Racial Difference as Violence: Colorblindness and Post-racialism in Anti-Affirmative Action Court Cases

A thesis

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Abstract

This thesis uses Critical Race Theory (CRT) and Frantz Fanon's theory of violence to explore the questions: What discourses on race and affirmative action have the Supreme Court constructed and how do they connect to larger U.S. ideologies surrounding race? To answer these questions I conduct a Critical Race discourse analysis of three anti-affirmative action court cases: *Grutter v. Bollinger* (2003), *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), and *Abigail Fisher v. University of Texas Austin* (2013). I describe the Court's use of a "race-neutral aspiration" discourse, a "cultural deficit" discourse, and a "White racial innocence" discourse to undermine affirmative action. I argue that these discourses are connected to the racial ideologies—colorblindness and post-racialism—where racial difference is violent toward people of color, as it decouples race from power. The conclusion of this thesis discusses this violence at selective universities, particularly through diversity.

Keywords: Affirmative Action, Colorblindness, Post-racialism, Violence, Higher education, Diversity

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Racial Difference as Violence: Colorblindness and Post-racialism in Anti-Affirmative Action Court Cases

Although the majority of colleges and universities in the country admit most applicants who meet their minimum requirements, selective institutions of higher learning have become the "guardians" who delegate access to societal influence and power (Guinier, 2003). People of color have attended selective and White institutions of higher education in the United States since the mid nineteenth century, and the courts have played a significant role in discussions about their access to these institutions (Bowen & Bok, 2000). [1] The Supreme Court case *Brown v. Board of Education* (1954) put an end to legally permitted segregation in schools, which applied to the many segregated universities in the South (Bowen & Bok, 2000). Discussions around equal educational opportunities for Blacks continued throughout the late 1950s and early 1960s, and in June 1965, President Johnson delivered a speech at Howard University that would move legislation around race beyond that of nondiscrimination to incorporate more vigorous forms of affirmative action (Bowen & Bok, 2000). As a result, the early and mid 1960s witnessed an increase in Black populations in highly selective universities.

With the growing numbers of Black students, White higher education institutions assumed that Black students would "naturally fit in," but some Black students were disillusioned when entering into predominantly White spaces (Bowen & Bok, 2000, p. 7). However, despite the disillusionment, the federal government retained support for affirmative action. The government not only encouraged, but mandated affirmative action (Bowen & Bok, 2000, p. 8).

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[1] When referring to "White institutions" I not only mean predominantly White institutions, but institutions with historical origins for exclusively serving Whiteness and White people.

In this thesis, I use Critical Race Theory (CRT) and Frantz Fanon's theory of violence to explore the questions: What discourses on race and affirmative action have the Supreme Court constructed and how do they connect to larger U.S. ideologies surrounding race? To answer these questions I conduct a critical race discourse analysis of three anti-affirmative action[2] court cases: *Grutter v. Bollinger* (2003), *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), and *Abigail Fisher v. University of Texas Austin* (2013). In my analysis, I describe the Court's use of a "race-neutral aspiration" discourse, a "cultural deficit" discourse, and a "White racial innocence" discourse to undermine affirmative action. In looking at the language of the Court I argue that these discourses are connected to the racial ideologies, colorblindness and post-racialism, where racial difference is violent towards people of color as it decouples race from power. The discussion of this thesis focuses on how these discourses and ideologies can be taken up by selective universities, especially through conceptions of diversity.

A Background on Anti-Affirmative Action Court Cases

The Civil Rights Movement made racial diversity more relevant to colleges and universities in the 1960s and 1970s. Students of color protested on college campuses for the recruitment of minorities, residential space, curricula focusing on race and ethnicity (African-American Studies, African Studies, Africana Studies, Chicano/a Studies, Asian-American Studies, Tribal Studies, Ethnic Studies, etc.), financial support, and access to

[2] I refer to these cases as "anti-affirmative action" court cases because the cases continually work to challenge and limit the implementation of affirmative action. I also do this to align myself with the way that CRT scholars have referred to the cases.

the resources at selective institutions. Although diversity was seen as something that improved the quality of schools as it "enrich[ed] the education of all," equitable education for Blacks was not a primary consideration of these institutions (Bowen & Bok, 2000).

For civil rights leaders equal educational opportunities for Blacks, and not racial diversity, was the focus of their work that led to the *Brown v. Board* decision. Derrick Bell (1995a) likewise claims that desegregation, while putting Blacks in the same schools as Whites, did not provide equal education for Blacks. The quality of education for Blacks in White institutions became inconsequential to these White institutions as long as Blacks were present in those spaces (Bell, 1995a). The legal strategy behind desegregation is further explained by the concept of interest convergence. With interest convergence, in order for resources to be redistributed toward the education of Blacks, there needed to be an inherent interest for Whites that did not disrupt White privilege: "Whites simply cannot envision the personal responsibility and the potential sacrifice…that true equality for Blacks will require the surrender of racism-granted privileges for Whites." (Bell, 1995b, p. 22)

Supreme Court cases consistently spur conversations around racial diversity and equal education opportunity within higher education, particularly in admissions practices. Legal opposition to affirmative action quickly arose upon its creation. *University of California v. Bakke* (1978) deemed the use of racial quotas in admissions

unconstitutional; *Adarand Constructors v. Pena* (1995) applied strict scrutiny[3] to all court cases concerning race; *Gratz v. Bollinger* (2003) held that a point or ranking system attached to race in admissions was unconstitutional; *Grutter v. Bollinger* (2003) established that race-conscious affirmative action could be used in an effort to attain a critical mass of underrepresented populations to enjoy the "educational benefits of diversity"; *Parents Involved in Community Schools v. Seattle School District No. 1* (2007) decided that voluntary public school integration plans were unconstitutional unless de jure discrimination was proven. These cases provide the foundations for the *Abigail Fisher v. University of Texas Austin* (2013) case and contribute to the data and context of my analysis. The precedents set by these previous cases inform the current language of the Court. In this most recent case heard by the Supreme Court at the start of its 2012-2013 term, Fisher, the plaintiff, questions if race-conscious affirmative action can ever be narrowly tailored enough or effective enough to justify its use. As the decision for Fisher has yet to be announced, I only examine its oral arguments in this thesis.

I selected *Grutter v. Bollinger* (2003) because its role in defining the purpose of affirmative action as the "educational benefits of diversity." This case ruled that the University of Michigan Law School had a compelling interest in promoting diversity and that the university could take a race-conscious admissions approach only if race was combined with other factors, all on an individual basis. However, this case had a large

[3] There are two major tests that the use of race has to pass under the Court's declaration of strict scrutiny. There must be a "compelling interest" for the government and the policy or practice has to be "narrowly tailored" to that interest.

part in changing the focus of affirmative action's "compelling interest" from redress for past discrimination against people of color, to "obtaining the educational benefits that flow from a diverse student body" (*Grutter v. Bollinger*, 2002). This shift demonstrates the Court's use of a color-blind ideology given that in the case race is no longer connected to historical oppression in the context of higher education.

Along with *Grutter,* I selected the case *Parents Involved in Community Schools v. Seattle Public Schools* (2007) for its significant impact on altering the *Brown v. Board* (1954) decision. In *Parents Involved,* "the landmark *Brown v. Board of Education* (1954) decision was turned on its head to advantage White students" (Ladson-Billings, 2009, p. 111) because high school integration was placed in the same category as affirmative action, making race neutrality in integration practices necessary. Justice John Roberts's opinion epitomizes this overturning of *Brown v. Board* with his strong emphasis on race-neutrality. In his opinion he claims, "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race," which signals the Court's transition to a post-racial ideology (*Parents Involved in Community Schools v. Seattle Public Schools No. 1,* 2007).

Lastly, *Abigail Fisher v. University of Texas Austin* (2013) is a recent case that has reached the Supreme Court, and if decided in favor of Fisher, then it is likely that race-conscious admission practices on college campuses will be drastically impacted. As Bowen & Bok (2000) state, the "imposition for this kind of race-neutral policy would presumably take Black enrollments at many of these selective institutions most of the

way back to early 1960s levels, before colleges and universities began to make serious efforts to recruit minority students" (p. 39).

Theoretical Conversation

In this thesis, race and racism are central concepts. I define race as a fluid social category, historically constructed to develop notions of difference (Bonilla-Silva, 2010). The term racial difference alludes to the stratification that occurs through the oppositional construction of White and non-White. A site of racial difference is a moment in the process of constructing race where these racialized actors in a society are affected materially because "all actors in [the] racialized society are affected materially" (Bonilla-Silva, 2010, pp. 15-16). When I speak of the material consequences of race and racism I focus on the external objects; personal relationships; human rights; civil liberties; political, social, and economic powers; and immunities important for human well-being that are consistently denied to people of color (Harris, 1993). This denial occurs directly and indirectly through racist policy, law, and other ideological mechanisms.

Racism is a social system based on race that works in the economic, political, social, and ideological structures of society, to create a hierarchy of dominance and subordination that privileges Whiteness. There are privileges inherent in Whiteness that are held by White people, regardless of whether they are aware of them (McIntosh, 1992; Leonardo, 2004). Whiteness—or the right to a white identity—has historically been defined by what it is not, granting exclusive rights and benefits to those who are legally and culturally defined as White (Roediger, 1991; Jacobson; 1998). This definition is developed through a social relation to Blackness as "the assigned political, economic, and

social inferiority of blacks necessarily shaped white identity" (Harris, 1993, p. 1736). This inherent value in Whiteness above Otherness—those who are not white--shapes white supremacy, which is the ideological, structural, and systematic maintenance of White superiority.

Critical Race Theory

Critical Race Theory (CRT) is a field stemming from Critical Legal Studies (CLS) that looks at the law as an instrument of White supremacy and examines the fundamental role that race plays in U.S. society (Crenshaw et al, 1995). Core tenets of CRT include the normalcy and endemic nature of racism that inhabits our daily lives; the reinterpretation of ineffective civil rights law; the challenge to claims of objectivity, neutrality, and meritocracy; and the foundational role of property rights in shaping racist institutions (Crenshaw et al., 1995; Ladson-Billings & Tate, 1995; Ladson-Billings, 2000; Solórzano, 2013). CRT also values the building of communities at the margins where race, gender, and class domination meet and intersect (Cho et al., 2013; Crenshaw, 1991). In order to build communities at the margins, and to address the specific needs of several ethnic/racial groups, various branches of CRT have emerged such as Latino/a Critical Race Theory (LatCrit), Asian Critical Race Theory (AsianCrit), and Tribal Critical Race Theory (TribalCrit) that emphasize the role of race and racism in issues such as immigration, language, identity politics, skin color, sovereignty, and culture (Brayboy, 2004; Brayboy, 2005; Brayboy 2013; Chang, 1993; Chang, 1998; Delgado Bernal, 2002; Espinoza, 1990; Hernandez-Truyol, 1997; Montoya, 1994; Solórzano & Bernal, 2001; Villalpando, 2003)

Gloria Ladson-Billings and William Tate (1995) introduced CRT to the field of education, and it is now used as an analytical tool to understand the intersection of race and power in the education system (Dixson, 2013; Harris, 1993; Ladson-Billings, 2013; Ladson-Billings & Tate, 1995; Vaught, 2011). Conversations of Critical Race Theory in education have addressed issues like the segregation and resegregation of schools (Dixson, 2013), the racialized epistemologies and cultural capital of students of color (Ladson-Billings, 2000; Yosso, 2005), the need to disrupt racist education structures and policies, the development of critical race pedagogies (Gillborn, 2005; Lynn, 1999; Vaught, 2011), and the process of engaging in critical race praxis among others (Vaught & Hernandez, 2013).

CRT scholars have worked to disrupt majoritarian and dominant stories (Delgado, 1989), discourses, structures, and policies by mapping out the power dynamics of various educational contexts, and using methodologies of research that work to challenge racism (Delgado, 1989; Delgado, 1990; Ladson-Billings, 2000; Guinier & Torres, 2002; Vaught, 2008). Inherent in this disruption of dominant power structures is valuing the experiential and cultural knowledge of people of color, and some scholars have looked to disrupt dominant scholarship through the methodology of counter-storytelling (Delgado, 1989). Though I do not use counter-storytelling in this thesis, I borrow its value for challenging positivism and objectivism in dominant discourses of the law.

My thesis builds on the foundation of research done by CRT scholars around affirmative action and diversity in higher education (Anderson, 2007; Brayboy, 2003; Delgado, 1991; Delgado & Stefancic, 2000; Guinier, 2000; Guinier, 2004; Harris, 1993;

Harris and Kidder, 2005; Lawrence, 2001; Matsuda, 1991; Matsuda & Lawrence, 2001; Matsuda et al., 1993; Morfin et al., 2006; Solórzano et al., 2002; Yosso et. al, 2004; Wade, 2004). These works have mapped out the legal rationales used to justify or combat affirmative action; examined and challenged the claim that the U.S. Constitution is color-blind, objective, or neutral; explained the pitfalls of race-neutrality and the need for race-conscious policy; discussed the hate speech and racist conditions that students of color experience regularly in higher education; and outlined the ineffectiveness of diversity rhetoric to address issues of racism and discrimination. With this, these scholars have called for more expansive affirmative action within higher education

Whiteness as Property and Affirmative Action. One concept that is foundational to my theoretical understanding of affirmative action is "Whiteness as Property." While I do not extensively engage with the Whiteness as property framework throughout the thesis, it provides a context and backdrop to my understanding of race and affirmative action, which is why it calls for explanation. Cheryl Harris (1993) discusses the concept of Whiteness as property in relation to affirmative action. In outlining a brief history of race formation in the U.S. she discussed how property rights consist of a legal understanding of custom and command. Harris (1993) explains how existing "customs", cultural norms, and social relations, that exclusively gave rights and privileges to people who were defined as White, were codified and strengthened through the system of Black chattel slavery and the usurpation of Native lands. This codification was justified throughout history using racist doctrine and ideologies, such as designated "objective" scientific research like eugenics, to prove the inherent value of Whiteness. Though

particular scientific understandings have changed, different ideologies have been used in history to naturalize a belief in White superiority and an expectation that Whiteness should be valued and supported by the law. She explains that Whiteness is a form of property using James Madison's definition—"everything to which a man may attach a value and have a right" (as cited in Harris, 1993, p. 1726) —because it historically and currently contains all the functions of property such as the right to use and enjoyment and the right to exclusivity (Harris, 1993).

