protection clause (Siegel 2004). Like “I Have A Dream”, however, Brown has been subject to interpretations moving it away from this core. Because of the impact of Brown both legally and culturally – its instant emergence as a challenge to the edifice of Jim Crow and its provocation of legal, social, and extra-legal strategies of mass resistance – race relations became simultaneously a cultural and legal battle in the post-Brown years.
Tracing the development of racial ideology through reviewing published opinions in court cases helps to show how the movement actors contending primarily over the scope and nature of state action sought to advance racial projects. This approach also reveals how and when particular discursive strategies began to break through into state discourse. Lawyers actively sought to link racial projects expressed in carefully chosen language to constitutional principle, and the courts that adjudicated these legal questions advanced, rejected, or transformed these racial projects through their opinions. Judicial opinions then formed the basis for further legal argumentative – and at times ultimately ideological – efforts toward the advancement of racial projects. Considering this process closely can illuminate how racial transformation took place at the specific discursive interface of culture and the state provided by constitutional law.

The Emergence of Colorblindness as a Legal Strategy

Colorblindness did not emerge as a legal strategy or broadly employed trope after its debut in *Plessy v. Ferguson*. Rather, the phrase lay dormant in constitutional law for several years, in significant part because agendas of egalitarian transformation were placed in retreat with the announcement of *Plessy* and the wave of state-level institutionalization of structural forms of racial ascription. While the courts largely hewed to the principle that the law had to pay lip service to equality, on both the state and federal level, abstracted, decontextualized, and thin versions of equality were sufficient to pass constitutional muster. Only the most egregious of overt racial discrimination provoked direct action on the part of the courts, though the contours of the Jim Crow legal order were carefully delineated through processes of legal struggle (see, e.g., Pascoe 1996; Novkov 2008). The NAACP’s litigation strategy, developed and employed from the 1930s through the early 1950s, mounted a multilayered attack on *Plessy*’s minimalist vision of equality challenging to the constitutional framework for racial equality built in the late nineteenth century. This attack emphasized both the need for a more robust analytic vision based in equality that considered the state’s complicity in sustaining racial discrimination and the need to consider the substantive, concrete, and vast inequalities existing under these practices in the states. Their strategy culminated in direct challenges to *Plessy* in *Sweatt v. Painter* and *Brown*, finally achieving the desired abandonment of separate but equal in *Brown* on substantive and analytic grounds.
When Brown was announced, the outcome was less controversial among legal scholars than the reasoning, particularly its reliance on social science evidence. The controversy of the 1950s, however, as Siegel notes, underlined Brown’s roots in anti-subordination principles and did not address the question of racial classification. Herbert Wechsler’s famous critique of Brown’s reasoning noted its failure to articulate a neutral basis for invalidating segregation, and southern resistance to Brown challenged the Brown Court’s claim of real harm (Siegel 2004: 1476). Siegel shows that resistant Southern activists and judges, faced with Brown’s analysis of the factual psychological harms of segregation, generated legal responses based in claims of psychological harm arising from forced integration. Wechsler’s claim that neutral principles could not ground the outcome in Brown, taken in the context of Southern legal argumentation against desegregation, generated a range of responses from legal scholars seeking to revise the reasoning and place it upon less controversial – and manipulable – constitutional ground.

Siegel argues that this dynamic produced the rise of anti-racial classification justifications in the 1960s among academics supporting the assault on segregation. She identifies Owen Fiss’s pathbreaking article in the Harvard Law Review in 1965 and respected federal court judge John Minor Wisdom’s 1966 opinion upholding the Department of Health, Education, and Welfare’s efforts to enforce the Civil Rights Act of 1964 as significant public turning points. She notes the incentives for this shift among liberals, explaining that “a constitutional regime that treated racial classification as presumptively irrational would legitimate Brown by deflecting attention away from social struggle over the kinds of injury to which equal protection doctrine ought to be responsive” (Siegel 2004: 1499). This mode of reasoning began to take hold as a cooler means of justifying the invalidation of Jim Crow policies than the “hot” allegations concerning to the status harms of segregation (Id. at 1502-03). Siegel notes that when the Court finally confronted the explosive question of laws barring interracial sexual intimacy (first in McLaughlin v. Florida in 1964 and then in Loving v. Virginia in 1967), the Justices avoided conducting an analysis based in the status or dignitary harms communicated by these statutes in favor of invoking a rule against racial classification (Id. at 1503-04).

