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# THE CHANGING NATURE OF THE DOMINANT JUSTIFICATIONS THAT LEGITIMATED THE OPPRESSION OF AFRICAN- AMERICANS IN THE UNITED STATES

Kevin Brown\*

*The original justifications for the oppression of both African-Americans in the United States and Dalits in India were drawn from the religious systems of thought of both societies. However, over the centuries, the basic justifications for the oppression of African-Americans changed, while the primary rationale for the oppression of Dalits still remains rooted in religion. This essay sketches out the dominant forms that made and continue to make the oppression of African-Americans appear to be part of the natural order of things. It shows how the primary justifications for the oppression of Blacks changed over time. In so doing, this essay demonstrates the dynamic nature of oppression and that success against one form of oppression may not lead an oppressed group to liberation, but may simply generate a new set of justifications for their continued oppression in a different form.*

*Keywords:* African-Americans, Blacks, Dalits, Civil Rights, Desegregation Movement, Racial Discrimination

## INTRODUCTION

The original justifications for the oppression of both African-Americans in the United States and Dalits in India were drawn from the religious systems of thought of both societies. However, over the centuries, the

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basic justifications for the oppression of African-Americans changed, while the primary rationale for the oppression of Dalits still remains rooted in religion. This essay sketches out the dominant forms that made and continue to make the oppression of African-Americans appear to be part of the natural order of things. It shows how the primary justifications for the oppression of Blacks changed over time. In so doing, this essay demonstrates the dynamic nature of oppression and that success against one form of oppression may not lead an oppressed group to liberation, but may simply generate a new set of justifications for their continued oppression in a different form.

The English, and later Americans, brought Africans to North America in order to generate profits. However, people are motivated by more than just the pursuit of wealth. Resting the justifications for an institution like slavery only on economic motives ignores the emotional, psychological and spiritual concerns of human nature. At the time of the English colonisation of North America, Christianity was the dominant religion in Western Europe. It also set the boundaries of acceptable European thought. Thus, the place that Europeans looked to for justifying slavery was the Bible. The first part of this essay discusses the religious justifications developed for a race-based system of slavery.

As Western civilisation embarked upon the scientific revolution in the middle of the sixteenth century, subsequently expanding into the seventeenth and eighteenth centuries, it created new forms of thought and ways of understanding reality. As a result, racial scientists generated 'evidence' that provided a scientific basis for the biological inferiority of Blacks. This biological inferiority at first supplemented and, eventually, supplanted the religious justifications for the inferiority of Blacks. The second part of this essay discusses the scientific evidence generated to support the inferiority of Blacks up to the abolition of slavery.

With the end of the Civil War, slavery came to an end in the United States. However, after the abolition of slavery in the 1860s and a period of Reconstruction that ended in the 1870s, American society began to institute segregation. The institution of segregation replaced slavery as the principal means of continuing the subordination of African-Americans. By the early part of the twentieth century, segregation and conscious racial discrimination formed part of customary American business, educational, political and social practices. Blacks found themselves segregated from Whites from the cradle to the grave, and beyond. The primary justification for segregation was the fear of inter-racial breeding between Blacks and Whites (miscegenation). The third part of this essay discusses the racial justifications for segregation after the abolition of slavery.

As the 1930s unfolded, scientists increasingly began to believe that the environment influenced intelligence and other personality characteristics and traits more than innate endowment. By the 1950s, most social scientists believed that the status of Black people could be improved by enriching their social environment, that is, by increasing their contacts with Whites and assisting them in overcoming their 'deficit' culture. The social environmentalist triumphed in the Supreme Court's 1954 opinion in *Brown vs. Board of Education*,<sup>1</sup> which struck down statutes that allowed for the segregation of African-American school-children. The unanimous ruling ushered in a remarkable fifteen-year period during which all three branches of the Federal Government contributed to addressing racial inequality in the spheres of education, employment, housing and voting rights. There were two different aspects of the desegregation movement's judicial decisions, legislation, and programmes and policies implemented to dismantle the structures and attenuate the effects of oppression on African-Americans and other under-represented minorities. Most of the civil rights measures adopted in the 1960s and early 1970s were predicated upon a special concern about assisting Blacks to overcome the impact of their historical discrimination by enriching their social environment and helping them overcome their 'deficit' culture. Thus, even while American society instituted these policies and programmes, they were based on the belief that slavery and segregation had made Blacks inferior. Therefore, the vision of blacks embodied in the desegregation movement would, ultimately, prove inadequate to eradicate the historic oppression of blacks because it never adequately rejected White supremacy. The fourth part of this essay discusses this aspect of the desegregation movement.

The other aspect of the desegregation movement urged people to think and act as if they were colour-blind, in favour of judging and treating others as individuals based on the content of their character, not the colour of their skin. Since individuals and governments were encouraged to transcend race, this colour-blind/individualist aspect asserted that it was wrong to take account of race, even for purposes of dismantling the effects of racial discrimination. This second aspect of the desegregation movement was in conflict with the first. By the end of the twentieth century, the second aspect became dominant and has led America into the post-racial era. In so doing, the Supreme Court has almost eliminated all of the legal rationales for using race to create policies and programmes for dismantling the continuing oppression that African-Americans and other under-represented minorities still encounter. In other words, for the first time in its history, American society has moved into a new historical epoch wherein the ability to use race to determine legal rights and responsibilities has largely, though not completely, disappeared. The

substantive impact, however, is the freezing in place of the oppression of African-Americans and other under-represented minorities without the ability to make further significant improvements in their situations. Thus, colour blindness and individualism are providing a new set of justifications for the continued historic subordination of African-Americans. The final part of this essay addresses how the second aspect of the desegregation movement became dominant.

## **RELIGIOUS JUSTIFICATIONS FOR A RACE-BASED SYSTEM OF SLAVERY**

The original justification for the oppression of African-Americans in the United States was rooted in the need to justify a race-based system of slavery. While selecting a point to begin the story of the rationalisation of the enslavement of Blacks is somewhat arbitrary, I will start with the date 29 May 1453. On this day, Constantinople, the capital of the Byzantium Empire, fell to the Ottoman Turks. The first Christian to rule the Roman Empire, Constantine, founded the city in 330 AD. Its fall brought an end to the eastern portion of the Roman Empire, an imperial state that had lasted for nearly 1,500 years. Constantinople's fall was also a massive blow to the economic interests of Western Europe. By 1453, the spice trade with Asia had become vital to the well-being of Western Europe. One of the major consequences of the seizing of Constantinople by the Ottoman Turks was that the overland routes to the spice lands of Asia were now in the hands of Muslims. They could impose high tariffs for the passage of spices on the overland route. Since the maritime routes to Europe through the Mediterranean Sea were all controlled by Venice, the fall of Constantinople provided Western Europeans with an economic incentive to seek alternative passageways to Asia.