This value of Whiteness as natural and objective is masked by ideologies such as color-blindness and post-racialism that distract from the real material conditions of people of color. Affirmative action is an essential tool to "delegitimize the property interest in whiteness" (Harris, 1993, 1778). To delegitimize the property interest of Whiteness is to challenge the positivism of the Court and to expose the customs that work to subordinate people of color. Though affirmative action works to do this, Harris (1993) refutes the claims that affirmative action is a system of privileging Blacks or increasing the property value of Blackness, stating that affirmative action "is based on principles of antisubordination, not principles of [B]lack superiority" (Harris, 1993, p. 1785). To work towards principles of anti-subordination the discourses surrounding affirmative action must align with the material realities of people of color.

Response to Dominant Frameworks of Affirmative Action. As a Black male student applying to selective institutions of higher education, I was often exposed to the concept of diversity, as several predominantly White institutions tried to prove to me through their recruitment materials that they were diverse. I often wondered where this

idea of diversity came from and what it actually meant. I also wondered why recruiters from these institutions often avoided discussing race in relation to this diversity. When I entered into college I was told informally through conversations with my White peers and formally through a university funded conservative publication that I was an unqualified "diversity acceptance" that only got into the institution because of affirmative action. This was a moment where I recognized the connection between affirmative action and diversity, and how channels of informal and formal discursive practices on university campuses can enact harm on students who looked like me.

This experience revealed to me the power of discourse. In breaking down the comments of my peers, which ultimately were not refuted by my institution, I found that it was related to a larger discourse on campus that placed students on a binary of qualified or unqualified. These qualifications were said to be based on "merit" and according to this discourse, not all students were accepted to the institution based on merit alone. Diversity was another reason why students were accepted, and these forms of diversity, such as race, had no connection to merit. Although the institution did not formally practice affirmative action in their undergraduate admissions, this discourse persisted. Whiteness exclusively owned the designation as qualified and White students were the only students that were seen as evaluated on the basis of merit alone. Blackness was inextricably connected to diversity, which was desired by the university, but was not connected to any form of knowledge or added competence by this larger discourse.

Mari Matsuda & Charles Lawrence (1998), explain how the appeal to meritocracy is the most used weapon against affirmative action, going on to discuss how the opposite

of merit is privilege and that merit is always trumped by privilege. These two scholars contest this idea of merit by discussing White legacy admits—children of alumnus admitted to institutions—as having significantly less "merit," than their peers. To refute the claim that unqualified students of color were taking the spots of white students, Matsuda & Lawrence also discuss how White women have been the primary beneficiaries of affirmative action (p. 56), and how no challenge has come against these two populations. In response to these dominant definitions of qualified and merit, the two scholars assert a new definition of qualified that asks new questions to distinguish merit. These questions think of students holistically, considering the role that they will play following graduation. They ask how students will have the capacity to serve their communities and to serve the needs of those excluded from larger societal power structures, which is essential to productive democratic processes. They use these questions to emphasize the value of the experiential knowledge that students of color enter universities with. This reframing of affirmative action threatens the admissions structures that privilege Whiteness in these institutions.

Though CRT scholars have collectively supported the use of affirmative action, describing it as a tool used to work toward the outcomes that would occur if racism did not exist, some have questioned how the law constructs affirmative action through a dominant lens. For example, Richard Delgado (1991) explains how the current framing of affirmative action is "neither backward looking nor rooted in history" (p. 1223). He states that the goals of affirmative action are not focused on promoting people of color or addressing the fact that "we have been unfairly treated, denied jobs, deprived our lands,

or beaten and brought here in chains." Current conceptions and legal discussions of affirmative action disregard these truths while calling the policy a move toward a "fresh start" (p. 1223) in a decontextualized and a-historical manner. Also, in various affirmative action court cases, the Supreme Court focuses on the front end admissions practices, disregarding the effectiveness of affirmative action in achieving its outcomes. Dominant frameworks of affirmative action have described it as unfairly privileging Blacks, despite the fact that its outcomes do not changed the subordinated status of Blacks and the inherent privileging of Whiteness through Whiteness as property (Harris, 1993).

In response to the dominant framework of affirmative action, CRT scholars emphasize the outcomes of affirmative action at the legal, institutional, policy, and structural level; and discuss affirmative action as a tool to work toward expansive equality and equal participation (Crenshaw, 1988; Matsuda & Lawrence, 1998). CRT also argues that to look at affirmative action from the front end diminishes this goal of equal participation, but to look at the outcomes can lead to its productive expansion. For example, Lani Guinier (2000) demonstrates the success of affirmative action at the University of Michigan Law School by looking at data surrounding three generations of students of color who graduated from the law school during the time when the university practiced affirmative action. She suggests that students of color, who were the intended beneficiaries of affirmative action, better accomplished the mission set out by the university to be "contributors to the public interest" and to "contribute in diverse ways to the well-being of others" (p. 566). This occurred despite the fact that the criteria for

admissions did not align with these goals. She suggests that affirmative action become *confirmative action* as "many of the criteria used to select affirmative action's beneficiaries should be confirmed and broadened to select all incoming students" (p. 566). However, Guinier (2000), Matsuda & Lawrence (1998), and other scholars acknowledge that to expand affirmative action will require a reframing of how it is viewed and practiced.

Building on CRT's Work in Affirmative Action. As I describe in the following section, I build on these foundational works by integrating Frantz Fanon's theory of violence and Cho's framework of post-racialism. In the context of anti-affirmative action court cases, violence (Fanon) occurs at the site of racial difference through the deployment of color-blind and post-racial ideologies (Cho) that decouple race from power. By decoupling race from power I mean that the discourses that reinforce these ideologies mask the privileging of Whiteness that exists in the U.S. education system. This works to naturalize the inequities and violent conditions that students of color experience in racist higher education institutions that inherently value Whiteness over people of color. Inequitable conditions are portrayed as natural or captured within the actions of individual students of color, instead of the racist structures of these institutions.

Frantz Fanon was particularly interested in the process of decolonization in the context of African nations. He participated in the Algerian anti-colonial movement in their fight for independence. During this struggle, Fanon theorized the structures of colonial violence that were based on the active separation of the "settler" (colonizer) and the "native" (colonized) and the naturalization of this separation through the construction

of race and the deployment of colonial force. He challenged this binary of colonizer/colonized by emphasizing the power of the native and the need for anti-colonial violence in order for decolonization to occur.

In defining violence I focus on power. Violence is a powered force that harms, violates, abuses, confines, devalues, scars, appropriates meaning, and exists throughout society (Lawrence & Karim, 2007). Though not directly engaged with in this thesis, this characterization of violence connects to the work of Michel Foucault (1995) who discusses how power organizes the world through discourse. Bruce Lawrence and Aisha Karim (2007) describe Foucault's contribution:

> One of the most important contributions of Foucault's work is his suggestion that historical epochs are ordered and structured by epistemes (systems of knowledge) which regulate what can or cannot be articulated at the historical juncture. He demonstrates how data, facts, and methodologies are themselves products, effects produced by the ways in which power organizes the world through discourse. In other words, data, facts, and claims to objectivity are invested with power relations and allegiances. They are not preexistent entities awaiting identification or discovery. (Lawrence & Karim, 2007, p. 444)

This idea that history is articulated through the lens of power and regulated by discourses relates to Fanon's work with violence. Fanon discusses how in colonial power relations the historical articulation works to separate the colonizer/colonized by maintaining a structure that empowers Whiteness and exploits the Other. According to Frantz Fanon (1963), anti-colonial violence is necessary to transform the colonial

relationship of racial domination and subordination. While examining violence in a colonial context, Fanon claims that violence is inextricably linked to power structures and dynamics. This power is established often in invisible modes of historical domination and is maintained in every day interactions between the colonizer and colonized that naturalize the existence of violence. For example, violence is enacted through the historicizing of colonization as an act of civilizing the Other. This discourse enacts violence by dehumanizing the Other and characterizing them as uncivilized, but it also justifies the violent daily acts of the colonizer, while simultaneously protecting the colonizer's conscious. In the colonizer's conscious, this violence is justified because it is necessary to civilize a "savage." This violence manifests in different ways in different contexts, but is part of a process that conditions the racialized Other to be complicit to a system of racial domination, reifying a White supremacist social hierarchy.

In this thesis I use Fanon's conception of violence to understand the discourses of race in Supreme Court cases. The violence in these discourses is not physical violence but this discursive violence occurring in these cases is connected to the body. Fanon captures this idea by describing how White supremacist structures use the body as a vessel for colonial violence, producing within Black bodies the complicity to an atmosphere of intimidation and subordination. According to Fanon (1963), this violence produces a "muscular tension" in the Other that needs an "outlet" (Fanon, 1963, p. 54), and this outlet can come through the use of anti-racist violence to reshape history and to begin the process of decolonization.

This reframing of the colonial relationship in his seminal text *The Wretched of the Earth* (1963) was in itself a form of anti-colonial violence as he challenged discourses that worked toward the naturalization of the colonial order. While acknowledging the difference of the context, several aspects of Fanon's theory of violence are helpful in understanding the existence of violence in race relations within the U.S. today, particularly within the education system.

I use a concept I call "racial difference as violence," which borrows from and integrates Frantz Fanon's conception of violence with the racial ideologies of the Court. I define racial difference as violence as the process of decoupling race and power through the simultaneous hyper-visibility of racial or cultural difference with the invisibility of racial power. This occurs through discourses and ideologies that work to reaffirm that racial difference is a natural distinction in society that should not be disturbed; it occurs through the construction of racial difference as a concept of the past that has little to do with modern day issues; it occurs through the disregard of the impact of race-based historical oppression; it occurs through the masking of White privilege in society by reinforcing the "progress" that has been made. All of these are examples of violence that are enacted through the decoupling of race from power in order to reinforce a systematic racial domination that privileges Whiteness and subordinates people of color.

Discursive and material violence are prevalent in the context of anti-affirmative action court cases and higher education. Discourses used by the Court or schools work to justify the discrimination and material limitations experienced by students of color. When racial difference as violence is deployed through discourse I refer to it as discursive

violence. I refer to material violence when violence enacts economic, psychological, or epistemological harm to people of color. In the context of higher education, this definition of material violence includes but is more than just financial resources. It is more closely related to power dynamics and the distribution of power within institutions of higher learning. I emphasize that racial difference as violence is a pervasive constant, particularly in a post-racial society, which mediates conversations of diversity on college campuses.

Methodology: A Critical Race Discourse Analysis

In this thesis I use discourse analysis to see what discourses are used by the Supreme Court and how they are used in relation to race and affirmative action. James Gee (2011a; 2011b) describes discourse analysis as the study of language-in-use. This methodology acknowledges that language and the practices surrounding language create meanings that shape social groups, cultures, and institutions. In looking at the anti-affirmative action court cases, I explore how the language that is used produces meaning around race and affirmative action that can then be taken up by post-secondary institutions.

With a line by line analysis of the oral arguments' transcripts, I looked particularly at how words and phrases constructed meanings. Using the index of the *Fisher* case oral arguments, provided by the Court, I identified the ten most frequently used words directly related to race and affirmative action. In doing so, I connected words that belonged together such as "critical" and "mass" into "critical mass," counting them as one word. I also disregarded identifiers such as the word "Justice" or "Texas" that

were used to address persons, places, and court cases. These were then the words I used for my analysis of all three cases.

After I created the top-ten list, I pulled out all the quotes that used these words in the text. I analyzed how these quotes, and the use of the words in these quotes built meaning around race and affirmative action by answering Gee's (2011a) discourse analysis questions. Themes and discourses were then identified based on the common threads that became apparent in the text.

To do a "Critical Race" discourse analysis, I borrowed from the work of Critical Race scholars (Vaught, 2008; Duncan, 2008). Vaught (2008) discusses the complexity of engaging in a Critical Race methodology. She explores tension between attending to power inequities with an aim of social transformation, while maintaining an ethnographic responsibility to participants. This question of responsibility is explored in the context of interviewing racist White participants in a school. Though this is an ethnographic endeavor, I take strategies from this work when engaging in my own discourse analysis. To "write against racism" Vaught (2008) emphasizes applying race and racism as a central foci, engaging explicitly with CRT frameworks, using inquiry for radical research, "reclaiming culture" by highlighting liminal positions, and focusing on larger structures and practices that are not strictly situated in individuals. In supplementing Gee's discourse analysis questions with these Critical Race methodological insights, I engage in a Critical Race discourse analysis.