Siegel argues that the arguments against anti-classification worked well in attacking de jure segregation in the south and, as these arguments began to be expressed in terms of colorblindness, supported an agenda of racial equalization through federal court decision-making. She notes that anti-classification was used primarily as a tool to dismantle state-based
efforts to support racial hierarchies placing people of color at the bottom, while the federal courts consistently allowed state and local governments to act against segregation, even if these actions required the incidental or direct recognition of race. She summarizes the developments of the 1960s as generating a liberal – and in King and Smith’s terms, racially egalitarian – form of colorblindness as a substitute for the Supreme Court’s jurisprudence of the 1950s based in the psychic and status harms of segregation:

During the first decade after the Court declared in *McLaughlin* that the Equal Protection Clause enjoined state action that classified on the basis of race, judges generally understood the presumption against racial classification as a race-asymmetric constraint: courts wielded the principle to protect blacks against status-enforcing harm but did not employ it to constrain race-based state action designed to alleviate segregation, even when whites objected that such race-based policies inflicted harm [Id. at 1518].

This practice enabled federal and state courts to uphold race-conscious plans designed to address de facto racial discrimination in public school pupil placements outside of the south. Federal courts in New York, New Jersey, and Oklahoma and a state court in Illinois all upheld race-conscious plans against objections based in anti-classification claims by white parents in the mid and late 1960s (Id. at note 162 and 168). By 1965, noted federal judge Skelly Wright, a leading architect of desegregation, had written a law review article objecting strenuously to white plaintiffs’ citation of Harlan’s dissent and efforts to connect it to *Brown* to generate an anti-classification principle for use against desegregation plans (Id. at note 170).

These arguments, however, could ultimately be detached from the desegregation context and moved elsewhere, and Siegel claims that they began to gain traction in the social and political context of Nixon’s election as president in 1968. The space was opened in part, she argues, because Nixon ran against the Warren Court on issues of race initially by appealing to northern whites on the issues of desegregation and a coded racial language of law and order. While in his first term Nixon provided equivocal support for some desegregation measures, by 1972 he campaigned “on opposition to welfare, busing, quotas, and affirmative action – even against programs begun in his own administration” (Id. at 1523). His appointments to the federal courts reflected these sentiments, and created additional space for change in Siegel’s analysis (Id.). Siegel thus sees the late 1960s as the initiation of an institutional change through the courts and claims that the pressures on the courts to adopt conservative colorblindness were not effective until the cultural and political context had shifted: “Courts did not begin to articulate
this understanding as constitutional law until desegregation policies began to take new forms, and hostility to the desegregation initiatives of the Warren Court found expression in the election of Richard Nixon” (Id. at 1521).

Siegel’s analysis fits well into Omi and Winant’s frame in many regards. She notes the emergence of the racial project of the civil rights movement, focusing on the efforts to achieve desegregation on the part of legal strategists for the movement. She argues that the early years following Brown, these strategists promoted a racial project of reform based in anti-subordination rhetoric, linking this to constitutional principle. As the state began to acknowledge and assimilate the reformist language, elite members of the legal community both within and outside of state institutions articulated fallback justifications. By the mid to late 1960s, these justifications had been fully assimilated by the state through the legal system, as judges regularly invoked anti-classification language to invalidate stigmatizing racial regulations and practices while rejecting this language as a basis for denying race consciousness as an ameliorative technique. The principle of anti-classification as a norm for state behavior formed the ground for the civil rights racial hegemony in the center of American culture and politics in the late 1960s and early 1970s.

As such, in Omi and Winant’s terms, this hegemony posed a target, this time for a right wing racial project. Siegel’s research suggests that opponents of the civil rights consensus recognized by the mid 1960s that they would not be able to return to the previous racially conscious and overtly ascriptive regime and made a considered choice to build out from the new consensus. Appropriating the language of anti-classification and linking it to colorblindness in their legal arguments, these advocates pushed back against race-conscious remedies for discrimination by invoking neutral constitutional principle. But as Omi and Winant suggest, in Siegel’s analysis these legal arguments could not gain significant traction and begin to influence the state until the cultural conditions were hospitable to entertain the possibility of shifts at the broad level of hegemonic consensus.

In considering litigation in the federal courts, this analysis largely resonates. The explicit use of colorblindness as a legal principle supporting desegregation emerged in the early 1960s, with the Fifth Circuit Court of Appeals first raising it in a Texas desegregation case decided in 1960. Boson v. Rippey invalidated a plan devised to avert desegregation in the Dallas public schools by “grouping . . . the schools into white, Negro, and mixed schools, and . . . canvassing
parents and pupils in order to learn ‘who does and who does not want integration, and thereby
giver all concerned what they prefer’” (Boson v. Rippey, 285 F.2d 43, 45 (5th Cir. 1960)). The
court’s opinion rejected alternative frameworks for its ruling in favor of colorblindness: “Negro children have no constitutional right to the attendance of white children with them in the public schools. Their constitutional right . . . is the right to . . . be treated simply as individuals without regard to race or color” (Id.). The first time the US Supreme Court used the phrase after 1896 was in the winter of 1961 in Garner v. Louisiana, a case involving appeals by defendants convicted of violating a vague statute prohibiting individuals from disturbing the public peace. The defendants in the case had conducted a sit-in at an all-white lunch counter, and Justice Frankfurter quoted Harlan’s language approvingly in his concurrence (Garner v. Louisiana, 368 U.S. 157, 263 (1961)).