The Portuguese were the first to pursue an alternative sea route. They sailed south and encountered the sub-Saharan Africans. Vasco da Gama would captain the first Portuguese ship to sail around the southern tip of Africa, reaching Calicut (modern day Kozhikode) in 1498. The Portuguese would also sail to South America, where they would establish dominion over Brazil, the largest country in Latin America today. Since the Portuguese sailed south, the Spanish decided to sail west. During those voyages, the Spanish 'discovered' the West Indies and, later, Central and South America. The English sailed north and in 1607, they established the first permanent colony in North America at Jamestown, Virginia. A dozen years later, the first record of Blacks in English North America appears in a letter that John Rolfe, the husband of Pocahontas, wrote to Sir Edwin Sandys. Rolfe noted that a Dutch man-of-war sold the colonist twenty Africans.<sup>2</sup>

As with the Portuguese and the Spanish, the English came not as explorers in a quest for wisdom, knowledge and understanding, but as merchants and adventurers in search of wealth and riches. Thus, the Europeans tended to view the indigenous people they came in contact with during their Voyages of Discovery as either financial assets in, or obstacles to remove, from their pursuit of wealth. They did not see the native peoples of Africa, the Americas or Asia as populations who should be treated with honour and respect.

Estimates place the number of Africans displaced by the Trans-Atlantic slave trade at over twelve million, out of which only about 500,000 were brought to North America. The transportation of Africans into the New World, including those imported into North America, was the result of the need of the Europeans for labour in order to turn their new discoveries of land into profit. However, economic motivations alone can never suffice to explain the institution of slavery. People are motivated by more than material needs and desires. Thus, throughout the colonial and US history, the white oppressors of African-Americans have, and continue to, promulgate religious, scientific and cultural rationales to justify the belief that African-Americans were and are inferior. In so doing, these oppressors seek to make the subordination of African-Americans appear to be part of the natural order of things, not the result of the oppressors' historic inhumane treatment of Black people (Mannix 1965: 59).

By the time the first Africans walked off a slave ship in Jamestown, Virginia, Europeans had been in contact with sub-Saharan Africans for 175 years. At the time of the British colonisation of North America, Christianity was the dominant religion of Europe. It also provided the intellectual boundaries of European and North American thought. Therefore, as the European Christians found the need to develop justifications and rationales for the institution of slavery, they naturally turned to the Bible. Therein the Europeans found plenty of support for slavery. The Grand Patriarch of Judaism, Christianity and Islam, Abraham, owned slaves. In Chapter 25 of Leviticus in the Old Testament (the Testament used by Christians and Jews) of the Bible, God specifically authorised the Israelites to enslave the heathens among them, but not the descendants of Israel. Thus, as long as the Europeans were enslaving heathens, whom they considered the Africans-to-be, they were carrying out the will of the Almighty. Jesus was silent on the issue of slavery. However, the letters of the Apostle Paul, which make up half the New Testament (the testament of the Bible for Christians, not Jews), took slavery for granted.<sup>3</sup> Thus, the Europeans believed that slavery was not a sin against Divine Law because the Bible sanctioned the institution (Cook 1990).

There were two stories drawn from *Genesis*, the first book in the Old Testament, to justify the enslavement of Blacks (Goldenberg 2003: 178–81). The primary religious justification for enslaving Blacks, and Blacks alone, was derived from the curse that Noah placed on the descendants of Ham. According to *Genesis*, after God’s first creation of the world and mankind, He came to see “that the wickedness of man was great on the earth and that every imagination of the thoughts of his heart was only evil continually” (Genesis Chapter 6, Verse 5). God, therefore, decided to destroy mankind, as well as the animals, the insects and the birds. However, Noah found grace in God’s eyes. Thus, when God destroyed the Earth by bringing forth the Great Flood to cover the entire world, Noah and his family were the only humans to survive. One day after the waters from the Great Flood receded, Noah became drunk and was lying naked in a stupor in his tent when he was discovered by his son, Ham. Ham saw the nakedness of his father and told his two brothers, Shem and Japheth. The other two brothers took a garment, laid it upon their shoulders, went backwards and covered Noah. They never saw their father’s nakedness. When Noah awoke and discovered what had happened, he blessed Shem and Japheth, but cursed a son of Ham to be servants to Shem and Japheth. Both Christians and Muslims came to believe that the descendants of Ham had turned Black. Oral stories of the Hebrews collected in the Babylonian Talmud from the second to the sixth century CE, also stated that the descendants of Ham were cursed by being Black (see Gossett 1968: 5; Jordan 1968: 18–19). The Ham legend was generally accepted in Christian communities before the importation of slaves to the New World and was used to justify the argument that the enslavement of Blacks was the result of a divine curse that no human had the right to alter (Feagin 2000: 74).

The second justification for enslaving Blacks was derived from the Biblical story of the first murder that ever occurred. According to *Genesis*, Adam was the first man and Eve was his wife. The first two sons of Adam and Eve were Cain and Abel. Cain was a tiller of the soil and Abel was a keeper of sheep. Both brothers made sacrifices to God. Cain offered the fruit of the ground but Abel offered a young sheep. God did not respect Cain’s offer of a sacrifice but respected that of Abel. Angered by God’s rejection, Cain slew his brother. In punishment, God placed a mark on Cain. Some Christian groups in the United States such as the Southern Baptists and the Mormons, like earlier Christian groups before them, believed that the mark God placed on Cain was black skin. However, since the Cain story did not indicate that his descendants were to be enslaved, his story lacked the justification for placing Blacks in bondage. Thus, these religious groups also asserted that a descendant of Cain married a descendant of Ham.

Black people were, therefore, the descendants of the merging of these two bloodlines (Goldenberg 2003: 178–81). As a result, Black people took their colour from Cain's descendant and the curse of being slaves from the descendant of Ham.