Though I use the term discourse throughout the thesis, the discourses that I focus on have also been discussed as majoritarian stories, master narratives, or dominant

discourses (Delgado, 1983; Ladson-Billings, 2000). These are discourses that are supported by oppressive racial power structures (Ladson-Billings & Tate, 1995). In looking at these discourses, I specifically used the CRT frameworks of color-blind Constitutionalism (Gotanda, 1995), reactionary colorblindness (Haney-Lopez, 2007), and post-racialism (Cho, 2009) to understand how the discourses of the Court connected to theoretical understandings of race and racism. By conducting a Critical Race discourse analysis of *Grutter, Parents Involved,* and *Fisher* I explore how racial difference was used in a way to decouple race from power in each case.

This thesis has implications particularly for understanding discourses on race and affirmative action, for expanding our understanding of post-racialism, and for understanding racial violence. In Chapter 1 I discuss the Court's transition from color-blindness to post-racialism and the concept racial difference as violence. With three CRT frameworks: color-blind Constitutionalism (Gotanda, 1991), reactionary colorblindness (Haney-Lopez, 2007), and post-racialism (Cho, 2009) I look at the ideologies held by the Court and argue that reactionary colorblindness served as a precursor to the Court's emerging use of post-racialism. I also argue that throughout the Court's transition from a color-blind ideology to a post-racial ideology, racial difference consistently served as a site of violence against students of color. Both ideologies and the concept racial difference as violence are explained further in Chapter 1. Following the explanation of the theoretical framework, Chapter 2 does a critical race discourse analysis of the *Grutter* and *Parents Involved* oral arguments. In these cases I look at the "race neutral aspiration" discourse and "cultural deficit" discourse in relation to color-blindness and an emerging

post-racialism. Chapter 3 focuses on the *Fisher* oral arguments and the "white racial innocence" discourse that connects to post-racialism. The discourses in the oral arguments are all analyzed in connection to the violence they enact against students of color. Using Fanon's theory of violence Chapter 4 concludes by revisiting racial difference as violence in the context of selective universities by examining a diversity brochure at one elite selective university. It also discusses further implications for discourses around race and affirmative action.

Chapter 1: From "Our Constitution is Colorblind" to "A Nation of Minorities" to "A More Perfect Union": The Legal Transition from Color-blindness to Post-racialism

On March 18, 2008, Barack Obama gave a speech entitled "A More Perfect Union," a brilliant but troublesome response to the national discussion surrounding his racial identity and allegiances. This conversation stemmed from his mixed race identity and controversial remarks made by his reverend, Reverend Jeremiah Wright, who claimed that the U.S. was receiving retribution on September 11th for its own violence done in the usurpation of Native lands, its continual acts of war and imperialism, and its denial of equal rights to Blacks and women. Obama's speech, which references the preamble of the U.S. Constitution, renounces the words of Reverend Wright and discusses the need to break down racial divisions within the country in order to achieve the vision of our founders to become "a more perfect union."

In this speech, Obama enacts the distancing move, a feature in Cho's (2009) post-racialism framework where practitioners distance themselves from "civil rights advocates and critical race theorists,"(p. 1603), moving away from acknowledging racism, color-blindness, or the need for "political correctness." A footnote in Cho's (2009) description of the distancing move discusses a news article in the *Chicago Tribune* that exposes the irony of Obama "transcending race" to reach the presidency while distancing himself from the same Black leaders that made it possible for him to be in the position in the first place (as cited in Cho, 2009). This feature of post-racialism and

others can be seen as operating within the Supreme Court as well, especially in anti-affirmative action court cases.

In this chapter, I establish the theoretical groundwork for my discourse analysis of the anti-affirmative action court cases, looking closely at the interaction between three racial ideologies: color-blind constitutionalism (Gotanda, 1991), reactionary colorblindness (Haney-Lopez, 2007), and post-racialism (Cho, 2009). The Supreme Court transitions from colorblind ideologies to a post-racialism, which is demonstrated in the anti-affirmative action court cases. I explain how these ideologies connect to each other and are distinct from one another. I then discuss how they operate in a way that enacts violence against people of color. In this transition the Court consistently decouples race from power at the site of racial difference, but this occurs in different ways with each ideology.

With Fanon I explore how violence is enacted with the naturalization of inequality and dominance through these three racial ideologies. I make the theoretical argument that racial difference as violence begins to occur with the Court's use of reactionary colorblindness as a precursor to post-racialism. This occurs as the Court moves toward racial anticlassification and increases its emphasis on ethnicity, contributing to the concept of "a nation of minorities." This process makes racial difference hyper-visible as acknowledging difference becomes a value. It simultaneously makes racial power invisible through the collapse of race and ethnicity.

Racial Ideologies of the Court: From Colorblindness to Post-racialism

When discussing ideology, I draw from Antonio Gramsci (1971) who discusses ideology as a system of ideas and views that are connected to power and used in the process of justifying the actions of dominant groups (Gramsci, 1971). Ideologies legitimate domination and naturalize the different status and power of social groups. A racial ideology in this context is a framework constructed with legal themes, discourses, and ideas that confine how the Court views and uses race, ultimately to justify and/or rationalize a racialized social order. Colorblindness and post-racialism are legal ideologies as well as racial ideologies, rationalizing racial inequality and domination in the oral arguments and decisions of the Supreme Court.

Although I attempt to demonstrate a transition by the Court in its use of these racial ideologies from colorblindness to post-racialism, I also acknowledge that this is not a neat and confined process that occurs with strict linearity. These ideologies happen concurrently to complicate the legal landscape. Gotanda (1991) discusses how the Court shapes and employs the ideology color-blind Constitutionalism, which asserts that the Constitution is colorblind. This is a racial ideology that is beyond not "seeing" race. Gotanda discusses color-blind Constitutionalism as reinforcing positivism and objectivism. He describes a collection of legal themes that stem from Supreme Court decisions that have treated the U.S. Constitution as an objective document with regard to race. In this interpretation, the U.S. Constitution becomes a document absent of race, where the racism present in the document that socially, economically, and politically advantages Whites is a naturalized order. For example, he discusses how historically,

mixed race individuals were defined by the amount of Black blood they had with terms such as “quadroon” and “octoroon.” This idea was used in court cases and worked to naturalize the idea that there existed a purity of blood that only White people possessed. Despite the fact that ideas surrounding race have changed throughout history and have impacted the decisions of the Court in various ways, this ideology ignores the foundational role that race plays.

Haney-Lopez (2007) explains that the Court’s use of reactionary colorblindness uses anticlassification and ethnicity to interpret and equate systematic racial discrimination against people of color with the use of racial remedies. As a result, race-conscious policies such as affirmative action are seen as a form of discrimination. This ideology protects Whiteness and contributes to the emergence of post-racialism.

Coming out of CRT scholarship, post-racialism is described as an emerging racial ideology that justifies the retreat from race as a central organizing principle in U.S. society (Cho, 2009). This ideology uses themes, discourses, and ideas surrounding racial progress and transcendence to separate race from powered contexts by implying that we are beyond systematic racial discrimination and the need for race-based politics. This claim is justified by “big events,” like the election of Barack Obama, that are used to prove the false concept of racial progression

The popular use of post-racialism has focused on the supposed declining significance of race and racial discrimination in American society. It is often characterized by the idea that we are beyond political correctness with regard to the use of race. Within popular media and culture the use of tropes and stereotypes of the

racialized Other even become necessary to demonstrate that race is no longer significant (Phelps, 2013). With post-racialism Whiteness is redeemed. This component is further discussed later in this chapter, exploring how Whiteness is restored to racial innocence.

Cho (2009) describes racialism as an era characterized by racialized values and decision-making. The era is organized and composed of individual and structural components of American society. Examples include the Jim Crow racialism and Civil Rights racialism. Post-racialists characterize Jim Crow and Civil Rights "racialisms" as overly determined by the use of race. Therefore in post-racialism there is a retreat from these values and a retreat from thinking of race as connected to power. Within post-racialism, the historical oppression only remains in previous racialisms. According to post-racialists, racism only occurred before the Civil Rights racialism and so is separate from current racial conditions. The ideology, post-racialism, views structural racism as an issue of the past. Current racism is depicted as only consisting of temporary individual actions done by racist individuals, and not in the structures, policies, and discourses that characterize this particular historical time period.

The Court's transition from color-blind Constitutionalism to post-racialism occurred through the use of reactionary colorblindness. In order to acknowledge this, an understanding of color-blind constitutionalism must be established. There are five legal themes in particular that characterize color-blind Constitutionalism. These legal themes are public/private distinction, nonrecognition of race, racial categories, formal race and unconnectedness, and theory of social change. The theme, nonrecognition of race, is particularly salient in color-blind Constitutionalism. The Court's use of nonrecognition of

race is based on the idea that the government's nonrecognition of race can lead to nonrecognition in the private sphere or personal lives of people. Gotanda (1991) explains how in order to engage in nonrecognition, racial characteristics must be classified, and then they must be recognized as non-White characteristics, followed by the active decision not to consider it. Though there is a decision to ignore it, there is still knowledge of the racial difference, which makes it impossible for it not to influence decision-making. Along with the nonrecognition of race, another legal theme in color-blind Constitutionalism is "formal race and unconnectedness", which establishes that race exists but that it is unconnected to meaning or a social reality. Race remains as a social construction that is insignificant and not tied to any forms of racial subordination.

These themes are supported by four types of race that are interchangeably deployed by the Court at different times. The four different conceptions of race are: status race, formal-race, historical-race, and culture-race. Status race is the traditional view of race used by the Court, which claimed that race was an indicator of social status, or the position that racial groups were naturally meant to hold in society. Status race was used in cases like *Dred Scott v. Sanford* (1857) to justify differential treatment[4]. Though status race is largely discredited today, it is used at times to protect intentional forms of racial subordination that imply racial inferiority (Gotanda, 1991, p. 257). Formal race interprets race as strictly a social construction. This interpretation allows the Court to "unconnect" race from historical oppression to discredit the impacts of racial power. The opposite of

[4] *Dred Scott v. Sanford*, (1857) found that African Americans were not citizens regardless if they were born in a free state, and therefore did not have the right to sue in a Federal Court.

formal race is historical race. When used within a color-blind ideology historical race often uses a stagnant definition of racial difference and oppression. Culture race views "Black" as being linked to cultural practices and beliefs. Though all these aspects of color-blind Constitutionalism connect to the emergence of post-racialism, this chapter focuses on the transition of formal race and unconnectedness to moral equivalence. I do this because moral equivalence is a driving force for the transition to post-racialism. Formal race and unconnectedness has to do with the understanding that race is a social construction that is unconnected to power. When this combines with "race as ethnicity," an aspect of reactionary colorblindness, and a "big event," it becomes moral equivalence.

Reactionary Colorblindness and Moral Equivalence. Over time, color-blind Constitutionalism opened the door for another form of colorblindness, reactionary colorblindness, and it is the precursor to modern day post-racialism. Reactionary colorblindness is "an anti-classification understanding of the Equal Protection Clause that accords race-conscious remedies and racial subjugation the same level of constitutional hostility" (Haney-Lopez, 2007, p. 2). Since race was "unconnected" from historical oppression and power by color-blind Constitutionalism (Gotanda, 1991), reactionary colorblindness asserted that race-conscious remedies for people of color could be considered the same as discrimination against Whites. As a result, the intent of the Equal Protection Clause for protecting marginalized communities of color was subverted and instead was used to protect White privilege.

In the context of the Court we see that color-blind Constitutionalism became insufficient in addressing the pressure experienced by the Court as proponents of

affirmative action continued to demand equality, particularly on college campuses. As a response, the Court, building on color-blind Constitutionalism, transitioned into reactionary colorblindness.

If color-blind Constitutionalism interprets the Constitution as neutral and objective, reactionary colorblindness took it a step further and made it so we were blind to the existence of racial hierarchies altogether. This occurred through "race as ethnicity" which is a key feature of reactionary colorblindness. Race as ethnicity is the legal collapse of formal race and culture race making race a social construction that was unconnected to power but connected to ethnic culture. This feature was used to help define Whiteness as connected to marginalization in order to justify their heightened protection by the Equal Protection Clause of the Fourteenth Amendment. Reactionary colorblindness occurred with the legal collapse of race and ethnicity. In *DeFunis v. Odegaard* (1974) opponents of affirmative action released amicus briefs and statements that became the primary argument for those working to develop an anticlassification understanding of the Fourteenth Amendment (Haney-Lopez, 2007, p. 16). These statements claimed that racism was illegal and that affirmative action was a form of racism. Race was understood as strictly a cultural characteristic with a strong emphasis on ethnic culture rather than structural racism, which made it possible for opponents of affirmative action to claim injustice. In the early twentieth century ethnicity served as a tool to minimize the social meaning of race, and to emphasize that differences in experiences happened because of culture differences, separate from racial categories or hierarchies. This move worked to devalue the racialized group politics and built

discourses defining racism as strictly overt and individual cultural discrimination. This use of ethnicity was engulfed by reactionary colorblindness to develop static definitions of ethnic groups that were not influenced by larger societal structures (Haney-Lopez, 2007). It also viewed assimilationist practices as solutions to any racial divides that existed; discrimination became a matter of ethnic minorities changing their culture in order to fit in with American society rather than actively working to tear down the barriers in their way.

Reactionary colorblindness developed an anticlassification understanding of the Equal Protection Clause, which protected Whiteness, making race-conscious policies equal to discriminating against Whites. Moral equivalence built on this and made race-consciousness immoral as issues of racism became an element of the past. Moral equivalence is the process of drawing equivalence between racial subordination and racial remediation through the belief that they are both racist processes that are morally wrong because of their use of race-conscious decision making. The Court, and particularly Justice Clarence Thomas, consistently used reactionary colorblindness to make it unconstitutional to recognize racial hierarchies in the logic of the law. Conceptions of power were discarded and the Court started its use of moral equivalence in *Adarand Constructor, Inc v. Pena* (1995). As Justice Thomas stated, "I believe that there is a moral [and] Constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality" (*Adarand Constructors Inc v. Pena*, 1995).