The Fifth Circuit followed the Supreme Court into the realm of criminal justice as well in a case involving the appeal of a black man sentenced to death for raping a white woman in Louisiana. The case came out of Jefferson Davis Parish, which was about 25% black and 75% white; the Jury Commission had ensured that blacks were included in each grand jury. The grand jury for Collins’ case had apparently been subject to particularly careful selection methods, as six blacks were purposely included in the pool of twenty from which the grand jury of twelve – which only heard Collins’ case – was selected. The Fifth Circuit condemned this process on colorblind grounds, explaining “A Negro is entitled to the equal protection of the laws, no less and no more. He stands equal before the law, and is viewed by the law as a person, not a Negro. . . . An accused cannot demand a mixed grand jury, some of which shall be of his same race” (Collins v. Walker, 329 F.2d 100, 105 (5th Cir. 1964)). When the case was reargued due to allegations of factual errors in the Circuit Court’s ruling, the majority reached the same outcome. Nonetheless, a concurrence and a dissent distinguished analytically between the permissibility of excluding jurors on the basis of race and making an effort to include minorities in jury pools, implicitly criticizing a blanket rule of colorblindness (Collins v. Walker, 335 F.2d 417 (5th Cir. 1964)). These early left critiques of colorblindness did not prevail against the framing device, however, as the Fifth Circuit again relied on colorblindness – specifically citing Judge Rives’ endorsement of the principle in his majority opinion in Collins – to push forward a suit.

4 The Circuit Court’s opinion gives few details about the full background of the case and process of jury selection; however, the opinion states that the blacks put on the grand jury were known to the parish officials and implied that they were selected for that reason.
challenging longstanding Georgia practices of discrimination against blacks in jury service 
(Pullum v. Greene, 396 F.2d 251 (1968)).

The phrase made scattered appearances in the federal district courts as well. The Southern District of New York endorsed colorblindness as constitutional principle in a case challenging the racialized drawing of congressional district lines in New York City. The plaintiffs alleged that three districts had been drawn to “pack” non-white citizens and citizens of Puerto Rican ancestry, while a fourth district had been drawn to overrepresent whites.6 The district court, in dismissing the suit, claimed that creating districts that took racial proportions into account “would indeed be to indulge in practices verging upon the unconstitutional” (Wright v. Rockefeller, 211 F.Supp 460, 467 (S.D.N.Y 1962)). In concurrence, District Judge Feinberg rejected the claim that “under the Constitution there can be ‘good’ segregation along racial lines as against ‘bad’ segregation” and specifically invoking colorblindness as the appropriate principle for redistricting (Id. at 468, Feinberg, J., concurring).

The other cases addressing colorblindness all involved desegregation, and as Siegel notes, mostly involved judges who were confronting arguments from whites that state-initiated desegregation measures constituted unconstitutional recognizance of color. In early 1961, the district court for the Southern District of New York supported a desegregation suit in Taylor v. Board of Education (191 F.Supp. 181 (SDNY 1961)). The New Rochelle school board argued if permissive zoning privileges were to be mandated for blacks, the law would also require extension of the same privileges to other ethnic and racial minorities, and that this would place too great a burden on the district. The court quickly brushed aside this concern, explaining that “the Constitution is not this color-blind. The Brown decision dealt only with Negroes” (Id. at 196). The NAACP’s struggles to desegregate the Oklahoma City School District bore fruit as the district court approved a rezoning plan. The court noted, “Clearly, defendants may consider race in disestablishing their segregated schools . . . Brown . . . did not convert Justice Harlan’s metaphor into constitutional dogma barring affirmative action to accomplish the purposes of the Fourteenth Amendment. Thus, racial classifications which effect invidious discrimination are

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5 The Middle District of Alabama likewise quoted Rives’ language in invalidating the jury selection processes in Macon County, Alabama (Mitchell v. Johnson, 250 F.Supp. 117 (M.D. Ala. 1966)).
6 The case was complicated by the intervention of Democratic Party elites, including Congressman Adam Clayton Powell, who claimed that the real injury was partisan rather than racial, as the Republican-controlled New York Legislature had drawn district lines to dilute Democratic voting strength (Wright v. Rockefeller, 211 F.Supp. 460, 460 (S.D.N.Y. 1962)).
forbidden but may be upheld if deemed necessary to accomplish an overriding governmental purpose” (Dowell v. School Board of Oklahoma City, 244 F.Supp. 971, 980 (1965)). A New York court admonished white plaintiffs challenging desegregation in Buffalo, characterizing their argument as a “so-called ‘colorblind’ standard” and noting that “the Fourteenth Amendment, while prohibiting any form of invidious discrimination, does not bar cognizance of race in a proper effort to eliminate racial imbalance in a school system” (Offermann v. Nitowski, 248 F. Supp. 129, 129 (W.D.N.Y. 1965)).