## **SCIENTIFIC JUSTIFICATIONS FOR A RACE-BASED SYSTEM OF SLAVERY**

Western civilisation embarked upon the scientific revolution in the middle of the sixteenth century, expanding into the seventeenth and eighteenth centuries. New scientific 'evidence' emerged to prove that Blacks were inferior, thereby making the bondage of Black people appear to be scientifically justified. The first use of the word 'race' did not occur until 1606 and there were only five discussions relating to the varieties of humankind during the entire seventeenth century (Lieberman *et al.* 1999: 56). The first group of scientists to record racial differences, the natural scientists, blended religion with their scientific explanations of the differences among people. These first racial 'researchers' were not so much seeking to develop scientific ideas independent of religion as they were attempting to describe God's divine plan that could be discovered by studying nature (Ibid.). Christians also attributed racial differences to the natural ordering of life contained in what they presumed was the Great Chain of Being in which God had ordered creatures from the highest to the lowest. In the Chain, Blacks were placed as the lowest link in the human portion of the chain, considerably below Whites.<sup>4</sup>

The natural scientists presumed that because Blacks were found in Africa, they had been negatively affected by the hot climate there. As scientists explained, the heat of the intense sun of Africa overheated the brains of Blacks, thus disrupting their mental development.

In 1735, Carolus Linnaeus produced the first division of humans into races that included personality traits. Linnaeus divided humans into four races, Homo Europeus, Homo Asiaticus, Homo Afers and Homo Americanus. He linked personality traits and characteristics with race in a way that still applies in the United States today. According to Linnaeus, the characteristic traits observable in Homo Europeus were gentle, acute, inventive and governed by custom. The Homo Asiaticus displayed the traits of being melancholy, greedy, severe, haughty, desirous, ruled by opinion and covered by loose garments. In contrast, the personality characters and traits of Homo Afers were lazy, crafty and ruled by their desires, not intellect (Jordan 1968: 18–19).

Following the well-accepted position of the natural scientists about the inferiority of Blacks was the science of physiognomy, the science of discovering temperament and character from outward physical appearance, especially the face. During the latter part of the eighteenth century, the Dutch anatomist, Pieter Camper, demonstrated that a connection existed between facial and cranial measurements and personality traits and character. Camper showed that a beautiful face and a beautiful body were inseparably attached to a beautiful nature, beautiful character and beautiful soul. He 'proved' that the optimal facial angle was one hundred degrees. Since the facial angle of Europeans measured out at ninety-seven degrees, they were closest to the optimal angle. In contrast, the facial angles of Black people measured between sixty and seventy degrees. This placed them closer to apes and dogs than human beings (West 1982: 57–58).

Despite the rampant sexual relationships that White male slave masters forced upon their African-American female slaves, Whites generally viewed inter-racial mating (miscegenation) as inconsistent with God's Will. The Christians pointed out that God had placed Whites and Blacks on different continents. The only reason that they came together on a continent populated by Native Americans was due to interference by humans.

A debate emerged among the scientific community in the 1840s, which fostered additional concerns about miscegenation and, eventually, contributed to the development of the primary scientific justification for segregation. Up to that time, the dominant beliefs about the unity of the human races in American society were derived from the Bible. Once again, according to the *Genesis*, all humans descended from Adam and Eve. As these monogenesisists argued, though Blacks may differ physically and mentally from Whites, they were of the same species. The position of these theological naturalists was summarised by John Bachman. He noted that when different species of animals produced a hybrid, by art or accident, these hybrids became extinct in a very short period of time. As a result, no group of animals has ever developed from the commingling of two or more species. Consequently, the creation of the various species of animals is an act of Divine Power alone. The fact that all the races of mankind produce fertile progeny is one of the most powerful and undeniable arguments in favour of the unity of the races (Bachman 1850; reprinted Ruchames 1969: 453).

The American School of Ethnology, which emerged in the 1840s, rejected the position of the monogenesisists. Scholars who followed this school argued that the differences among the human races were divisions of

species, not varieties. As a result, Blacks constituted a form of life which was altogether distinct from that of Whites. These polygenesists, nevertheless, preached the natural superiority of Whites and the inevitability that the destiny of the White race was “eventually to hold every foot of the globe where climate does not interpose an impenetrable barrier” (Nott 1854: 80). The polygenesists asserted that Blacks and Whites were different species. However, this did not mean that they could not reproduce. Rather what it meant was that the products of such inter-breeding were aberrations of nature that would not live as long, would be physically weaker and find it more difficult to reproduce. The polygenesists would remain influential throughout the rest of the nineteenth century until their debate with the monogenesists was largely superseded by the Social Darwinists (Nobles 2000: 31).

In the mid-nineteenth century, Paul Broca, the founder of the Society of Anthropology of Paris, broke new ground in the understanding of how the human brain functions. He measured the shape of the head and developed a cephalic index. Broca demonstrated that variations in the human head shape were linked to significant differences in the races. Others went further to argue that poor cephalic index ratings corresponded with lower intelligence. Broca also agreed that black skin and woolly hair were associated with inferior intelligence, while white skin and straight hair were the equipment of the best group (Tucker 1994: 23–24).

In 1856, the first American translation of the four-volume treatise on racial differences written by French diplomat Count Joseph Arthur de Gobineau was published in the United States. Gobineau was considered the most influential thinker about racial differences of the nineteenth century (Feagin 2000: 82). His treatise was highly regarded in the United States (Newby 1965: 9). Gobineau asserted that all the high civilisations of humanity were products of the White race. The White race had a peculiar racial characteristic that produced a people with reflective energy, energetic intelligence, feelings for utility, unusual perseverance, great physical power, extraordinary instinct for order, love of liberty and life, and hatred of despotism. Among the other issues that Gobineau dealt with in his treatise were the laws that explain the rise and fall of civilisations (Newby 1965: 9). Gobineau claimed that a society’s abundance was based upon its ability to preserve the blood of the noble group that created it. When their blood is mixed with that of degenerate groups, it inevitably leads to the destruction of that society. The logical conclusion from Gobineau’s work for the United States was that miscegenation between Whites and Blacks could destroy the nation.

## **RACIAL JUSTIFICATIONS FOR SEGREGATION AFTER ABOLITION OF SLAVERY**

With the end of the Civil War and the abolition of slavery, the need to justify a race-based system of slavery no longer existed. Segregation existed in the North before the Civil War largely by custom, as opposed to by law. Yet, African-Americans in the North found themselves locked into the bottom of the racial caste system. Blacks were systematically separated from Whites or excluded from railway cars, omnibuses, stage coaches and steamboats. They were segregated into secluded and remote corners of theatres and lecture halls; they could not enter most hotels, restaurants and resorts, except as servants; they prayed in separate pews and partook of the sacrament of the Eucharist after Whites. They were segregated in housing, schools, hospitals and cemeteries. The cities of Boston, Cincinnati, New York and Philadelphia had their segregated Black residential areas. However, because of the need for Whites to oversee the actions of Blacks, segregation did not extensively exist in the South, where 94 per cent of the Blacks lived in 1860. Whites simply excluded Blacks from places that they did not want them to be in.