Strict scrutiny emerged from this case and transformed reactionary colorblindness into moral equivalence, a key component of post-racialism. This transformation served as a bridge to post-racialism as state and local courts were able to claim that de jure segregation was remedied and that integration practices were successful. In completing the payment for past de jure discrimination, the sole purpose of integration and affirmative action was transformed to the "educational benefits" of diversity. Though Justice Thomas used moral equivalence, it needed to be attached to a particular historical context. This context would occur with a big event that symbolically demonstrated racial progress and transcendence (Cho, 2009). The culmination of the decision for *Parents Involved in Community Schools v. Seattle Public Schools No. 1* (2007) and the election of President Barack Obama served as events that solidified the use of moral equivalence in a context of post-racialism. In *Parents Involved* the Jefferson County School District, which had once experienced legal segregation and claimed to have remedied it, along with Seattle Public Schools, which claimed a de facto segregation, were condemned for how they engaged in integrative practices. This ruling against them became possible only in a context where integration was no longer seen as a necessity to remedy past discrimination. Unless de jure discrimination was written into law, strict scrutiny was a tool that made it increasingly difficult to prove that racism existed in the logic of the Court. However, Jefferson County School District was pivotal in the emergence of a legal post-racialism that expanded with the election of Obama as they had proved in state and local courts that the impacts of desegregation were remedied. The existence of different contexts that claim the arrival of remediation ignore power that exists in racial difference

as progress is seen as a linear process that is achieved with time. This disregards the endemic nature of racism that exists in our education structures and that constantly needs to be disrupted in order to protect people of color.

Post-racialism. Though post-racial discourses have existed since the Reconstruction period in the U.S. with court cases like *Plessy v. Ferguson* (1896) (Barnes et. al, 2010), its reoccurrence in the 21st century as a racial ideology can be linked to a backlash to the symbolic election of the first Black president in 2008 (Cho, 2009). This event was used by post-racialists to legitimize the claim of racial progress in the U.S., and with race being collapsed with ethnicity through reactionary colorblindness, there was now space to claim that we are all "minorities" in some way, which became a foundational belief within post-racialism. Reactionary colorblindness served as a precursor to the current ideology of post-racialism by decoupling race from power through the equalization of racialized experiences. The belief that we were all oppressed at one time became prevalent and to justify the need for legal consideration of historical oppression on the basis of race and the use of race-conscious strategies became increasingly difficult.

Post-racialism is a current ideology that denies the centrality of race and the need for race-based decision-making due to perceived racial progress. The characteristic that most differentiates post-racialism from other racial ideologies like color-blind Constitutionalism and reactionary colorblindness is the use of a symbolic representation of racial transcendence or a "big event" (such as the election of Barack Obama) to prove the existence of racial equality. Post-racialism is enacted in specific ways within

schooling contexts and research has shown the importance of its consideration while understanding the structure of schools and while attempting to engage in praxis (Vaught and Hernandez, 2013; Vaught, 2013b). Post-racialism has four key features: racial progress and transcendence, race-neutral universalism, moral equivalence, and the distancing move (Cho, 2009). Racial progress and transcendence works on the premise that we have achieved racial equality. As a result race-based strategies are characterized as inherently less effective than race-neutral mechanisms, promoting a race-neutral universalism for U.S. institutions.

Not only are race-based policies less effective, but with moral equivalence they are characterized as equivalent to discrimination against white people, equalizing the dismantling of White privilege to the systemic racism facing people of color. Moral equivalence takes the movement toward "anticlassification" of the Equal Protection Clause that occurs through reactionary colorblindness one step further. Moral equivalence makes the discrimination against Whites as equally immoral as the racism experienced by people of color because of the assumption that we have achieved racial equality. To promote race-conscious remedies is seen as racist and regressive in a post-racial context. This denies the ability for there to be specificity in experience as the experience of people of color is forcefully assimilated to that of Whites, making their experience of discrimination the same. The immorality of discrimination against Whites is also conflated with any action that challenges White privilege. For this reason, there is a move by practitioners of post-racialism to distance themselves from a historically racialized and oppressive past.

This shifted the Court's use of formal race detached from history to the Court's use of historical race. There was an acknowledgement of the history of oppression that people of color experienced, but this was considered strictly a historical moment that had little to no impact on current race relations, especially since all ethnic groups within the U.S. were oppressed at some point.[5] Within the moral equivalence feature of post-racialism, the Court recognized that individual White ethnic groups were once oppressed, and therefore also needed protection from the Fourteenth Amendment in the same way that people of color needed protection. Building on this, with the acknowledgement that all people were once oppressed because of their race (which the Court collapsed with ethnicity) there was an understanding that race was pernicious. The danger of race was then used to justify the increased standards for passing the strict scrutiny test of the Court, and the overall need to retreat from race.

With this collapse of race and ethnicity, anti-essentialist arguments became popular in discourses about race, and with this defining race became difficult. Even people of color did not want to be defined by their race, especially with the many stereotypes that were tied to things like Blackness. This resulted in a distancing move: Black leaders who utilized a post-racial strategy distanced themselves from community and group political definitions of Blackness because it was depicted as a stagnant and

[5] The Naturalization Act of 1790 that combined all white ethnic groups into one racial category of White, constructed in opposition to Blackness. This concept of a White racial group is constructed differently within post-racialism as Whites emphasize their ethnic histories in order to build connections to a historically oppressed group. This includes them in the legal discourse surrounding equal protection and allows them the ability to claim racial discrimination when remedial race-conscious policies are deployed.

historical identity that clung to outdated ideologies of the Civil Rights period. With this multi-cultural practices became popular and people of color used culture race to define themselves. Learning and understanding culture is a valuable part of education; however, the Court used this to undercut movements toward racial equity. Though there is a need to acknowledge the specificity of an individual's position (Vaught and Hernandez, 2013), and to use it to work towards justice, these anti-essentialist arguments worked against the political organizing of racial groups. Organizations like the NAACP and political figures like Jesse Jackson, and academic fields like critical race theory, were seen as stuck in the past or cynics that only looked at the futility of racism. Instead of looking at these relics of the past, in post-racialism there is the emphasis of political figures that could embody Blackness while symbolically representing this multicultural or culture race approach (i.e. Barack Obama).

These racial ideologies are intertwined. However, the value of this analysis does not only lie in distinguishing the use of these ideologies. In fact there is a need to acknowledge that these ideologies work in tandem, building off one another as they are deployed sometimes simultaneously. The murkiness of their use is also important to recognize as it demonstrates the Court's strategic use of multiple meanings of race to reinforce and disguise racial subordination. And this subordination occurs with post-racialism's redemption of Whiteness.

Post-racialism and Redemption. As an undergraduate, on November 5th, 2008 I went to the academic quad of my university with many classmates, following the historic election of Barack Obama. In a euphoric atmosphere students cheered and chanted the now universal mantra of "Yes We Can" as they celebrated having our first Black president. At one moment, within a group of Black students who had clustered together on the quad, one Black student started singing the civil rights anthem "We Shall Overcome" and was joined by many of us standing in her vicinity. As the group began singing, a White student nearby joined in, slightly changing the lyrics of the song as she sang "we have overcome, today!" She was promptly joined by many of her peers, both White and Black as they sang the song together. Post-racialism made this example possible and it encapsulates the redemption of Whiteness. Cho (2009) states, "Here redemption is used mainly in a property sense, while secondarily in a quasi-religious sense – a process through which whiteness is decoupled from its problematic association with white supremacy" (p. 10).

Here, the redemption of Whiteness, a socio-cultural process where Whiteness is restored to its full value and is freed from its legacy of oppression (Cho, 2009; Cho, 1999), is restored to its racial innocence. This is a psychological and political freedom from the "burden" of race where White Americans no longer have to experience any form of White guilt. Along with this, they can feel superior to their racist predecessors, denying any self-implication to the racist structures that still exist. This redemption not only dissociates Whiteness from racist structures, there is a political denial that those

racist structures still exist and post-racialism posits that racism is strictly enacted by ignorant individuals (Barnes et. al, 2010, p. 975).

This is where the violence of post-racialism lies. It is not only in the portrayal of American society as racially transcendent, but in the act of disconnecting race from any racialized hierarchy or power. Because of this detachment through post-racialism, Whiteness is not only able to join the song originally used for the fight against racial oppression, but it has the power to change it and be celebrated for that change. The song is then changed to a message signaling the end to the fight for civil rights and racial equity. Moments like these coupled with headlines that cry "Racial Barrier Falls in Decisive Victory[6]" and speeches that summon the words of MLK to chastise the Black family structure are characteristics of post-racialism[7]. Ultimately, post-racialism works to redeem Whiteness and subordinate people of color (Cho, 2009).

By claiming that the U.S. is post-racial, people who advocate against affirmative action and race-based remedies are lauded for their stances as they are able to align themselves with a fight for racial equality. This does not merely impact individuals, but also institutions and the state as White normativity is restored under a mask of progressiveness.

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[6] (2008, November 5) "Obama, racial barrier falls in decisive victory." New York Times, pp. 1A.

[7] Obama speech to NAACP redeems whiteness and structures of white supremacy from considering historical and structural racism as the most powerful Black man exclusively blames the struggles of Black families on the choices made by Black individuals.

Racial Difference as Violence

In each of these racial ideologies, racial difference is a consistent nexus of violence in which discourses are developed and deployed. The racialized discourses produced by the Court within anti-affirmative action court cases concerning university admissions practices influence the practices of universities around diversity. Consequently given the use of various understandings of racial difference, students of color are consistently violated by discourses that mark their difference but mask racial hierarchies and power.

In color-blind Constitutionalism we see how the Court's strategic deployment of various meanings of race at different times in different contexts deploys violence against students of color. Each of the four conceptions of race in color-blind Constitutionalism becomes more violent when connected to an ideology that views our Constitution and Court as objective and neutral. In regarding the Court as neutral, deficit discourses become prevalent as the inequity is naturalized through the characterization of the racialized Other as inherently inferior to Whites. *Dred Scott v. Sanford* 1858 is an example of this as Scott was characterized as inherently belonging to a lower class of people who did not deserve their freedom. This was characterized not as a social construction connected to the development of the Constitution, but as the natural order of things. Formal race in contrast represented this recognition that race was a social construction. Also in contrast historical race acknowledged the need to incorporate the history of oppression that impacted the legal experience of people of color.

How violence is deployed through reactionary colorblindness is distinct from the violence in color-blind Constitutionalism as violence is done through the conflation of race and culture. By emphasizing ethnicity in cases like *Bakke* (1978) the Court was able to undermine group political or race-conscious actions that worked to remedy racial discrimination. As race was conflated with culture, Whiteness was then more fully included in the Equal Protection Clause, reinforcing the systematic protection of White privilege by the law. Racial remediation no longer was a substantial reason for using race and race needed to be interpreted as culture. Haney-Lopez (2007) states,

> The rise of race-as-ethnicity rested on the following suppositions: First, race as such amounted to nothing more than superficial physical differences. Second, ethnic groups nevertheless possessed distinctive cultures. Third, racial domination lay defeated in the past, and no permanent dominant or subordinate groups remained. Fourth, conflicts over interests and cultures produced and explained relative group success. Fifth, antidiscrimination law dispreferred and even victimized "white" ethnic minorities. (Haney-Lopez, 2007, 1028)

With the transition to post-racialism, reactionary colorblindness becomes moral equivalence as the racial subordination of people of color is equated to the use of racial remediation. In post-racialism, racial remediation is not only seen as detrimental to Whites, but also to students of color. Students of color are seen as being wronged by not being viewed by their "merit," which denies them the opportunity to work hard for their achievements. The characterization of harm done to Whites with moral equivalence is obvious as particularly poor Whites are seen as being denied access to selective

institutions so that these colleges can meet their racial quotas. This is a falsely perceived notion as racial quotas have been deemed unconstitutional.

The violence enacted through moral equivalence builds on reactionary colorblindness. It is not only the anticlassification and the connection to culture that defines how violence is operating. It is in equating White experiences to the experiences of people of color. White ethnic groups (Italians, Irish, Jewish, Polish, etc.) are seen as having the same oppression as Blacks in America, which is then used to discount any current disparities between races. Also, with the existence of so many different ethnic groups (who are conflated with racial groups) there is no way to remedy the oppression of everyone. As a result the goal shifts from remediation to embracing racial differences. These racial differences are devoid of any conception of power and are used to demonstrate racial transcendence. With the increasing number of political leaders of color, the violence shifts from a color-blind violence to a violence surrounded by a bed of language that encompasses multiculturalism. This emphasis on culture and celebrating difference occurs while upholding deficit discourses that stem from the belief in moral equivalence and the equivalence of racial subordination to racial remedies. The celebration of racial difference then becomes necessary in post-racialism to prove that all the work that needs to be done with regard to racial difference is being done, despite the fact that the existence of power is ignored.

Fanon (1963) maintains that racism and colonialism are mediated and enacted by violence that is used to create and maintain a social order that is based on race and on a racial hierarchy. Violence is used to strengthen the racialized social order and to regulate

material distribution. In each of these ideologies we can see how the racialized social order of White supremacy is reinforced in different ways. With the naturalization of this social order, students of color are denied the status of citizenship, denied access to opportunities for education, and are denied the ability to resist through group politics that are depicted as obsolete. With these foundations, we can understand how violence exists beyond physical acts, although they are tightly connected to them. There are discursive and material forms of violence that denigrate the existence of particular racialized minorities, categorizing them as inferior to Whites in order to establish inequitable distribution.