One case, however, provided a harbinger of arguments we associate more readily with the late 1970s. In adjudicating a Virginia case allowing a freedom of choice plan7 to stand, Judge Michie quoted the language of Dowell approvingly in insisting nonetheless that the plan had to promote the integration of the teaching staff. This portion of his opinion highlighted the significance of history, explaining that consideration of racial factors in assigning teaching staff was appropriate in the context of Augusta’s past discriminatory practices. He approved this plan as a specific measure to address previous faculty segregation and emphasized that his order “envisions no . . . permanent race consciousness” (Kier v. County School Board of Augusta County, 249 F. Supp. 239, 247 (W.D. Va. 1966)). The insistence of using race consciousness only to address previous discrimination and to ameliorate the specific wrongs caused by this discrimination, alongside the implication that race consciousness itself was a dangerous tool foreshadowed the rise of debate over affirmative action. It is probably not accidental that this ruling also dealt a partial loss to the foes of segregation through Michie’s approval of the conservative freedom-of-choice plan in lieu of mandatory desegregation. His analysis of the specific history of racially discriminatory practices did not extend into a fuller analysis of Virginia’s troubled history and thus did not justify addressing this general history through specific measures that privileged group remediation over individual liberal associative choice.

Despite this case, federal court judges generally used colorblindness was used fairly lightly, and usually as a simple quotation of the Harlan principle in support of some action taken to dismantle segregation, bolstering the commonly accepted view that color blindness in the 1960s was primarily an anti-racist principle. Its presence in the discourse is striking, though, and

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7 Such plans, often advanced by opponents of desegregation, allowed some latitude for parents to select the schools their children were to attend. While plans that were clearly designed to evade the mandate of Brown were universally invalidated, plans with more modest scopes in districts with smaller proportions of black students sometimes made it through constitutional review.
courts were clearly willing to use it as a constitutional framework for the invalidation of state policies and practices.

The picture on the state court level is somewhat more complex, and suggests that conservative appropriations of colorblindness by state actors began well before the first lawsuits were filed challenging affirmative action plans. As on the federal level, colorblindness as a concept useful in addressing race made its appearance in the early 1960s, first appearing in North Carolina in early 1961. However, the concept was not initially used to invalidate or question the state-sponsored implementation of racially discriminatory policies. Seven defendants, five black students from North Carolina College for Negroes and two white students from Duke, challenged their convictions for trespass at a Durham luncheonette. The court rejected their claims, resting its ruling upon the principle that a private operator of a private restaurant “has the right to select the clientele he will serve, and to make such selection based on color, race, or White people in company with Negroes” (*State v. Avent*, 253 N.C. 580, 586 (NC 1961)). The only place that the court looked for discrimination was in the trespass statutes themselves, and concluded specifically that both statutes under which the defendants had been charged were “color blind.” The main statute’s purpose “is to protect people from trespassers on their blinds,” and the form of inquiry only addressed possession, intentional entry, and denial of permission to enter by the person in possession (Id. at 589). The high court of South Carolina cited this language approvingly in reaching a similar decision to uphold convictions of several black high school students who refused to leave a segregated lunch counter (*City of Charleston v. Mitchell*, 239 S.C. 376, 387 (S.C. 1961)).

The high court of Michigan cited Harlan’s *Plessy* dissent more equivocally in a case that overturned an administrative regulation seeking to eradicate racial discrimination from the real estate business. The court agreed that Harlan’s view was an appropriate statement of “constitutional faith,” but denied that this ideal had been reached even as it was using the state action doctrine to invalidate a regulation seeking to move toward the ideal (*McKibbin v. Corporation & Securities Comm.*, 369 Mich. 69, 90 (Mich. 1962)). In this sense, color blindness appeared as a liberal ideal rather than a principle, but did not provide sufficient authority for the court in question to find a state action appropriate for redress.