After Abolition, the Civil War and a period of Reconstruction, segregation statutes and customs spread through the American South.<sup>5</sup> By the early part of the twentieth century, segregation and conscious racial discrimination formed part of customary American business, educational, political and social practice. Discrimination based on race in employment, merchandising stores, eating establishments, places of entertainment, and hotels, was generally accepted as a fact of life. African-Americans seldom occupied positions above the most menial levels in American businesses and corporations. Even lower level management positions were, for the most part, unobtainable for them. Only a handful of African-Americans could attend the prestigious colleges and universities of the country and almost none of them taught there. Many places in the country maintained separate water fountains, waiting rooms, transportation facilities, rest rooms, schools, prisons, hospitals and cemeteries for Whites and coloured people. In other words, Blacks found themselves segregated from birth to death and beyond.

The primary justification for segregation was the fear of inter-racial breeding. "From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage."<sup>6</sup> Many Whites who never supported slavery and may even have believed in the equality of the races, nevertheless, thought that God abhorred inter-racial mating. An opinion handed down by the Pennsylvania Supreme Court shortly after the end of the Civil War made this rationale clear.<sup>7</sup> In upholding the right of a conductor, acting

pursuant to a company rule, to require a Black female passenger to sit in an area of the carriage for Blacks that in all respects was as comfortable, safe and convenient as the area for Whites, the Court wrote:

“Why the Creator made one Black and the other White, we know not; but the fact is apparent and the races distinct, each producing its own kind and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts and feelings which He always imparts to His creatures when He intends that they shall not overstep the natural boundaries He has assigned to them. The natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures . . . But to assert separateness is not to declare inferiority in either; . . . It is simply to say that following the order of Divine Providence, human authority ought not to compel these widely separated races to intermix.”<sup>8</sup>

The Civil War also provided scientists with a wealth of ‘evidence’ about racial differences. Agencies of the US Government pioneered wide-scale measurements of soldiers during the Civil War. The autopsies and anthropological studies carried out during the War were the first mass studies of physical differences of the races ever conducted that compared not only Blacks and Whites, but also the products of the inter-racial breeding of Blacks and Whites (Mulattoes). This evidence helped support the belief that inter-racial mating had to be prevented because of the dangers that it entailed. From these scientific measurements, surgeons and physicians generally concluded that Mulattoes might be more intelligent than the full-blooded Blacks. However, due to their physical infirmities and lack of morals, all things considered, Mulattoes were worse than full-blooded Blacks.

In 1869, Dr. Sanford Hunt, a surgeon in the US Military during the War, published a report that he had prepared earlier for the United States Sanitary Commission in the prestigious London *Anthropological Review*. Nearly all the subsequent late nineteenth-century studies on the racial inferiority of Blacks pointed to this report to justify their conclusions

(Haller 1971: 21). The report detailed the results of 405 autopsies that Dr. Hunt had conducted on soldiers during the Civil War. His article classified the weight of the brains of the soldiers he had autopsied on the basis of the soldier's fraction of White blood. Thus, he reported the average brain weights for full-blooded Whites and Blacks, as well as those with three-fourth, half, one-quarter, one-eighth and one-sixteenth parts of White blood. Hunt found that the average weight of the brain of the White soldier was over five ounces heavier than that of the average Black. He also found that the weight of the brain of the person who was three-quarters White was closest to that of the average White brain, and was only three ounces smaller. The mixed race person, who was 50 per cent Black and 50 per cent White, had a slightly heavier brain than the full-blooded Black. However, Hunt also found that those with only one-quarter, one-eighth or one-sixteenth white blood had smaller brains than the full-blooded Black person (Hunt 1869). Thus, Hunt concluded that:

“Slight intermixtures of white blood diminish the negro brain from its normal standard; but, when the infusion of white blood amounts to one-half, it determines a positive increase in the negro brain, which in the quadroon is only three ounces below the white standard” (Hunt 1869).<sup>7</sup>

Hunt also found that “the percentage of exceptionally small brains is largest among negroes having but a small proportion of white blood” (Hunt 1869).

Hunt's research was understood as establishing the fact that Blacks with at least 50 per cent White blood were more intelligent than full-blooded Blacks, but those Blacks with less than this amount were not as intelligent as full-blooded Blacks. Thus, miscegenation by Whites with any Blacks would prove to have negative consequences for generations to come. Therefore, preventing miscegenation was an important social goal.

Benjamin Gould also performed several anthropometric studies of Civil War soldiers for the Sanitary Commission (see Robinson 2007: 120). He published his findings during the same year that Hunt published his (B. Gould 1869: 471). Unlike Hunt, Gould only reported on three categories, white, black and mulatto. Gould discovered that the lung capacity of the Black soldier was less than that of the White, but greater than that of the Mulatto. Comparisons of the head size, weight and height, led Gould to conclude that Mulattoes were physically inferior to both Blacks and Whites. While discussing Mulattoes in his report, Gould stated:

“The curious and important fact that the mulattoes, or men of mixed race, occupy so frequently in the scale of progression a place outside of, rather than intermediate between, those races from the combination of which they have spring cannot fail to attract attention. The well-known phenomenon of their inferior vitality may stand, possibly, in some connection with the fact thus brought to light” (B. Gould 1869: 319).

Another federal agency that published data on measurements conducted on troops during the Civil War was the Provost Marshal-General’s Bureau. In 1875, the Bureau released its report on the records of the examinations of over a million recruits, drafted men, substitutes and enrolled men in military service during the Civil War (Baxter 1875). Although its conclusions varied at times from those of the Sanitary Commission, the Bureau’s findings generally corroborated the Commission’s findings, but on a much larger scale (Haller 1971: 29). Part of the results of this report included a study of questionnaires sent to military medical doctors regarding their observations of Black and Mulatto recruits, including their physical builds, intellects, and abilities to perform military service. The answers of the doctors confirmed the belief that Mulattoes were less capable of enduring the hardships of military service and were weaker than both Black and White recruits (Haller 1971: 30).

By the 1880s, the scientific evidence from Civil War firmly established the dangers of miscegenation. Even though the battle between the monogenesists and the polygenesists continued until the end of the century, the last three decades of the nineteenth century saw the development of explanations on racial differences that drew upon the evolutionary theories of Charles Darwin. Darwin asserted that if monogenesists and polygenesists accepted his theory of evolution, their dispute would come to an end. While the separate races existed, the debate between the monogenesists and polygenesists obscured the evolutionary reality of the different human races. There were three separate groups of Social Darwinists, but all of them agreed that Blacks and Whites were different because Whites were more evolved than Blacks. Thus, the discussion of whether Blacks and Whites were separate species missed the evolutionary aspect of the development of the two groups.