Racial difference is used within colorblind and post-racial ideologies in order to justify inequitable distribution. When he is talking about colorblindness, Barnes (2010) states that, "this tendency to ignore or minimize the substantive importance of racial difference in judicial opinions was, in effect, the Court's default approach to equal protection analysis for decades" (Barnes et al, 2010, p. 970). Within colorblindness, students of color are told that their racial difference cannot be seen by the Constitution or the Court and that their racial difference does not significantly contribute to any difference of experience. This not only denies the existence of racial hierarchies, but it also disregards epistemologies that are attached to marginalized communities that are inherent in the experiences of students of color, which differ from Whiteness (Delgado Bernal, 2002; Ladson-Billings, 2000). This discourse prevents the protection for students of color against racism as it is uses culture to disregard power and to equate the experiences of Whites and Others.

Post-racialism uses racial difference as a site of violence by hyper-emphasizing racial difference as a cultural and ethnic identity encompassed by all that is connected only to past histories of oppression. Through this, people of color are a part of their own oppression as they are tokenized and used to demonstrate that their racial difference is no longer relevant.

Each ideology is constructed by different discourses that operate in different ways. Some discourses are unique to colorblind ideology or to the post-racial ideology based on the historical context of the court case. Some discourses used by the Court contribute to both racial ideologies, but in different ways. Other discourses interact with one another building the assumptions that become foundational to these racial ideologies. In the next chapter I examine the discourses employed by the Court in their oral arguments, demonstrating how racial difference is a site of violence in cases that utilize the racial ideologies of colorblindness and post-racialism.

Chapter 2: Color-blind Constitutionalism and Reactionary Colorblindness in *Grutter v. Bollinger* and *Parents Involved in Community Schools v. Seattle Public Schools No. 1*

In *Gratz v. Bollinger* (2003) the court ruled that the use of a point system that assigned points to race for weighting undergraduate admissions violated the Equal Protection Clause of the Fourteenth Amendment because students were not treated as individuals in a holistic review process (Morfin et al., 2006). However, in the case *Grutter v. Bollinger* (2003), the Court held that the University of Michigan Law School passed the Court's strict scrutiny test in its use of race-conscious admissions practices. In this split 5 to 4 decision, the Court established that there were three major reasons that "the educational benefits of diversity" were a compelling governmental interest. First working toward a "critical mass," defined as a "sufficient number of underrepresented minority students," could ensure that students of color did not feel isolated or like spokespersons for their race. The second reason was that a critical mass would provide adequate opportunities for the type of interactions needed for the educational benefits of diversity. Lastly, a critical mass could challenge all students to think critically and reexamine stereotypes. These reasons were seen as benefiting students of all races, the Law School, and the nation, but none of the reasoning explicitly considered integration practices or access to resources for students of color.

This precedent set by the Court was complicated by another split 5 to 4 decision in the *Parents Involved in Community Schools v. Seattle Public Schools*

No. 1 (2007) case, which some have argued as the case that overturned Brown v. Board. This case shifted the gaze of the Court in discussing affirmative action from competitive and selective institutions to public high schools and institutions working for integration. Integration practices were collapsed with the "diversity" benefits of affirmative action and again the purpose was diverted from establishing access and resources for students of color. The Court made a statement by establishing jurisdiction in this case. This jurisdiction was a challenge to the power of state laws and state institutions that worked toward increased integration and that originally had jurisdiction over the process of integrating their schools. With the Supreme Court's decision in *Parents Involved* every high school that worked toward integration now had to be aware of whether they passed the strict scrutiny test of the Supreme Court if they wanted to avoid a law suit.

After establishing that the case was in the purview of the Court, it also held that the Seattle Public School's school choice program that used a race-conscious tie breaker system for integration purposes was unconstitutional. Chief Justice Roberts authored the decision of the Court and stated that the school district did not pass the Court's strict scrutiny test. According to the decision, the compelling governmental interest that was identified by Seattle Public Schools did not justify the "discriminatory" means for achieving that interest. This was because "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification;" and the effect of the tie breaker program was characterized as so minimal that it could be achieved by race

neutral means. The Supreme Court also found that the means were not narrowly tailored. To be narrowly tailored, the Court found that the policy must establish in detail how decisions based on an individual student's race was made in a competitive or "challenged" program, which was different than considering an individual as part of a racial group. Finally the Court ironically found that the plurality and need for racial diversity argument was too dismissive of the Court's interest to ensure the equal opportunity for all people regardless of their race. This was ironic because the concern of the Court in *Parents Involved* was the protection of White students instead of the students of color that originally inspired *Brown v. Board*.

In this chapter, I undertake a Critical Race discourse analysis of the oral arguments of two anti-affirmative action court cases, *Grutter v. Bollinger* (2003) and *Parents Involved in Community Schools v. Seattle Public Schools No. 1* (2007), to examine what discourses the Supreme Court constructs around race and affirmative action, and how these discourses relate to larger understandings of race. Though I looked at both the decisions and oral arguments of the Court, my analysis focuses on the oral arguments for comparative purposes as the *Fisher* case, which is analyzed in the following chapter, has not yet concluded. However, the analysis of the Court's construction and use of racial difference is applicable regardless of that forthcoming decision. The oral arguments are also useful for exploring a site where the discourses were positioned in a state of flux as the Justices attempted to address the tensions and contradictions in their discussion around affirmative action. Along

with exploring these tensions between the Justices, petitioners, and respondents, I look at the power dynamics of the Court as a single entity that produces larger meanings of race and affirmative action in the discourses and ideologies they use. From this examination, I suggest that in the oral arguments of these two anti-affirmative action court cases discourses operate to disconnect race from power and reinforce colorblind ideologies, leading into the use of a post-racial ideology. In this transition, racial difference is a site of discursive violence against students of color.

***Grutter v. Bollinger*: Race-neutral Aspiration Discourse**

The race-neutral aspiration discourse is a discourse that stems from colorblindness. It utilizes language that constructs a message that the ultimate goal for a democratic state plagued by the unfortunate use of race is to reach a point where race does not matter. This is an aspiration. According to the discourse it is a reachable and attainable goal when looked upon with colorblindness. However, this discourse constructs racial difference in a way that ignores the power relations that exist within it. In understanding White supremacy as a system that governs all the structures within our society, this aspiration becomes an unattainable goal. This misrecognition of the social reality of people of color acts as discursive and material violence. The obstacle in reaching this race-neutral aspiration becomes the racialized Other themselves who refuse to assimilate through the discarding of their culture, refuse to work hard in order to change their circumstances in society, and refuse to integrate themselves with Whites. However, in using Fanon, we can see how this discourse and color-blind ideology is one

stemming from violence used to write a history that categorizes racialized Others as individuals who are improved through their exposure to Whiteness. This discourse is developed through the oral arguments of Grutter.

Race-Neutral Aspiration and "Formal Race and Unconnectedness". In the oral arguments for *Grutter*, Barbara Grutter was represented by Mr. Kirk Kolbo and was joined and supported by Solicitor General, Theodore Olson who represented the United States. Ms. Maureen Mahoney argued on behalf of Lee Bollinger who was the president of the University of Michigan. In these oral arguments, Mr. Kolbo focuses his argument on challenging race-conscious means for achieving diversity, which is established as a governmental interest by the Court. By using Gee's (2011a) discourse analysis questions and Gotanda's (1991) color-blind Constitutionalism and Haney-Lopez's (2007) reactionary colorblindness framework, I was able to demonstrate how the language of the Supreme Court separates race from power.

A pattern emerges in the Court's use of color-blind Constitutionalism and reactionary colorblindness. In particular, there is an interchangeable use of "formal race and unconnectedness" and "race as ethnicity" to construct a race-neutral aspiration discourse. As established in the theory chapter of this thesis, formal race is the understanding of race as socially constructed formal categories, which are unconnected from power through the denial of the social reality of people of color (Gotanda, 1991). Race as ethnicity is the process of anticlassification with race through the collapse of racial categories with culture and ethnicity to align Whiteness with an experience of marginalization. These conceptions of racial difference are used simultaneously to

establish that the university has a program based on "racial discrimination" that gives a preference to students of color. This argument is seen in the opening comments of Mr. Kolbo.

> MR. KOLBO: Barbara Grutter applied for admission to the University of Michigan Law School with a personal right guaranteed by the Constitution that she would not have her race counted against her. That race – that the application would be considered for free from the taint of racial discrimination. The law school intentionally disregarded that right by discriminating against her on the basis of race as it does each year in the case of thousands of individuals who apply for admission. The law school defends its practice of race discrimination as necessary to achieve a diverse student body. (*Grutter v. Bollinger,* 2003, p. 3)

Using Gee (2011a) to understand this quote we can ask, how are discourses being used to make things and people connected or relevant to each other or irrelevant to or disconnected to each other? In this quote, affirmative action is connected to racial discrimination and a relationship between racial discrimination and diversity is also built. People of color, whose racial difference embodies this diversity, are then constructed as representatives of racial discrimination and the University of Michigan is the perpetrator of it. Barbara Grutter is established as the victim of racial discrimination. This assertion is based on the use of formal race which is used by Mr. Kolbo when asked about the underrepresentation of Black and Hispanic students in higher education.

> MR. KOLBO: I think the mere fact of underrepresentation that is [to] say blacks are not represented as they are in the population is not a concern that would justify racial preference. (*Grutter v. Bollinger*, p. 6)

In returning to Harris (1993), it is evident that Mr. Kolbo's use of race aligns with a dominant understanding of affirmative action as a form of racial preference and racial privileging. Harris states,

> In according "preferences" for Blacks and other oppressed groups, affirmative action is said to be "reverse discrimination" against whites, depriving them of their right to equal protection of the laws… The Supreme Court's rejection of affirmative action programs on the grounds that race-conscious remedial measures are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment—the very constitutional measure designed to guarantee equality for Blacks—is based on the Court's chronic refusal to dismantle the institutional protection of benefits for whites that have been based on white supremacy and maintained at the expense of Blacks. (Harris, 1993, p. 1767)

This idea of preference is only made possible in a colorblind discourse, and the aspiration aspect in Kolbo's words comes out in his reframing of the problem.

> MR. KOLBO:…If there is some reason that—that particular minority groups are not participating as fully in the fruits of our society such as being represented at the schools, we need to address those problems. But racial preferences don't address those problems. (*Grutter v. Bollinger,* 2003, p. 7)

Gee's (2011a) discourse analysis questions focusing on practice and action further explain the language of this quote. In asking how practices are enacted in a particular context, we can ask who is framed as responsible for "being represented" in an educational context. In Mr. Kolbo's language we can see a difference between "not participating" in the "fruits of our society" and not having access to these "fruits." However, in this quote, Kolbo still uses language to establish this participation as significant by developing an aspirational tone. He does this by demonstrating a desire to address the "problem" of underrepresentation, a problem that he centers in an unknown reason as to why students of color choose not to be represented. This alludes to the aspiration that students of color will one day choose to participate. In Mr. Kolbo's words there is an understanding of race that is unconnected to racism, and the social reality that students of color are underrepresented in higher education because of reasons other than their choosing not to participate. However, this statement is complex because students of color may choose not to participate in a racist institution, but in describing the higher education institution as part of the "fruits of our society," Kolbo acknowledges the value that exists in these institutions. He is able to establish this White institution as one of the vehicles for attaining these "fruits." To imply that underrepresentation is occurring for some unknown reason that needs to be addressed disregards the power of the institution to choose its students and the inequitable conditions of White and Black high schools that prevent students of color from reaching the qualifications of these schools (Kozol, 2005), qualifications that are based on Whiteness (Matsuda & Lawrence, 1998). This relates to Gotanda's (1991) description of formal race and unconnectedness. Kolbo's quotes

disregard the connection between race and power by discussing underrepresentation as a matter strictly focused on increasing numbers instead of addressing inequity.

With Gee's (2011a) discourse analysis question we can also ask how discourses are used to create and sustain relationships in language. Throughout the *Grutter* oral arguments, a relationship is made between racial progress and the end of affirmative action. Though Ms. Mahoney works to protect affirmative action in her statements, she also operates under language established by the Court, further perpetuating the race-neutral aspiration discourse. When asked about the fixed time period for affirmative action, Ms. Mahoney responds,

> MS. MAHONEY: What the policy says, of course, is that it will only take race into account as long as it is necessary in order to achieve the educational objectives. I don't think the Court should conclude that this is permanent, because there are two things that can happen that will make this come to an end. The first is that the number of high-achieving minorities will continue to grow and that law school will be able to enroll a sufficient number to have a critical mass or meaningful numbers or substantial presence without having to take race into account. The second thing that can happen Your Honor is that we could reach a point in our society where the experience of being a minority did not make such a fundamental difference in their lives, where race didn't matter so much (*Grutter v. Bollinger,* 2003, p. 41)

Both concurring and dissenting views in the case use formal race and unconnectedness when employing a discourse that establishes that affirmative action

programs are preferential programs for students of color and that there is a goal of eventually stopping race-conscious practices. Ms. Mahoney's opinions going against Barbara Grutter also align themselves with this depiction of affirmative action as they do not challenge this aspiration.