The first appearance of colorblindness in a state court ruling against racial discrimination affecting a person of color was in Delaware in 1963, where the high court considered a black
man’s challenge to the Delaware Alcoholic Beverage Control Commission’s denial of a license to him. Moving quickly away from a strict focus on the central issue in the case, the court provided a wide-ranging analysis of the history, politics, and practices of racial discrimination in the region, as well as a broad look at the racial and geographic elements of the market for alcohol. Citing sources ranging from US Supreme Court cases on discrimination to Ruth Benedict, the court demolished the Delaware ABC Commission’s claim that they had not known the plaintiff’s race when they had denied his license and that the neutrality of the stated policy was sufficient to save it. Color blindness appeared near the end of the opinion as an aspiration rather than a rule of law or principle, in a quotation from Lyndon Johnson: “Until justice is blind to color, until education is unaware of race, until opportunity is unconcerned with the color of men’s skins, emancipation will be a proclamation but not a fact” (Mitchell v. Delaware ABC Comm., 193 A.2d 294, 371 (Del. 1963)). The opinion, in its close analysis of the historical relationship between racist attitudes and state practices, had interesting parallels to California’s high court ruling in Perez v. Sharp invalidating California’s antimiscegenation law.

As Siegel notes, liberal uses of color blindness to dismantle racism prevailed on the state level in the 1960s predominantly in cases involving school desegregation. New Jersey, Illinois, Michigan, and New York all endorsed color blindness in desegregation lawsuits that upheld plans for closing segregated schools or otherwise tackling the problem of segregation. In New Jersey, the high court rejected a claim that the school board had taken inappropriate notice of race by citing color blindness as an ideal but relying factually on the long history of inimical race consciousness in state policies and practices (Morean v. Board of Education, 200 A.2d 97, 99 (N.J. 1964)). In Michigan, the high court pointed out that color blindness need not prevent the recognition of the significance of race in historical state practice, especially the organization of the public schools (Jipping v. Lansing Board of Education, 166 N.W.2d 472, 474 (Mich. 1968)).

However, even in the realm of desegregation, color blindness was not solely a liberal and anti-racist concept, even in the 1960s. A dissent in a 1964 New York Court of Appeals case presented a full-blown endorsement of color blindness in arguing that a desegregation plan should have been rejected. Dissenting Justice Van Voorhis argued that the school board had clearly used race as the dominant factor in redrawing school district boundary lines and attacked this practice as violating the principle of equality. He identified the bedrock of anti-discrimination as “that each person shall be treaded without regard to race, religion or national
origin” and argued that if school children . . . can be admitted because they are Negroes, they can also be admitted because they are Aryans” (Balaban v. Rubin, 199 N.E.2d 375, 378 (NY 1964)). This understanding of color blindness also grounded a ruling by a New York trial court invalidating the busing of black pupils to white schools, labeling the program a form of “preferential treatment” and condemning it as “a departure from the ideal which judges individuals by their own merits rather than by affiliations” (Strippoli v. Bickal, 248 N.Y.S.2d 588, 603-04 (SC NY 1964)). Likewise, another dissenting Justice on the New York Court of Appeals in a different school desegregation suit commented the next year that “In striving for the desired color-blind society, we should avoid creating an increasingly color-conscious one” (Van Blerkom v. Donovan, 207 N.E.2d 503, 506 (NY 1965)).

Another dissent criticized an Illinois ruling upholding a state statute mandating regular review and redrawing of school district boundaries to promote integration in language reminiscent of 1990s critiques of affirmative action. Justice House announced that the act told school authorities, “for the first time in the history of this State . . . to make decisions based upon race and nationality” (Tometz v. Board of Education, 237 N.E.2d 498, 506 (Ill. 1968)). Going on to quote from Brown and Bolling v. Sharp, the dissent defined racial discrimination as “the act of making distinctions based on race” and identified the principle of anti-discrimination at the heart of Brown as a neutral principle (Id.). The dissent even went so far as to suggest that targeting policies based on class rather than race would be a more acceptable constitutional basis for ameliorating inequality, citing Paul Freund’s 1964 analysis of the limits of civil rights law (Id. at 507).

The phrase also appears in two more southern state cases before the 1970s, and in both cases, the courts involved rejected challenges to racist practices. The location of color blindness in these cases, however, was quite different. Georgia took a position that fit more comfortably in the standard story that color blindness was an anti-racist principle in the 1960s by rejecting a black defendant’s challenge of his conviction on the ground that blacks had been excluded from his jury. The court cautioned that a strong invocation of color blindness would strip away discretion in jury selection. The interests of justice, implied the court, rested upon a process that would secure higher quality jurors than “random selection” (Brookins v. State, 144 S.E.2d 83, 89 (Ga. 1965)). While the court in this case did not issue an anti-racist ruling, it did view color blindness as a commitment to (inappropriate) racial equalization.
In Alabama, however, an appellate court considered whether the arrest and conviction of six black defendants for trespass at a Talladega soda fountain constituted sufficient state action to trigger an equal protection claim. The facts and posture of the case look significantly like *State v. Avent*, the 1961 case in which the North Carolina high court upheld the convictions of seven participants in a Durham lunch counter sit-in. The court asserted that in this case, the state was not disingenuously claiming to be color blind because it had not in fact drawn a color line in passing the criminal statute under which the defendants were prosecuted (*Banks v. State*, 170 So.2d 417, 421 (Ala. App. 1964)). Since the sheriff and criminal court had simply been enforcing the law, reasoned the appellate court, the racial motives of the complaining drugstore owner could be read out of the narrative. This case thus mobilized colorblindness to support a racist outcome.