One group of Social Darwinists followed Charles Darwin’s statement in his *Descent of Man*, published in 1871. Darwin wrote, “[a]t some future period, not very distant as measured by centuries, the civilized races of man will almost certainly exterminate and replace throughout the world the savage

“races” (Darwin 1871: 201). By the 1890s, tough-minded racial Darwinists like Frederick Hoffman were pointing to data collected during the decennial census that showed higher Black mortality and lower Black birth rates than those of Whites. This group argued that census data demonstrated the futility of egalitarian or even traditionally paternalistic approaches to Black economic, social and political participation. Emancipation from slavery had been the worst thing that ever happened to Blacks, because as enslaved people at least their survival needs were met (Hovenkamp 1985: 624, 625). Nathaniel Shaler, a prominent social scientist and a dean at Harvard University, went on to assert that the law of natural selection meant the eventual extinction of the Black race (Tucker 1994: 35). Lewis Henry Morgan also argued for the extinction proposition. He asserted that since the Black race was at a lower stage of development than Whites, when Blacks were brought into contact with the superior White race outside of the protection of slavery, Blacks were unable to compete with the Whites (Hovenkamp 1985: 624, 653–54).

Social Darwinists who were not preaching the eventual extinction of the Black race were not much more sanguine about the prospects of Blacks. Many evolutionary scientists of the day argued that intelligence evolves slowly over a long period of time. These optimistic Social Darwinists asserted that Blacks were destined to evolve to the level of Whites, but slowly. Thus, it would take hundreds of thousands of years before Blacks reached the same intellectual level as Whites. Since this was an evolutionary fact, there was little society could do to improve the situation of Black people.

Another group of Social Darwinists turned the arguments of the optimistic ones on their head. They asserted that while Blacks were evolving, so were Whites. More importantly, Whites were actually evolving at a faster rate than Blacks. Thus, the gap between the two races was actually growing larger, not smaller (Hovenkamp 1985: 624, 633–34). No matter how inferior Blacks of the present seemed to Whites of the present, the future would only see the situation grow worse.

As the twentieth century dawned, scientists provided a new form of evidence for proving the sub-standard nature of the Black race, intelligence testing. In 1904, Alfred Binet was commissioned by the Minister of Public Education in France to develop techniques to identify children whose lack of success in normal school classrooms suggested a need for some form of special education. Binet developed a series of short tasks, related to everyday problems that were intended to assess basic reasoning processes

such as ordering, comprehension, invention and censure (Stephen Jay Gould 1996: 181). Binet, however, did not assert that he was measuring an innate, genetically inherited capacity. The theory that Intelligent Quotient or IQ is a product of heredity was an American product (Ibid.: 185). H.H. Goddard brought Binet's ranking scale of intelligence to America and reified it into a score about innate intelligence.

In 1916, Lewis Terman, a professor at Stanford University, revised Binet's scale and increased the number of tasks to be performed on the IQ test. He gave his revision the name, Stanford-Binet. Terman relentlessly emphasised that the IQ tests measured the limits of intelligence and the inevitability of those limits. "Practically all of the investigations which have been made of the influence of nature and nurture on mental performance agree in attributing far more to original endowment than to environment" (Terman 1916). Terman argued that those whose IQs were below 100 should not be admitted to professions of prestige and monetary reward. Substantial success in such occupations probably took an IQ of 115 or 120. By identifying in advance those who were feeble-minded, Terman argued that intelligence testing could curtail crime, pauperism and industrial inefficiency. With the mentally infirm identified, appropriate measures could be adopted to control their socially destructive tendencies.

R.M. Yerkes, a Harvard University professor, convinced the US Army to allow him to administer intelligence tests to all of its World War I recruits. Yerkes asserted that he could assist in the war effort by efficiently identifying those people who should be leaders and those who should be commanded. Yerkes, Terman, Goddard and other colleagues developed the army's mental tests in the summer of 1917. As an army colonel, Yerkes presided over the administration of these tests to 1.75 million World War I recruits. One of Yerkes' lieutenants, E.G. Boring, selected 160,000 case files and produced results from this sample. His results confirmed that Blacks constituted a mentally deficient race. He found that Blacks were at the bottom of the intellectual scale, with a full 89 per cent of them testing out at the IQ level of morons (IQ 50 to 69), imbeciles (IQ 20-49) or idiots (IQ below 20) (Stephen Jay Gould 1996: 227).

### **'DEFICIT' SOCIAL ENVIRONMENT AND CULTURAL JUSTIFICATIONS FOR DESEGREGATION**

Since Blacks did not perish and their numbers continued to increase during the twentieth century, it became obvious that the Social Darwinists who predicted the extinction of the Black race in America were wrong. In addition, as the 1930s unfolded, scientists increasingly began to believe

that social environment influenced intelligence more so than innate characteristics. Throughout the 1930s and 1940s, this position gained adherents and became the dominant one. Thus, by the 1950s, most social scientists believed that the status of Black people could be ameliorated by enriching their social environment, that is by increasing their contacts with Whites, and assisting them in overcoming their ‘deficit’ culture. The social environmentalist triumphed in the Supreme Court’s 1954 opinion in *Brown vs. Board of Education*.<sup>9</sup> In *Brown*, the Court struck down statutes that allowed for the segregation of African–American public school students in 21 states where 40 per cent of the nation’s school-children were enrolled in school (Ravitch 1983: 125).

The Court’s analysis in *Brown* began with the assumption that the physical facilities and other tangible factors of the public schools attended by Black and White students were equal. Given the objectively measurable equality of segregation in this context, the Court was forced to identify the inherent harm that resulted from segregation. In one of the most quoted phrases from *Brown*,<sup>10</sup> the Court said, “[t]o separate [African–American youth] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” The Court went on to quote approvingly from the district court in Kansas:

“Segregation of white and colored children in public schools has a detrimental effect upon the colored children ...; [f]or the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. *Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children...*”<sup>11</sup>

Chief Justice Warren buttressed the conclusion that segregation in public schools inflicted psychological damage on African–Americans by citing studies of social scientists in the (in)famous footnote #11 of the opinion in *Brown*. The unanimous ruling by the Supreme Court in *Brown vs. Board of Education* ushered in the beginning of the end of legally imposed segregation. The landmark ruling sparked a remarkable fifteen-year period during which all three branches of the Federal Government contributed to addressing racial inequality in education, employment, housing, and voting rights (Orfield and Eaton 1996). The Supreme Court rulings in the 1950s and 1960s outlawed racial and ethnic discrimination by governmental

entities. Congress passed several major pieces of civil rights legislation in the 1960s attacking discrimination in the private sector and the political process, including the 1964 Civil Rights Act, the 1965 Voting Rights Act, and the 1968 Fair Housing Act.