Along with Ms. Mahoney's statements, a tension exists in the Court in designating where race can be used as certain members of the Court express the need for this "racial discrimination" and "racial preference" for students of color to reach the compelling interest of diversity. Justice Breyer raises this point of contention as he discusses the need to have racial minorities in leadership.

> JUSTICE BREYER: Would you allow recruiting targeted at minorities?
>
> MR. KOLBO: I don't see the constitutional objection with that your honor.
>
> JUSTICE BREYER: Fine. If you can use race as a criterion for spending money, I take it one argument on the other side, which I'd like you to address, is that we live in a world where more than, than half of all the minority—really 75 percent of [B]lack students below college level are at schools that are more than 50 percent minority. And 85 percent of those schools are in areas of poverty. And many among other things that they tell us on the other side is that many people feel in the schools, the universities, that the way—the only way to break this cycle is to have a leadership that is diverse. And to have a leadership across the country that is diverse you have to train a diverse student body for law, for the military for business, for all other positions in this country that will allow us to have a diverse leadership in a country that is diverse.

> MR. KOLBO: Because very simply, Justice Breyer, the Constitution provides the right of -- individuals with the right of equal protection. And by discriminating on the basis of race at a point of competition, innocent individuals are being injured in their constitutional rights. (*Grutter v. Bollinger,* 2003*,* pp. 13-4)

Again in seeing how things are constructed as connected or disconnected, the language in these quotes show that though Mr. Kolbo was able to indirectly deny that underrepresentation was connected to power, he is able to acknowledge that race is directly connected to the material resources (money) of the university. However when it comes to the "point of competition," resources should not be connected to race and not used to benefit students of color. This is connected to Gotanda's (1991) theme of nonrecognition in color-blind constitutionalism. Kolbo is advocating for the nonrecognition of race when White privilege is challenged. This "point of competition" is important because it is the point within affirmative action where White privilege is directly challenged. Kolbo demonstrates the value of recruiting students of color, recognizing race, until it results in them being selected above White students whose privilege is protected by an "objective" and color-blind Constitution.

Along with this, Justice Breyer spends time describing the conditions of schools in the U.S. He constructs the issue as having to do with the tendency of minority populated schools to be in areas of poverty. Though the intentions of this comment seem to favor students of color, the language is complex and has the potential to contribute to the race-neutral aspiration discourse without the centrality of race. In stating these conditions, Justice Breyer does not challenge Kolbo's language of racial discrimination

and racial preference in relation to affirmative action, which allows for a dominant framework of affirmative action to remain. Affirmative action is seen as "privileging" Blacks because they are "impoverished." However this poverty is not linked to racist policies or the inequitable treatment of people of color in the U.S. Without this acknowledgement race becomes decentralized and unconnected to the social reality of people of color, which allows Mr. Kolbo to ultimately dismiss these conditions because racial discrimination against Whites is unconstitutional.

The focus on "diverse leadership" also foreshadows the Court's eventual use of a post-racial ideology as the aspiration for society is to have more leaders who are diverse with little to no consideration of racist structures and policies in higher education that inherently privilege Whiteness. This framework constructs the success of affirmative action as being captured in having a few individuals of color in leadership, instead of working toward the antisubordination of people of color through the removal of white privilege in the structures, policies, and overall conditions of higher education.

As a result, the aspirational end goal of affirmative action becomes symbolic leadership as this leadership will be used to demonstrate racial progress. However, this symbolic success does little to change the material situation of the majority of people within the Black community (Bell, 1992). With this aspiration of reaching a point where a program based on "racial preference" is no longer needed implies that race and racism will not be attached to power or the social reality of people of color in the future.

Race-Neutral Aspiration Discourse and Race as Ethnicity. Along with formal race and unconnectedness, the race-neutral aspiration discourse also uses race as ethnicity, which stems from reactionary colorblindness. In the oral argument, each side uses race as ethnicity in different ways to establish a race-neutral aspiration. Mr. Kolbo uses a more national, multicultural approach to connect race to ethnicity in order to justify race-neutral practices.

> MR. KOLBO: It is precisely because we are a nation teeming with different races and ethnicities – one that is increasingly interracial, multiracial, that it is so crucial for our Government to honor its solemn obligation to treat all members of our society equally without preferring some individuals over others. (*Grutter v. Bollinger,* 2003, p. 4)
>
> MR KOLBO: If there is some reason that – that particular minority groups are not participating as fully in the fruits of our society such as being represented at the schools, we need to address those problems. (*Grutter v. Bollinger*, 2003, p. 7)

In these two quotes, Mr. Kolbo builds the significance of ethnicity by connecting it to race and emphasizing the "increasingly interracial" society that characterizes the U.S., and as discussed previously Mr. Kolbo locates racial disparities between Whites and people of color in the lack of participation of those racial "minority" groups. This use of race as ethnicity is used by Justice Scalia as well to disconnect racial minorities from academic excellence.

> JUSTICE SCALIA: I find it hard to take seriously the State of Michigan's contention that racial diversity is a compelling State interest, compelling enough

> to warrant ignoring the Constitution's prohibition of discrimination on the basis of race. The reason I say that is that the problem is a problem of Michigan's own creation…Now if Michigan really cares enough about that racial imbalance, why doesn't it do as many other State law schools do, lower the standards, not have a flagship elite law school, it solves the problem (*Grutter v. Bollinger*, 2003, p. 31)

In order to protect White students from "racial discrimination" Justice Scalia urges the University of Michigan to lower its standards so that students of color can get in. With his language, Justice Scalia develops an inverse relationship between the increases in the number of students of color to the acquisition of elite status for the law school. By developing this relationship, that implies that getting students of color results in the lowering of standards, Scalia continues the pattern of locating the cause of racial disparities in the bodies of students of color, instead of in the barriers to access. With Justice Scalia's interpretation, it becomes the responsibility of the "unqualified" students of color to change in order to meet the standards of the elite university, or it becomes the responsibility of the university to lower the level of competition. However, according to Matsuda & Lawrence (1998), it is the responsibility of the university to use affirmative action to reframe the merit-based standards to remedy the impact of racism.

Ms. Mahoney connects race to ethnicity in a different way as she describes the special and unique experiences that students of color have to contribute to the institution and to their White peers. Though this is in support of affirmative action, it constructs the value of students of color as commodities to a university and to their White peers.

> MS. MAHONEY: certainly the minorities who have been admitted under the program are not feeling stigmatized by it…In addition, the Whites who are seeing their performance in the class and who are confirming that they find it highly beneficial to have the – the chance to share the experiences of the minority students when they are learning about the law has to be given substantial weight in considering whether this is somehow stigmatizing or perpetuating historic stereotypes (*Grutter v. Bollinger*, 2003, p. 52)

With this established the case becomes one that is arguing whether affirmative action should end now or later rather than truly examining the experience of students of color on college campuses. This race neutral aspiration discourse enacts violence on students of color as their racial difference is characterized as strictly a formal category that is collapsed with ethnicity to disconnect race from power. This allows for the racial disparities existing in higher education to be blamed on the ability of students of color.

By constructing racial difference as an impediment to equal treatment, and therefore democratic practices of equality, Whiteness diminishes the role that students of color have played historically in shaping the democratic process of these institutions regardless of their exclusion from substantial participation in them. In this colorblind discourse of race-neutral aspirations, equality is achieved only through assimilation with the nonrecognition of racial difference, though marked bodies of color are still systematically discriminated against. This denies pluralistic approaches to democratic processes that identify the value that students of color have. In the Court's aspiration to reach a period where racial difference had lost its significance, the Court strived to

portray the education system as one that was meritocratic or that aspired to be strictly meritocratic. In the next section I look at this discourse of meritocracy in connection to the Parents Involved oral argument and how it develops a cultural deficit discourse that occurred with the continued collapse of race as ethnicity. However, within the Parents Involved case the use of reactionary colorblindness begins to shift to moral equivalence, making way for a post-racial ideology to move the Court closer to race neutrality.

Parents Involved

Parents Involved in Community Schools v. Seattle Public Schools No. 1 (2007) was the case that ushered in an era of post-racialism. In the case, the petitioners, Parents Involved in Community Schools, comprised of parents from the Seattle school district, were represented by Mr. Korrell who argued that they were injured by the Seattle Public School district's "integration tiebreaker" that was a part of their school district's open choice process. Unlike in *Grutter,* this case challenged the idea that you can have a race-conscious objective, while *Grutter* only challenged the means to which this objective was achieved.

> JUSTICE GINSBURG: But can they have a race conscious objective? I think that that's the question that Justice Kennedy is asking you, and I don't get a clear answer. You say you can't use a racial means. But can you have a racial objective? That is, you want to achieve balance in the schools.
>
> MR. KORRELL: Justice Ginsburg, our position is that that is prohibited by the Constitution absent past discrimination. (*Parents Involved in Community Schools v. Seattle Public School District No.,* 2007, p. 6)

This signals a move toward post-racialism as integration itself is challenged as a governmental interest. With the post-racial feature of racial progress and transcendence, there is no longer a need to work against segregation. Though Derrick Bell (1995b) made it clear that integration did not result in equal education opportunities for Blacks, Mr. Korrell asserts that proof for past discrimination is needed and that racial mixing is an unconstitutional goal.

> JUSTICE SCALIA: …even if one of the purposes of those schools is to try to cause more [W]hite students to go to schools that are predominantly non-[W]hite. It's just voluntary, I mean, but the object is to achieve a greater racial mix.
>
> MR. KORRELL: Your Honor, we object to the – if that's the sole goal of a school district absent past discrimination, we object. (*Parents Involved in Community Schools v. Seattle Public School District No. 1*, 2007, p. 7)

Though Mr. Korrell is against the objective of integration, he does allude to the fact that it can occur with past discrimination. Gotanda (1991) explains how colorblindness "offers no vision for attacking less overt forms of racial subordination" (p. 54). To explain this he cites the case *Board of Education of Oklahoma City v. Dowell* (1991) that states "that once a school board has complied in good faith with a desegregation order and 'the vestiges of de jure segregation have been eliminated as far as practicable,' a school district should be released from an injunction imposing a desegregation plan" (Gotanda, 1991, footnote p. 54). The definition of past discrimination connected to the Courts definition of de jure segregation and even though in *Parents Involved,* these integration practices were voluntary practices by the school districts, it was seen as

unconstitutional. Indeed, "[a]ccording to Justice Thomas, because the Seattle school district has never operated a *de jure* segregated school system or been subjected to federal court orders to integrate area schools, the school district could not proactively ameliorate the disparate impact of *de facto* racial inequality regarding pupil assignment (Donnor, 2013, p. 198). With this, segregation could not be addressed through integration practices unless the federal government had formally ordered segregation in the past, or if the Court ordered desegregation.

In this transition from colorblindness to post-racialism, the ways in which discursive violence is deployed shifts from a denial of the social reality of people of color (color-blind violence) to the blaming of people of color for their inequitable conditions (post-racial violence). The emphasis in the emergence of a post-racial discourse becomes the cultural deficit that exists in racialized Others. Instead of acknowledging an aspiration to move toward a time where race does not matter (race-neutral aspiration discourse), the burden shifts to people of color to prove that their inequitable status is not a product of their own doing (cultural deficit discourse). This is made possible because of the post-racial belief that we have arrived in a time of equality. The Court redeems itself in a post-racial context. With post-racialism the Court is decoupled from a history of oppression and people of color are confined within a cultural deficit discourse that continues to perpetuate their inherent inferiority. We see aspects of this cultural deficit discourse in the oral arguments of Parents Involved.

This cultural deficit discourse was made possible by the anticlassification that occurred through reactionary colorblindness. We can see the value in anticlassification in the comments of Mr. Korrell.

> MR. KORRELL: Your Honor, I think that the fundamental command of the Equal Protection Clause is that government treats as individuals, not as members of a racial group. And that command I don't think is suspended because of the nature of a school's admissions process. That right is still possessed by the individual students, and if a student is entitled to be treated as an individual as opposed to a member of a racial group at a university level, it's Parents' (Parents Involved in Community Schools) position they are entitled to the same protection at the high school level. (*Parents Involved in Community Schools v. Seattle Public Schools No. 1*, 2007, p. 14)

Gee's (2011a) discourse analysis methodology looks at language and politics by asking, how are discourses being used to create, distribute, or withhold social goods or to construe particular distributions of social goods as "good" or "acceptable" or not? Mr. Korrell frames the command of the Equal Protection Clause as providing goods (protection) to individuals instead of groups framing the protection of racial groups as unacceptable. He separates treating people as individuals from treating them as part of a racial group, despite the fact that the Equal Protection Clause was generated to protect Black people in the U.S. With "race as ethnicity", Mr. Korrell is able to align the protection of Whiteness and White privilege with the Equal Protection Clause. This

alignment between Whites and non-Whites is made directly by Mr. Korrell as he breaks down the students who were unable to get into their "preferred schools."

> MR. KORRELL: …roughly 100 students who were denied admission to their preferred schools were non-[W]hite and roughly 200 who were denied admission were [W]hite students. (*Parents Involved in Community Schools v. Seattle Public Schools No. 1*, 2007, 16)

Not only does Korrell align White and non-White students by stating that both students of color and White students were harmed by affirmative action by not getting their first choice high school, he infers that in this process, Whites were injured more than students of color.

While *Grutter* focused on the use of race-conscious practices where there was a "point of competition" in educational institutions with selective admissions processes, Parents Involved established that strict scrutiny could be applied to public high schools where the stated goal is often to equalize the educational experience and opportunities of all students instead of select students based on merit. To have even made it to the Supreme Court as an anti-affirmative action case made a statement given that this case had to do with voluntary integration practices of two school districts, Seattle Public Schools and Jefferson County.