Ultimately, these cases show that the process of appropriating colorblindness as support for racialized subordination began almost as soon as the phrase began to show up in court opinions again in the 1960s. This process, involving direct engagement between private opponents of desegregation and supporters of Jim Crow on the one hand and judges seeking to slow or reverse the pace of racial change on the other, took place quietly alongside what Siegel identifies as the articulation of colorblindness as a potential alternative justification for outcomes supporting racial liberalization. The existence of this quiet engagement beginning in the early 1960s undercuts any reading of color blindness as a neutral principle that worked for people of color in the 1960s when the agenda was to dismantle state-supported discrimination but against people of color in the 1990s when the agenda was to give people of color special assistance from the states. It also undercuts the idea that conservatives began to appropriate the language of abstract liberal equality in the 1970s as part of a broad backlash against the advances of the 1950s and 1960s on racial issues and poverty. Even before major struggles on busing became nationally salient through the Supreme Court’s ruling in *Swann* in 1971 and the violent struggles in Boston in 1974, the argument that color blindness should be embraced to block legislation or court orders mandating racial remediation was present and available not just among private white opponents to desegregation and state defenders of southern laws, but in judicial discourse itself. The tools of colorblind conservatism and the grounding conditions for generating cultural resonance around King’s speech as an articulation of racially regressive values were already fully assembled and ready when the broad cultural struggles over affirmative action broke out.
The Significance of Colorblindness’ Genealogy: Genealogy as Generative

Tracing the uses of colorblindness and finding the roots of its conservative appropriation in the early 1960s refines our understanding of how colorblindness could emerge so quickly and dominantly as an ideological tool in the late twentieth and early twenty-first centuries in struggles against affirmative action and other race conscious practices designed to ameliorate the consequences of the national government’s and individual states’ long investment in reflecting and institutionalizing racism. By the late 1960s, while conservative colorblindness was not yet dominant, significant groundwork was in place, and its ideological coherence had been cemented through a series of fairly invisible court cases. The arguments for using colorblindness were coming both from private individuals challenging anti-racist changes in state practices as well as state officials seeking to sustain racially subordinating practices, and they were being reinforced by the judges who adopted them, thus encouraging their continued use in future cases.

These endorsements by judicial officials discussed above were significant even if not widespread. Judges’ straightforward uses of colorblindness to push back against racial reform provided encouragement to those sharing this agenda that this tactic could work effectively by assimilating the new constitutional language of substantive racial equality and turning it to promote reinforcement of the status quo by denying the legitimacy of state ameliorative action. The more ambiguous uses were helpful too, as some judges endorsed a colorblind society as an ideal. Even if they went on to rule that this ideal had not yet been reached, the linkage of colorblind discourse with a vision of American idealism generated normative principles cabining state action by questioning its legitimacy and requiring justification for state recognition of race. This analytic move rendered history invisible and outside the realm of judicial access, unless it was a specific and individually based history like that recited by Judge Michie in his ruling upholding freedom of choice in the suit seeking to desegregate Augusta County, Virginia’s schools. Still other judges who endorsed colorblindness recognized its risks and sought to establish limits to the scope of the principle or to establish criteria through which it would operate as a general rule subject to exceptions.

Genealogical analysis also underlines the significance of discourse and its mobilization through the interaction of activists and state actors capable of institutionalizing it. Colorblindness was neither inherently liberal nor conservative, but could be mobilized to serve
either agenda. But a liberal/conservative distinction misses its ambiguity and complexity in the
critical period following its reintroduction when its meaning and political impact were contested.

Ultimately, the conservative appropriation of colorblindness won out over efforts by
those who attempted to use it to facilitate the dismantling of ascriptive racial hierarchies.
Purveyors of the conservative version of colorblindness that triumphed legally and culturally
linked it to liberal political cultural values of justice and fairness as abstract principles.8 This
linkage undoubtedly facilitated both the triumph of this particular understanding of
colorblindness over alternative conceptions of it and enabled conservatives to articulate it as a
legitimate interpretation of common American values.