There were two different aspects of the desegregation movement's judicial decisions, legislation, and programmes and policies implemented to dismantle the structures and attenuate the effects of segregation. Much of the civil rights progress that occurred through the 1950s, 1960s and 1970s was predicated upon a special concern about assisting Blacks in overcoming the impact of the historical discrimination they were subjected to. In his landmark speech during the commencement ceremony at the historically Black Howard University in June 1965, President Lyndon Johnson accurately stated this view:

“You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders as you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, ‘you are free to compete with all the others,’ and still justly believe that you have been completely fair.”<sup>12</sup>

Following this view, Whites in American society did not perceive the problem of the harm of segregation to be combatted in a two-fold manner. If segregation harmed the mental development of Blacks, it also harmed the mental development of Whites, but in a different way. Segregation preached the false message that Blacks were inferior, but it also preached the false message that Whites were superior. The failure to appreciate the two-fold nature of the harm of segregation would prove very detrimental to the progress of Blacks during the desegregation movement and beyond. Whites continued to believe that Blacks were inferior, however, now Whites believed that American society could do something to improve the Black race.<sup>13</sup> In other words, the desegregation movement did not reject the belief in the inferiority of Blacks as it was based on that belief. The difference was that now American society believed that it could make African-Americans better by getting them to no longer think, act, or behave as Black people. In addition, the movement did not adequately address the false belief in White supremacy because that was not viewed as one of the harms of segregation.

In the 1960s, American society began the process of treating students, teachers and administrators in public schools as members of racial and ethnic groups in order to integrate the schools. Selective higher educational institutions, including virtually all law schools, medical schools, masters programmes in business and elite undergraduate educational institutions started employing special efforts to recruit African-American students. For example, in 1965, law schools began employing affirmative action admissions practices (Gellhorn 1968). Within ten years, the proportion of African-American students enrolled in the nation's law schools jumped from about 1 per cent to 4.5 per cent (Bowen and Bok 1998: 5–6). The percentage of African-Americans enrolled in Ivy League colleges and universities increased from 2.3 per cent to 6.3 per cent between 1967 and 1976 (Ibid.: 7). During the 1968-69 academic year, only 2.2 per cent of the nearly 36,000 medical school students were African-American, with almost 60 per cent of them enrolled at the two historically Black medical schools of Howard University College of Medicine and Meharry Medical College (Noah 2008). Seven years later, African-Americans constituted 6.2 per cent of the nation's medical school students. Private employers, either voluntarily or under the potential threat of discrimination litigation, created affirmative action programmes to increase the number of African-Americans and other minorities employed in their workforces.<sup>14</sup> Governmental entities also sought to employ more African-Americans. In addition, various governmental units and private institutions created a number of programmes and policies to provide benefits to minority-owned businesses, including governmental contracts set aside for minority-owned businesses.<sup>15</sup> While certainly effective and helpful to Blacks, the failure to address the issue of White supremacy limited the possibilities for the dismantling of all aspects of the effects of America's history of racial oppression.

### **THE EMERGENCE OF THE POST-RACIAL ERA AND THE INABILITY TO USE RACE TO DISMANTLE THE CONTINUING EFFECTS OF RACIAL OPPRESSION**

The other aspect of the desegregation movement involved the assertion of the need to transcend considerations of race. This aspect urged people to think and act as if they were colour-blind in favour of judging and treating others as individuals based on the content of their character, not the colour of their skin. Since individuals and governments were encouraged to transcend race, this colour-blind/individualist aspect eventually led to the assertion that it was wrong to take account of race, even for purposes of dismantling the effects of racial discrimination. This second aspect of the desegregation movement, therefore, was in conflict with the use of race as

a means to dis-establish the effects of prior discriminatory conduct of the first aspect. By the end of the twentieth century, the second aspect became dominant and led America into the post-racial era. In so doing, the legal rationales for using racial classifications have largely been eliminated. In other words, from a legal standpoint, race matters less now in determining legal rights and responsibilities than at any time in the last 300 years. However, the substantive impact of the post-racial era is the freezing in place of the continuing effects of the prior oppression of African-Americans without the ability to make further significant improvements in their situations.

The first time that the US Supreme Court used the colour-blind/individualist approach to strike down a programme adopted to benefit racial minorities was in its 1978 opinion in *Regents of the University of California vs. Bakke*.<sup>16</sup> While a majority of the justices on the Court have not yet embraced a strict colour-blind interpretation of the constitution, *Bakke* starts the Supreme Court down the judicial road that has now led it to prevent virtually all efforts by governmental entities to employ racial classifications in policies and programmes intended to attenuate the effects of past and present racial discrimination. In so doing, the Court has now significantly limited the ability to develop policies and programmes to dismantle the continuing oppression of African-Americans and other under-represented racial minorities.

Before *Bakke*, the Supreme Court had developed two different tests to employ when examining an equal protection challenge to a governmental action, policy or programme. The Court used a deferential rational relationship test for the overwhelming majority of divisions or classes of people employed by the government. As long as the government was not acting arbitrarily, but was acting rationally in pursuit of a legitimate governmental objective, the Court would allow these discriminatory means. Under this test, the federal courts rarely struck down governmental actions. However, if the government employed a suspect class in carrying out its objectives, then the Court would apply strict judicial scrutiny. Legal scholars had come to note that the Court's application was "strict in theory, but fatal in fact". Thus, governmental measures that employed suspect classifications seldom survived an equal protection challenge. The Court had also indicated that the traditional indicators of suspectness dealt with whether the class was "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."<sup>17</sup> Under this definition, African-Americans constituted a suspect class, but Whites did not. As a result,

before *Bakke*, governmental programmes that provided benefits to Blacks were acceptable, but those that discriminated against them were not.

Allan Bakke was a White male who was denied admission to the medical school of the University of California at Davis. He argued that the medical school had violated Title VI of the 1964 Civil Rights Act and the equal protection clause of the Fourteenth Amendment to the United States Constitution because it operated a separate admissions programme that reserved 16 of 100 places for members of minority groups. Four justices in *Bakke* declined to reach the constitutional issue. For them, the separate reservation programme for minorities violated Title VI. On this ground, they concluded that race should not be a factor in admissions at all. Four justices would have upheld the separate reservation programme under both Title VI and the equal protection clause, noting that discrimination which benefits disadvantaged minority groups should be treated more deferentially than discrimination which harms these groups. Justice Powell's opinion was the decisive swing vote.