> JUSTICE SOUTER: The point of the affirmative action case is that some criterion which otherwise would be the appropriate criterion of selection is being displaced by a racial mix criterion. That is not what is happening here. This is not an

> affirmative action case. So why should the statements that have been made in these entirely different contexts necessarily decide this case.
>
> MR. KORRELL: Justice Souter, we disagree that the analysis in the Grutter and Gratz cases is entirely different from the analysis in this case…Similarly, in our case, with the plaintiffs, they wanted to go to their preferred schools, schools that the school district acknowledges provided different educational opportunities, produced different educational outcomes, and they were preferable to the parents and children who wanted to go. (*Parents Involved in Community Schools v. Seattle Public Schools No. 1*, 2007, pp. 8-9)

As is seen in these quotes, the debate of the case connected to what was the meaning of affirmative action. In Souter's framework of affirmative action, it was a temporary criterion used at a point of competition to ensure racial mixing. However, Mr. Korrell reframes this definition to mean the denial of opportunities to White students for the preferential treatment of students of color. This definition is what makes it possible for an anti-affirmative action court case to occur within a high school context.

This case may not have inherently connected to affirmative action because it focused on integration, which was explicitly about providing resources to students in the context of segregation and not strictly working for the educational benefits of diversity. However, the decision of the Court written by Justice Roberts argued that de jure segregation or legally mandated segregation had to exist at some point in the past of these school districts to justify its integration practices. The process for addressing integration was a decision that was made on the state level following Brown v. Board as long as

integration occurred with "all deliberate speed." However, Seattle public schools did not historically have de jure segregation, and the case could be viewed as an affirmative action case. This was a point of disagreement for the Court and Justice Breyer attempts to explain the differences in Grutter and Parents Involved in the oral arguments.

> JUSTICE BREYER: of course there are similarities to Gratz, they can choose, but there's a big difference. The similarity in *Grutter*, or the difference in *Grutter* and *Gratz,* is that you had to prod a school that was supposed to be better than others, that the members of school, the faculty and the administration tried to make it better than others. It was an elite merit selection academy. And if you put the [B]lack person in, the White person can't get the benefit of that. Here we have no merit selection system. Merit is not an issue. The object of the people who run this place is not to create a school better than others; it is to equalize the schools. (*Parents Involved in Community Schools v. Seattle Public Schools No. 1*, 2007, p. 12)

In this quote Justice Breyer explains that some universities establish a value in high-merit through competition. Though this merit-based selection process protects Whiteness through its masking of privilege (Matsuda & Lawrence, 1998), the point that Justice Breyer makes is that public mandated schools, like high schools are not meant to be a point of competition. Despite this point, in the decision of the Court to find the Seattle school district's system unconstitutional, a message is sent that an effort to "equalize" the education system, to make it quality for all, is not a compelling enough interest for the use of race-conscious means.

In this transitional shift from colorblindness to post-racialism in the Parents Involved case, reactionary colorblindness is used simultaneously with moral equivalence as the Court awaits post-racialism's "big event" that will be used as proof that leaders of color exist, and that no work needs to continue to remedy past and current discrimination. Racial difference becomes a site of violence in this context as racial groups are connected to ethnicity and culture in a way that constructs a cultural deficit discourse and discounts the impact of power. By disregarding the need for racial remedies because of "racial progress and transcendence", and through the collapse of race and ethnicity, racial disparities are characterized as being caused by the cultural deficit of racial minorities. Integration becomes a burden to Whites as people of color are characterized as choosing to separate themselves as there was no "de jure" segregation, This construction is helped by the election of Barack Obama and the racial disparities that exist become further connected to the culture of particular racial groups as individual leaders of color represent people of color who have bettered themselves. Within this discourse and others there is a shift from reactionary colorblindness to moral equivalence that is occurring as the Parents Involved case is a site of transition for the Court from a colorblind racial ideology to a post-racial one.

Chapter 3: The "Gutting" of *Grutter*: White Racial Innocence & Post-racialism in the *Abigail Fisher v. University of Texas Austin* Oral Arguments

The Fisher v. Texas case oral arguments solidifies the Courts use of post-racialism in a legal context. Within the Fisher case oral arguments there is an active use of a "White racial innocence" discourse that constructs Whiteness and White people as saviors to people of color through their tolerance of racial privileging that occurs in race-conscious practices and as unfair victims of race-conscious policies that place race above merit (Bernstein, 2012; Moore and Pierce, 2007; Pierce, 2012). The White racial innocence discourse enables the Court's emerging use of a post-racial ideology that redeems Whiteness through the dissociation of race from power. With Chief Justice Robert's emphasis on an end point to affirmative action; with race being attached to ethnicity and culture, making disparities the fault and choice of individual students of color; with the characterization of race as ambiguous and pernicious; and with the replacement of integration with diversity in Parents Involved, undercutting the integration goals of equal educational opportunities for students of color; we can see the Court moving toward a race-neutral universalism and a post-racial ideology. Post-racialism, the 21st century ideology that signifies the retreat from race occurs partly through race-neutral universalism, which interprets race-neutral mechanisms as being inherently and universally superior to race-conscious approaches. In having a race-neutral foundation, an inherently race-conscious affirmative action is constructed as injuring White individuals while having little to no educational benefits. With a race-neutral definition of diversity, considering race becomes unconstitutional and morally wrong, especially when

connected to the idea that the U.S. has progressed enough to transcend race. In this emerges a moral obligation to protect White students and to end affirmative action, which is depicted as racial discrimination. This post-racial meaning of diversity simultaneously points to racial difference as proof for the cultural inferiority of racial minorities and the racial progress and transcendence that has occurred in the U.S. In the context of the *Fisher* oral arguments, it operates through post-racial features that make racial difference hyper-visible and racial power invisible, in a way that enacts discursive and material violence against students of color. While enacting violence, Justices against affirmative action are also capable of wearing a mask of progressiveness with the help of post-racialism, which decouples race from power.

As is stated in Chapter 1, to engage in my discourse analysis I used the index provided by the Supreme Court in their *Fisher* case oral arguments. With the index I identified the top ten most frequently used terms directly related to race and affirmative action (See Table 1).

Table 1: Most Frequent Terms Related to Race and Affirmative Action

Rank	Word	Frequency of Use
1	Race	86
2	Percent	76
3	Critical mass	49
4	Plan	45
5	Diversity	36
6	Admissions	31
7	Minority	28
8	African American	25
9	Interest	22
10	Injury	20

After creating this list, I used these words to extract quotes from the oral arguments of all three court cases. Though particular words did not seem crucial in framing the race-neutral aspiration and cultural deficit discourses, this chapter looks at the two terms "critical mass" and "injury." When addressing Gee's (2011a; 2011b) discourse analysis questions these two terms seemed to most clearly demonstrate the white racial innocence discourse that emerged. One of the questions that was integral to this analysis was how is language used to make things and people connected and relevant to each other or irrelevant to or disconnected from each other. Critical mass was a term used in the *Grutter* case to work toward more students of color on college campuses, and in the *Fisher* oral arguments the Court uses language to disconnect students of color from an understanding of critical mass. Similarly with the term injury, in past cases it was used to describe students of color that were injured by unequal educational opportunities, and in these oral arguments it connects injury to White people in order to protect white privilege. These two terms are repurposed by the *Fisher* case to maintain and support dominant discourses like white racial innocence. Upon analyzing the development of the white racial innocence discourse, I also explain its connection to post-racialism.

Critical Mass

"Critical mass" emerges as an important concept used in Grutter. The Court established a compelling governmental interest for public universities to work toward a "critical mass" of "underrepresented" minorities in order to achieve the "educational benefits of diversity" (Grutter v. Bollinger, 2003). This concept of critical mass is reintroduced in the Fisher case oral argument. Critical mass is mentioned the most by

Bert W. Rein, the lawyer representing the petitioner, Abigail Fisher. With the help of Chief Justice John Roberts and Justice Samuel Alito, Rein constructed a discourse of White racial innocence by describing critical mass as ill-defined, and asserting that without a clear definition of critical mass, individuals, as well as the Court, are victims of the unfair use of race.

> MR. REIN: But what we are concerned about, as you are seeing here, is universities like UT and many others have read it to be green light, use race, no end point, no discernable target, no critical mass written, you know, in circumstances reduced to something that can be reviewed. (*Abigail Fisher v. University of Texas Austin*, 2013, p. 75)
>
> MR. REIN: If you have nothing to gauge the success of the program, if you can't even say at the beginning we don't have critical mass because we don't know what it is and we refuse to say what it is, there is no judicial supervision, there is no strict scrutiny and there is no end point to what they are doing. (*Abigail Fisher v. University of Texas Austin,* 2013, p. 80)

In these quotes, White individuals like Abigail Fisher are victims of race-conscious policies with "no end point." Mr. Rein characterizes critical mass as an ambiguous goal with no evaluative properties, thus a violation of the Court's decision of meeting strict scrutiny for the use of race. Chief Justice Roberts supplements Mr. Rein's assertions by consistently asking when the end point to the use of race-conscious practices and critical mass would be reached.

> CHIEF JUSTICE ROBERTS: I understand my job, under our precedents, to determine if your use of race is narrowly tailored to a compelling interest. The compelling interest you identify is attaining a critical mass of minority students at the University of Texas, but you won't tell me what the critical mass is. (*Abigail Fisher v. University of Texas Austin,* 2013, p. 46)
>
> CHIEF JUSTICE ROBERTS: Grutter said there has to be a logical end point to your use of race. What is the logical end point? When will I know that you've reached a critical mass? (*Abigail Fisher v. University of Texas Austin,* 2013, p. 46)

In this line of questioning, the Court is also a victim as their judicial supervision is depicted as being disregarded by UT's endless use of race-conscious policies. The Court is a victim because to not abide by the strict scrutiny precedent is to challenge the power of the Court.

This argument employs the post-racial feature of racial progress and transcendence. It characterizes race-conscious policies as unfairly challenging the power of the Court by not establishing an end point to the use of race. Rein's interpretation of critical mass is based on the foundational belief that race is devoid of power. Racial power is intimately tied to a history of marginalization against people of color that establishes and maintains a racial hierarchy in the U.S. that privileges Whiteness. Rein discussed race with the foundational assumption that there is a point where there will be enough progress to where race will no longer be an important factor to university enrollment. However, to even suggest that an end point for looking at race can be reached

and that the compelling interest (educational benefits of diversity) is the sole goal of affirmative action demonstrates a sort of historical amnesia that disregards the influence of race and racism on our institutions of higher learning. CRT helps us to understand the centrality of race and the endemic nature of racism. So affirmative action as a race-conscious policy can be interpreted not as the unfair privileging of minorities, but as an effort to disrupt the inequitable racial imbalance on college campuses. This is not to assert that affirmative action will always be the tool used to disrupt this racial imbalance, especially as CRT scholars have problematized the current dominant framework of affirmative action (Delgado, 1991). However, race-consciousness and race-based policies cannot become obsolete unless the system of racism is reshaped and the property interest of Whiteness is delegitimized (Harris, 1993). The push of CRT scholars to expand affirmative action to meet the needs of other marginalized populations instead of working toward an "end point" is one step toward this process of delegitimizing White privilege.

According to Mr. Rein, the Court is not only made a victim by the lack of an end point, but its power is disregarded by the university's use of race overall. Mr. Rein contributes to the discourse of White racial innocence by questioning the significance of race in establishing a critical mass of "underrepresented" populations, delegitimizing race-conscious practices, and promoting race-neutral universalism.

> MR. REIN: And so to -- to be within Grutter framework, the first question is, absent the use of race, would we be generating a critical mass? (*Abigail Fisher v. University of Texas Austin,* 2013, p. 10)

> MR. REIN: Well, we don't believe that demographics are the key to underrepresentation of critical mass. (*Abigail Fisher v. University of Texas Austin,* 2013, p. 14)
>
> MR. REIN: Grutter was intended to say this is an area of great caution; using race itself raises all kinds of red flags, so before you use race make a determination whether really, your interest in critical mass -- that is, in the dialogue and interchange, the educational interest, is that. (*Abigail Fisher v. University of Texas Austin,* 2013, p. 76)

In questioning the relationship between race and critical mass, Mr. Rein clearly states that "demographics," referring to racial demographics, are not the "key" to underrepresentation. This works to disconnect race from underrepresentation and critical mass, inferring that a critical mass of underrepresented populations can incorporate people of all races, including whites. This use of underrepresentation undermines race-conscious practices as it solely characterizes underrepresentation as a term that is race-neutral. Essentially, Mr. Rein attempts to prove that the educational benefits of diversity ("dialogue and interchange") and a critical mass of underrepresented peoples can exist in a context without racial difference, while at the same time implying that racial difference will occur without considering "demographics."

This disconnection of race and critical mass is elevated by the portrayal of race as contentious or needing "great caution" when used, leading to the conclusion that race should only be used when there is an identifiable end point to its use. This use of moral equivalence to define race as equally morally dangerous to us all, worked to dissociate

race from underrepresentation. It incorporated an anticlassification stance that infers that the use of "demographics" to define underrepresentation would unfairly privilege people of color and work as a form of racial discrimination against Whites. Overall race-neutral universalism is used to depict race-conscious mechanisms as inherently inferior and less equitable to race-neutral methods. As a result, Whiteness is normalized as critical mass is used to develop "dialogue" and "interchange" as opposed to encouraging racial equity and increased access for students of color to universities.