The capacity of conservatives to link their vision of colorblindness both to the cultural
iconography of Martin Luther King, Jr.’s “I Have A Dream” as well as to the constitution likely
helped their cause. While the direct citations of King for conservative colorblindness came later,
they nonetheless highlighted the efforts that conservatives were making to generate ideological
challenge from within the fragile civil rights consensus that could ultimately dismantle that
consensus.

The embrace of colorblindness as a policy of retrenchment by some judges created a legal
script that facilitated the later appropriation of King’s rhetoric. Colorblindness enabled the
bridging of the psycho-social tension leading to redemption for conservatives while
simultaneously serving the New Right’s substantive racial agenda. By linking the legal language
of colorblindness to King’s encompassing vision and rendering that vision compatible with the
New Right’s political goals, conservatives working within and outside of state institutions were
able to create an effective legal and cultural response to liberal egalitarianism. In the New Right
vision, redemption could only be reached through the embrace of conservative colorblindness as
a foundational norm. This form of redemption would make institutional and structural forms of
racism invisible by insisting upon the state’s incapacity to see race while simultaneously defining
racism as uncontrollable individual irrational attitudes not subject to regulation.

Genealogy enriches our understanding of political development and the courts. American
political development tends to see state institutions as the starting and ending points of change,
and the metric of change is the transformation of institutions. Focusing on the genealogy of a

8 It is interesting in light of this to note that John Rawls’ celebrated abstract theory of justice as fairness, which he
developed analytically through a heuristic device imagining individuals (not groups) lacking any markers of identity
as the fundamental subjects of justice and law, was first published in 1971.
racial ideology highlights the interface between the state and culture at the level and through the mechanism of legal discourse. As work on legal mobilization has shown, legal discourse provides a point of contact between movements and state institutions, and can enable the crystallization of cultural phenomena in institutions. Likewise, the production of legal discourse, once it is endorsed by multiple state actors in the form as judicial discourse in opinions, then can reflect back out through cause lawyers and shape the trajectories of movements. An obvious example of this phenomenon is the significance of the discourse of choice in liberal feminist arguments for abortion rights. The legalization of the right to choose abortion through the means of identifying choice as a constitutionally protected liberty had implications beyond the courthouse door, ultimately going so far as to generate the common cultural identifier for liberal feminists in favor of protecting abortion rights as pro-choice.

The example of colorblindness, while rendered more complex by of the initial struggle over ownership of the actual word, demonstrates this process as well. Ultimately, colorblindness as a constitutional discourse provided the grounding for the rise of the rights-based conservatism that Keck identifies, and wrote the cultural script that enabled legislative as well as legal success through the linkage of neutrality and fairness to this conservative rights consciousness (Keck 2004; Keck 2006).

Reva Siegel suggests that liberal defenders of black rights struggling for advances in the 1960s made a crucial mistake in abandoning the anti-subordination talk of Brown in favor of colorblindness. Her mistake story could be enhanced, not challenged, by pushing the timeline back through showing that the initial liberal embrace of colorblindness had a conservative counterpart practically from the outset. In fact, however, the point I wish to make is somewhat different and turns to political science’s recent engagement with history. Siegel’s lost tradition of anti-subordination, while perhaps valuable, overlooks the potential of historical analysis as a mode of egalitarian constitutional analysis. Balkin comes closer in his thought experiment rewriting Brown v. Board of Education when he argues that “the power of the state, through its laws and practices, has been enlisted continuously in the century since the Civil War to keep blacks separate from whites and maintain the social superiority of whites to blacks,” his analysis is directed toward elucidating the principle of equality and expanding the scope for interpretation of the Fourteenth Amendment based on an aspirational understanding of its agenda (Balkin 2001a: 81).
In other work, and following the insights of historian Peggy Pascoe, I have considered two cases, both addressing the same constitutional question and reaching the same result, but doing so through very different argumentative mechanisms (Pascoe 1996; Novkov 2008). These cases are *Loving v. Virginia*, which Siegel and I both criticize for the US Supreme Court’s reliance upon a constrained and abstract use of equal protection and due process to rule against Virginia’s law barring interracial marriage, and *Perez v. Sharp*, in which the California Supreme Court generates a deep historical and ultimately deconstructive attack on the purposes and outcomes of California’s antimiscegenation statute to invalidate it.

Justice Traynor’s approach in *Perez* employed the equal protection methodology of 1948—rather than first inquiring as to the nature of the distinction and determining the level of scrutiny, he directly considered the state interests at stake in generating and maintaining a policy against interracial marriage. Working through the articulated interests in legislative debates and in the state’s briefs, he systematically demonstrated that these interests masked a state desire initially to establish and then to maintain racial hierarchy. Like the ruling in *Brown*, Traynor relied upon social science evidence (he turned to anthropology more than sociology, however). Nonetheless, the primary mode of reasoning was tracing the historical generation of the statute and its concrete purposes and impacts over time (*Perez v. Sharp*, 32 Cal.2d 711 (1948)). Unlike *Brown* and *Loving*, which both considered history but lightly and focused on the tangled debates over the fourteenth amendment, *Perez* focused closely upon the history of discriminatory state practices as the root both of racist attitudes in the present and institutionalized racism. The linkages between individual racist attitudes and embedded institutional racism were tightly enough woven to render it the state’s responsibility to act affirmatively to address the problem.