Powell noted the original pervading purpose behind the equal protection clause of the Fourteenth Amendment, an amendment added in 1868 shortly after abolition and the Civil War, was "the freedom of the slave race, the security and firm establishment of that freedom and the protection of the newly-made freeman and citizens from the oppressions of those who had formerly exercised unlimited dominion over him."<sup>18</sup> However, this purpose was virtually strangled in its infancy by the Supreme Court's post-Civil War decisions. Powell went on to note that while the framers of the "Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the White majority, the Amendment itself was framed in universal terms, without reference to color, ethnic origin or condition of prior servitude."<sup>19</sup> Powell concluded that it was too late to hold that the equal protection clause permits the recognition of special wards. Rather, the purpose is to assure that all individuals receive the protection of equal laws.

Having decided that the equal protection clause provided strict scrutiny for the use by government of race as a suspect characteristic rather than protection for suspect groups like African Americans, Justice Powell rejected the social justice arguments to support the taking into account of race in the admissions process. Powell concluded that the medical school's social justice rationales of "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession; (ii) countering the effects of societal discrimination; [and] (iii) increasing the number of physicians who will practice in [minority] communities currently

underserved; . . .”<sup>20</sup> were inadequate to justify the use of race and, thus, the discrimination against Alan Bakke in the admissions process. In the end, Powell rejected the reservation of places in admissions to minority groups and only found that the educational benefits of diversity justified the taking account of race, as one factor among many, in an individualised admissions process.

The Supreme Court followed the logic of Powell’s opinion in *Bakke* in several different opinions issued since then. For example, in the Supreme Court’s 1982 opinion in *Wygant vs. Jackson Board of Education*,<sup>21</sup> the Court rejected the argument that providing Black role models for African–American public school students justified protecting African–American teachers with less seniority from lay-offs at the expense of White teachers with more years on the job. In 1989, in *City of Richmond vs. Croson*,<sup>22</sup> for the first time, a majority of the justices agreed that affirmative action programmes should be subjected to the same strict scrutiny as governmental programmes and policies that discriminate against under-represented minorities. In so doing, the Court firmly rejected the notion that state governmental entities could set up policies and programmes to help under-represented minority groups in order to dismantle the past and present effects of race discrimination absent compelling interests and means that are narrowly tailored to advance those interests. In the 1995 opinion of *Adarand Contractors, Inc vs. Pena*,<sup>23</sup> the Court extended the standard of review articulated in *Croson* to also apply to the federal government. In so doing, the Court reversed a decision that it had rendered only five years earlier in which it had stated that Congress, a co-equal branch of government to the Supreme Court, had wider authority to legislate in the area of eradicating the effects of race discrimination than state governments.<sup>24</sup> In another 1995 opinion, *Miller vs. Johnson*, the Supreme Court struck down a redistricting plan adopted by the Georgia General Assembly as violating the equal protection clause. The General Assembly took account of the race of people in drafting a redistricting plan that intentionally created three majority–minority legislative districts.

In its 2003 opinion in *Grutter vs. Bollinger*,<sup>25</sup> however, the Supreme Court re-affirmed Powell’s opinion in *Bakke* and upheld the use of race as one factor among many in an individualised admissions process of selective higher educational institutions in order to produce a critical mass of under-represented minorities with a history of discrimination. However, in *Gratz vs. Bollinger*,<sup>26</sup> a companion case to *Grutter*, the Court rejected the use of race in a mechanical process that determined who was admitted to the University of Michigan’s undergraduate student body on the basis of the points that an applicant accumulated. Under the point system, students

received points based on their grade point averages, standardised tests scores, whether they were children of the University of Michigan alumni, and other factors. In addition, applicants also received points if they were from under-represented minority backgrounds, Blacks, Latinos or Native Americans. This point system made it easier for members of these minority groups to get admitted to the University of Michigan. The Court stated that the process of awarding points to minorities because of their race violated the need for an individualised determination of whether they should be admitted. Finally, in the Supreme Court's 2007 *Parents Involved* decision,<sup>27</sup> it struck down the use of racial classifications as a means by which public schools could pursue voluntary school desegregation plans. In so doing, the Court essentially struck down the very type of school desegregation plans that it had actually ordered public schools to institute with its decisions fostering school desegregation in the 1960s and 1970s.

Much of the Supreme Court's rhetoric on the harm of governmental racial classifications contained in the controlling opinions in cases like *Bakke*, *Wygant*, *Croson*, *Miller*, *Adarand*, *Gratz* and *Parents Involved* rests upon the idea that the government should not treat people as members of racial and ethnic groups. Rather race should be transcended in favour of treating people as individuals. As the Court stated in *Miller*, at the "heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national classes . . ." <sup>28</sup>

This upcoming term, the Supreme Court will render its fourth major affirmative action decision in higher education. The Court is poised to potentially reduce the use of race in the admission process of selective higher education institutions.<sup>29</sup> The Court has also agreed to hear a challenge to the constitutionality of the Voting Rights Act of 1965.<sup>30</sup> Due to the decisions that the Supreme Court has already issued, as the twenty-first century continues to unfold, the Supreme Court's interpretation of the equal protection clause and federal anti-discrimination legislation is virtually colour-blind. Thus, the Court has severely limited the ability of American society to employ racial classifications in order to dismantle the effects of discrimination on Black people.

## CONCLUSION

Systems of oppression are always accompanied by rationales, which once accepted, provide the knowledge for a society to make the oppression appear to be part of the natural order of things. Originally, the justifications for the subordination of African-Americans and Dalits were rooted in

knowledge derived from religious beliefs. At the time of first contact between the English and the Africans, and for centuries before and after, Christianity was the dominant religion of Europe. Thus, for the English and later the Americans, interpretations of the Christian Bible provided justifications for the race-based system of slavery that developed in North America. Several passages from the Old and New Testament took slavery for granted. Thus, God had clearly sanctioned the institution. In addition, supporters of Black slavery in North America used two stories from *Genesis* to justify the enslavement of Blacks and Blacks alone, the curse that Noah placed on the descendants of Ham and the mark that God placed on Cain.

As Western society embraced the scientific revolution, scientific investigations generated new forms of knowledge based on observations and physical measurements. While the explanation for the inferiority of Blacks varied over the centuries, scientists have continuously concluded—on the basis of presumed objective, rational and unbiased scientific evidence—that Blacks, in some relevant way, were sub-standard beings. Thus, scientific evidence about the biological inferiority of Blacks was originally used to justify slavery. After the end of the Civil War and abolition of slavery, additional scientific evidence was generated that pointed to the dangers of inter-racial sexual relations. According to studies conducted during the Civil War, the products of miscegenation between Blacks and Whites produced offsprings that were physically weaker and, perhaps, less intelligent and less moral than full-blooded Blacks. The prevention of the dangers of miscegenation along with the recognition that the biological inferiority of Blacks was more or less permanent, provided powerful justifications for the institution of segregation in the Southern part of the United States during the latter part of the nineteenth and early part of the twentieth centuries, and its continued maintenance in the North. Thus, segregation succeeded slavery as the dominant form of subordination of African-Americans.

By the 1930s, social scientists were increasingly arguing that environment influenced intelligence and personality characteristics far more than biological endowments. This strand of scientific thought was far more optimistic than the previous biological notions of Black inferiority because it suggested that this inferiority could be ameliorated by enriching the cultural environment of Blacks, that is, increasing their inter-racial contact with Whites. The triumph of the social environmentalist in the 1950s helped usher in the Civil Rights Movement of the 1960s. However, this movement involved two contradictory aspects. The desegregation aspect fostered inter-racial contacts with Blacks by developing policies and programmes that took account of race. These included school

desegregation and affirmative action policies. However, the colour-blind/individualist aspect asserted that people should transcend considerations of race and treat others as individuals. The colour-blind/individualist aspect was in contradiction to the desegregation aspect because the former asserted that it was wrong to take account of race, even for purposes of employing policies and programmes that dismantled the effects of racial discrimination.

As a result of opinions by the Supreme Court, the colour-blind/individualist aspect came to dominate and has now led American society largely into a post-racial era. In this post-racial era, Blacks continue to trail Whites in terms of virtually all the important socio-economic indicators. Thus, Blacks earn less money, have accumulated less wealth, live a shorter period of time, are more likely to be poor, have less educational attainment, and are less likely to be employed in prestigious positions than Whites. Yet, the very policies and programmes that were put in place to help overcome the effects of the history of racial oppression of Blacks in the United States have largely been dismantled. As a result, the United States is freezing into place the effects of its history of discriminatory treatment of Black people with little means in which to ameliorate those conditions. Thus, colour-blind/individualism, which urges all to transcend (ignore) considerations of race is now functioning as a new form of subordination of African-Americans in the United States.

## Notes

<sup>1</sup> 347 U.S. 483 (1954).

<sup>2</sup> Letter from John Rolfe to Sir Edwin Sandys (January 1619/1620). See Kingsbury 1933: 241, 243; reprinted Finkelman 1986: 9.

<sup>3</sup> See, for example, 1 Corinthians 12: 13; Titus 2: 9–10; Philemon; Colossians 3: 22; and Ephesians 6: 5–6.

<sup>4</sup> See Jordan 1968: 481–511 for a discussion of the relevance of the idea of hierarchical ordering of races to American thought.

<sup>5</sup> For example, the 1910 census showed that 89 per cent of the African-Americans resided in the South. Even as late as 1940, the South was home to over three-quarters of the African-American population. See Bureau of the Census 1979. US Department of Commerce, 1979: 254.

<sup>6</sup> *State vs. Gibson*, 36 Ind 389 (1871) [quoting *The Philadelphia and West Chester R.R. Co. v. Miles*, 55 PA 209 (1867)].

<sup>7</sup> 55 Pa. 209 (1867).

<sup>8</sup> *West Chester and P.R. Co. vs. Miles*, 55 Pa. 209, (1867).

<sup>9</sup> 347 US 483 (1954).

<sup>10</sup> Professor Derrick Bell notes that the proponents of integration quoted this phrase repeatedly, in order to justify their belief that integration provides the proper route to equality. See Bell 1981.

<sup>11</sup> Brown, 347 US at 494 (quoting Brown vs. Board of Educ., 98 F. Supp. 797 (D. Kan. 1951)) (emphasis added).

<sup>12</sup> President Lyndon B. Johnson, Commencement Address at Howard University, *To Fulfill These Rights*, 4 June 1965.

<sup>13</sup> For a discussion of the racism embedded in America's efforts to desegregate its public schools, see Brown 1992.

<sup>14</sup> See for example, United Steel Workers of America vs. Weber, 436 U. S. 948 (1979).

<sup>15</sup> See for example, Fullivove vs. Klutznick 448 US 448 (1980); Metro Broadcasting, Inc. vs. Federal Communications Commission, 497 US 547 (1990); and Adarand Constructors, Inc. vs. Peña, 515 US 200 (1995).

<sup>16</sup> 438 US 265, 407 (1978).

<sup>17</sup> See San Antonio vs. Rodriguez, 411 US 1, 29 (1973).

<sup>18</sup> 438 US 265, 291 (1978).

<sup>19</sup> 438 US 293 (1978).

<sup>20</sup> 438 US 306, (1978).

<sup>21</sup> 476 US at 276 (1986). This opinion was a plurality opinion written by Justice Powell and joined by Burger and Rehnquist. Justice O'Connor joined all but Section IV of the opinion and wrote a separate concurrence. Justice White made the fifth person in the majority. His separate opinion concurring in judgement simply stated that the layoff policy was no different than discharging Whites and hiring Blacks until the suitable percentage of Blacks in the workforce was achieved.

<sup>22</sup> 488 US 469 (1989).

<sup>23</sup> 497 US 547 (1990).

<sup>24</sup> See Metro Broadcasting, Inc. vs. FCC 497 US 547 (1990) (holding that the Federal Government's use of racial classifications for benign purposes only needs to satisfy intermediate scrutiny).

<sup>25</sup> 539 US 306 (2003).

<sup>26</sup> 539 US 244 (2003).

<sup>27</sup> Parents Involved in Community Schools vs. Seattle School District No. 1, 551 US 701 (2007)

<sup>28</sup> Miller vs. Johnson, 515 US 900, 911 (1995).

<sup>29</sup> Fisher vs. University of Texas, 631 F. 3d 213 (5<sup>th</sup> Cir. 2011) *cert. granted* 132 S. Ct. 1536 (2012).

<sup>30</sup> Shelby County vs. Holder, 679 F. 3d. 848 (D.C. cir. 2012) *cert. granted* 133 S. Ct. 594 (2012)

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