This approach was echoed in the fascinating, but practically ignored, case of *Mitchell v. Delaware ABC Commission*, decided by Delaware’s high court in 1963 and discussed above. Like Traynor, the Delaware Court engaged a wide-ranging and thorough examination of the historical linkages between racially discriminatory beliefs, state practices, and the state’s responsibility for institutionalizing a system that enabled the generation of racialized outcomes through the application of facially neutral rules (*Mitchell v. Delaware ABC Comm.*, 193 A.2d 294, 371 (Del. 1963)). Because the case did not deal with a major culturally salient struggle over a racialized issue, the painstaking opinion did not have a broad impact, but nonetheless provided
an alternative model to the less deeply factually engaged modes of analysis that were beginning to win the day.

Critics like Robert Gordon might reply that the generation of yet another lost tradition of interpretation or momentarily viable road not taken that could have rendered more acceptable political outcomes misses the main point, which is conservative focus on vulnerable sites of power relations and manipulations of constitutional and common law doctrines to achieve rebalancings of the deep structure of the legal system to privilege New Right agendas (Gordon 1996). This criticism, however, misses the moment of opportunity available now – perhaps more in the state courts than in the federal courts – afforded by recent convergences in the formal practice of due process and equal protection analysis. Due process and equal protection are the twinned protectors of civil rights and civil liberties and have worked in parallel tracks with each other for decades. Supreme Court jurisprudence, informed now by the accepted practice of training generations of lawyers to separate the two modes of analysis, generally treats due process as backward looking, with the focus on defining the past status of a liberty in the history and traditions of the American people. Equal protection, on the other hand, is the abstracted and forward-looking mode that questions the nature of the distinction being made and matches it against the status of the group distinction. The separation of these modes of analysis is so extreme in legal training that many constitutional law case books teach leading cases combining these analyses in two excerpts divided by hundreds of pages.

But an argument can be made that these modes of analysis should be layered together, with history playing more of a role in equal protection considerations. This method – relying on genealogical practice – would question the generation of the group distinction at stake in a statute subject to equal protection review. From where does the distinction come, and what purposes was it generated to serve? How does this generation of a distinction tie in with the articulated state interests, and the historically institutionalized state practices that grounded the establishment of the questioned policy? Such questions would help to generate a more dynamic, more grounded, and less abstract methodology for equal protection review.

Like any other discursive practice, such a mode of analysis could be turned to purposes that might ultimately support a racially ascriptive agenda. But alternatives must be found now to the static and unfruitful modes of analysis that are being used. A straightforward return to what Siegel identifies as an agenda of anti-subordination is not possible, given the intensive process of
construction and doctrinal production that has taken place in the interim years. The alternative suggested here could be rooted in a descriptive doctrinal path tracing back through Supreme Court jurisprudence incorporating cases like *Moore v. City of East Cleveland* and even *Loving* itself, but requiring that the cases be read holistically rather than as separated discourses on equal protection and due process. As noted, this agenda would likely be launched most successfully in the state courts. But to do so would only be to take a page from the lesson book of conservative mobilization. *Plessy, Lochner,* and *Bakke* all put seals on and acknowledged developmental processes that had begun in state-level constitutional litigation.

Even if this speculative agenda for reform were to prove impracticable, hopefully I have demonstrated the critical value of tracing the genealogy of constitutional discourse. Discourse, especially legal discourse, becomes laden with ideological meaning and significance through the process of struggle that generates it and then ties it to particular political, legal, and cultural agendas. Once legal discourse has become captured in this way, it becomes available as an ideological tool as well as an institutionalized part of legal practice, and can have a broader framing impact on ideological struggles outside of the courtroom. The interplay between legal and cultural struggles over the legacy of civil rights and the meaning of the constitutional guarantee of equality came to center around colorblindness at an earlier point in history than most scholars have fully acknowledged. This struggle, which ultimately resulted in the triumph of a conservative conception of colorblindness, was rendered largely invisible by the broader struggle over civil rights in the late 1960s. Thus, as colorblindness emerged as a conservative ideology, both its roots in the early 1960s and the struggle over who was to own and define it were largely forgotten. It is well worth our while to make the effort to remember.
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Appendix A: Michigan Civil Rights Initiative Flyer