Mr. Rein takes the White racial innocence discourse one step further by discussing responsibility and choice. When in conversation with Justice Sotomayor, he describes the use of these two traits as alternatives to the continuing use of race-conscious admissions.

> MR. REIN: And that immediately thrust upon them the responsibility, if they wanted to -- you know, essentially move away from equal treatment, they had to establish, we have a purpose, we are trying to generate a critical mass of minorities that otherwise could not be achieved. (*Abigail Fisher v. University of Texas Austin,* 2013, p. 18)
>
> JUSTICE SOTOMAYOR: You are not suggesting that if every minority student that got into a university got into only the physical education program; and in this particular university that -- that physical education program includes all the star athletes; so every star athlete in the school happens to be Black or Hispanic or Asian or something else, but they have now reached the critical mass of 10, 15, 20

> percent -- that the university in that situation couldn't use race? (*Abigail Fisher v. University of Texas Austin,* 2013, p. 76)
>
> JUSTICE SOTOMAYOR: [If] every one of their students who happens to be a minority is going to end up in that program. You don't think the university could consider that it needs a different diversity in its other departments? (*Abigail Fisher v. University of Texas Austin,* 2013, p. 77)
>
> MR. REIN: Well, if that were the case, remember the factor that is causing it, and you are assuming, is choice. You have a critical mass of students. They choose to major in different things, and that's one of the problems with the classroom diversity concept. (*Abigail Fisher v. University of Texas Austin,* 2013, p. 77)

Mr. Rein builds on White racial innocence as he depicts Whites as sacrificing their "equal treatment" for the needs of racial minorities. This sacrifice is made in a way that "saves" students of color or gives them an opportunity that they otherwise could not get on their own. By discussing the need to justify the move away from "equal treatment" he infers that Whites were treated unequally up to this point for this purpose. However, in emphasizing that racial minorities have the ability to choose their own fate, Rein uses this "choice" to establish that White sacrifice is no longer justified in the context of universities. With this assertion, Mr. Rein uses White racial innocence to support his post-racial conception of diversity that disregards historical oppression, making equivalent the experiences of all races. This infers that any imbalance of opportunity within the university context is as a result of student choices or the irresponsibility of university practitioners.

Injury

Rein characterizes critical mass as oppositional to equal treatment, therefore connecting it to words like damage, harm, and injury that also oppose equal treatment. The use of the term "injury" in the oral argument contributes to the White racial innocence discourse and reinforces a post-racial ideology. In order for a case to reach the Court, there must be an injury claimed by the plaintiff, and throughout the oral argument injury is discussed by the Justices and lawyers. White racial innocence is first constructed by the foundational assumption that an injury exists. Justice Sotomayor is the only individual throughout the oral argument to question the existence of an injury at all.

> JUSTICE SOTOMAYOR: How do you get past Texas v. Lesage[8] with that injury? -- Which says that mere use of race is not cognizable injury sufficient for standing? (*Abigail Fisher v. University of Texas Austin,* 2013, p. 4)
>
> JUSTICE SOTOMAYOR: But you have to claim an injury. So what's the injury? (*Abigail Fisher v. University of Texas Austin,* 2013, p. 5)

But regardless of Justice Sotomayor's questions, there is little to no discussion on why an injury exists. The Court enters oral arguments with the foundational assumption that an injury has occurred to Abigail Fisher, casting her as a victim of UT's race-conscious policies. Building on this, Mr. Rein and Chief Justice Roberts connect injury to the Constitution and to previous Court precedents.

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[8] Texas v. Lesage 528 U.S. 18 (1999)

> MR. REIN: The denial of her right to equal treatment is a Constitutional injury in and of itself, and we had claimed certain damages on that. (*Abigail Fisher v. University of Texas Austin,* 2013, p. 6)
>
> CHIEF JUSTICE ROBERTS: What about our Jacksonville case that said it is an injury to be forced to be part of a process in which there is race-conscious evaluation? (*Abigail Fisher v. University of Texas Austin,* 2013, p. 55)

The injury these quotes describe is an injury of unequal treatment, which violates the Equal Protection Clause of the Fourteenth Amendment. In his quote, Chief Justice Roberts directly links this injury to the use of race and race-based practices by referencing Jacksonville. To have it as a Constitutional injury communicates that race-conscious practices injure not only Abigail Fisher or White applicants to the University of Texas, but it also injures the State. And to have a practice that injures the State, there must be a large benefit as Justice Kennedy alluded to in this question.

> JUSTICE KENNEDY: Is it -- are you saying that you shouldn't impose this hurt or this injury, generally, for so little benefit; is -- is that the point? (*Abigail Fisher v. University of Texas Austin*, 2013, p. 23)

Justice Kennedy contributes to the White racial innocence discourse as his question implies that Abigail Fisher's and the Court's injury may not equal the "educational benefit" achieved by the race-conscious laws. This contributes to the idea of White racial innocence as racial equality is depicted as a burden based on the sacrifices made on the part of Whites. Mr. Rein also develops a discourse of White racial innocence by tying the injury to White people's loss of material resources.

> MR. REIN: The reason why the payment of that fee doesn't redress the injury, Your Honor, is that she would have paid it even if Texas didn't consider race at all; and, therefore, the payment of the application fee back doesn't remedy the injury that she is complaining about. (*Abigail Fisher v. University of Texas Austin*, p. 57)
>
> MR. REIN: Because as -- as in the BIO, what UT pointed out was there are other kinds of financial injuries which were not ascertainable at the time the complaint was filed because we were trying to put her into the university. (*Abigail Fisher v. University of Texas Austin*, p. 75)

By linking the injury to monetary damage, the discourse of White racial innocence is connected to the politics of material distribution. Distributing material resources to racial minorities with race-conscious practices is depicted as unequal treatment to White applicants, who with a zero sum understanding are denied those materials. As a result these applicants, like Abigail Fisher are constructed as deserving material compensation.

The Supreme Court uses White racial innocence to support post-racialism as it operates to "rearticulate subordination as equality" (Cho, 2009, p. 12) by depicting racial remedies as a Constitutional injury that is materially detrimental to White people. However, the existence of an injury is only possible with a post-racial belief that there is a level playing field and that race-conscious policies privilege racial minorities over Whites.

Even though White racial innocence is a discourse more aggressively deployed by Mr. Rein and a few Justices, Mr. Garre, the lawyer defending the University of Texas, also reinforced this discourse by not challenging the existence of an injury.

> MR. GARRE: The fundamental problem with jurisdiction is this: First of all, they definitively cannot show that she was injured by any consideration of race. (*Abigail Fisher v. University of Texas Austin*, p. 54)

In this quote Mr. Garre's argument becomes that Abigail Fisher was injured, but perhaps not by race. He attempts to dissociate the injury from the consideration of race, rather than discounting the existence of an injury. In doing so he allows Abigail Fisher to become a victim, but infers that race is not the culprit of her harm.

Mr. Garre shows us an example of how post-racialism is also reinforced by those who are designated to support affirmative action. The distancing move is evident in the arguments in favor of the University of Texas as, Mr. Garre does not challenge the concept of injury. His lack of challenging the concept of injury represents a denial of the historical subordination of certain racial groups and the existence of White privilege within the university context.

Racial Difference as Violence in the Oral Arguments

These discourses, color-blind aspiration, cultural deficit, and White racial innocence are just a few discourses that link to color-blind Constitutionalism, reactionary colorblindness, and post-racialism. In each color-blind ideology, the Court's use of racial difference connects to an aspiration for a colorblind society through the use of the nonrecognition of race, formal race and unconnectedness, and race as ethnicity. Within a

color-blind discourse, racial difference becomes a site of violence as a White normativity is enforced through the devaluing of people of color who embody racial difference This devaluing occurs in naturalizing the inferiority of students of color by privileging Whiteness and constructing an ideology that forces and reinforces the need for racial Others to assimilate so that they are not seen. The Whites and White institutions are not obliged to change their disposition, structures, or policies in colorblindness and are even wrong in doing so.

This occurs as the color-blind practitioners view the cause of racial disparities as being because of individual or cultural deficiencies. Thus the solution becomes the assimilation of these individuals and cultural groups. This assimilative practice forced upon students of color who strive to gain the material resources they need for their education is connected to a violent colonial relationship as described by Fanon. In order to engage in a colonial project, the hearts and minds of the colonized must be changed and the values of the colonizer imposed and naturalized. This is done by portraying other values and sources of knowledge as inferior to initiate and maintain the colonial project. In order to achieve "success" or to gain any form of capital that comes from attending these elite institutions, students must be subsumed into this process mediated by discursive and material violence. Racist policies serve as barriers for the success of students of color and if students are not retained they are blamed for their own failure, sometimes because of the lack of emotional or cultural support from their homes, families, and communities. This blame occurs in paternalistic ways as institutions develop programs to help "at risk," "urban," or "underrepresented" groups, permanently

casting them as outsiders while doing little to change the structures of institutions that consistently exclude, isolate, and deny material to students of color.

In applying Fanon's (1963) concept of the "stretched dialectic" that incorporates the colonial relationship with the bottom line goal of maintaining the material privilege of Whiteness we can see in the oral arguments the language around racial preference naturalizing the maintenance of White privilege. This language constructs affirmative action as an illogical and temporary form of preferential treatment for minorities who are inherently less than their peers. Within colorblindness this naturalization of domination comes through an oppositional colonial relationship enacted through racial difference in a way that makes clear distinctions for racial difference. These clear distinctions are connected to different statuses in society as Blacks have an inherently lower economic or material status through the structure of institutions, and yet it is "unconnected" to power or historical oppression through the use of formal race that constructs race as meaningless. With this characterization of race, to have the overall goals of the Court to be a colorblind aspiration to racial difference, this act actively silences the experiences attached to bodies of color that are assigned by a colonial relationship to embody that racial difference.

In post-racialism, racial difference become more unclear as culture is assigned to racial delineations. As Fanon asserts, those who are colonized assert their difference from the colonizer in order to establish their identity and culture. This form of resistance is exploited to reinforce the dichotomy that exists between the racial Other and Whiteness. However with post-racialism, in the emphasis of cultural acts that connect to racial

difference, all individuals become capable of enacting these cultural practices. Race is categorized as not being connected to physical attributes with an increasing multicultural and multiracial world. Whites are then able to more easily enter spaces constructed for people of color and to exploit and take ownership over the experiences of the racial Other. Though racial difference is still observed in private, with the pervasive existence of stereotypes connected to the visual difference of race that work in ways to reinforce the inferior status of racial Others, in public race is indistinguishable as people self-identify and race is portrayed as an illogical classification system. When historical oppression is incorporated, it is done in a way to legitimize the need to morally move toward anticlassification with regard to race.

White Racial Innocence, Post-racialism, and Considerations for the *Fisher* case

Towards the end of the Fisher oral argument, Justice Sotomayor refers to the actions of the plaintiff as attempting to "gut" the Grutter decision. Justice Sotomayor was the most vocal in questioning the claims to injury made by Abigail Fisher. Her appointment as the first Latina woman in the Supreme Court signaled to many a more liberal shift within the Court that could potentially change how litigation surrounding race occurred. This "gutting" of Grutter is the removal of race from the meaning of diversity and affirmative action, transforming affirmative action and the Court overall to adapt to this post-racial era. The Court will tolerate the practice of affirmative action, but only with the maintenance of White privilege through race-neutrality. The Fisher oral argument contributes to this gutting by effectively constructing a discourse of White racial innocence to support this larger post-racial ideology.

Within the Fisher oral argument White racial innocence is a discourse used to redeem Whiteness and move the Court further toward a post-racial ideology. Redemption serves as a cathartic release that cleanses Whiteness from past wrongs. It returns a full innocence to Whiteness (that was tainted by slavery, Jim Crow and the Civil Rights movement) by employing terminology that connects the protection of White privilege to a fight for overall equality. Meaning is constructed through discourses like White racial innocence to portray White normativity while characterizing it as liberal or even radical. As a result, Whiteness is freed from the chains of White guilt. The ultimate price is paid by people of color who continue to combat a racist system that wears a pretty mask and uses their protests and resistance in a way to reinforce the dichotomous status quo of racial difference.

Regardless of the decision that is made by the Court in the Texas v. Fisher case, a change will occur in how race is constructed by language within the university context, and the actions of selective institutions will be further governed by laws and policies that will move away from race-consciousness. Advocacy and access for students of color will be challenged by an emphasis on a hyper-individualized, anticlassification approach that will be constructed as the only morally acceptable process. The idea of the inherent inferiority of students of color will be further propagated as racial disparities will be located in the cultural practices of those racial groups rather than seen through the structural and institutional racism that serve as foundations for the university system. This anticlassification and cultural inferiority will continue to be protected by a liberal guise of multiculturalism to maintain the innocence of these institutions as they use the

bodies of people of color to work as spokespeople for the reinforcement of policies that work toward their material disadvantage. In mapping out how these processes will occur, activists and scholars can strategize innovative ways for advocating on behalf of students of color, and students can work to understand how to step into these violent contexts in ways that mitigate material harm.

Chapter 4: Racial Difference as Violence and the Embracing of Differences to Enlighten Minds

In this thesis I discussed the Supreme Court's shift in ideology from colorblindness to post-racialism in its anti-affirmative action court cases, focusing specifically on the language within their oral arguments. In examining the oral arguments I found three discourses, race-neutral aspiration discourse, cultural deficit discourse, and white racial innocence discourse, which were most salient in the discourse analysis. When connected to the CRT frameworks color-blind Constitutionalism (Gotanda, 1991), reactionary colorblindness (Haney-Lopez, 2007), and post-racialism (Cho, 2009), I demonstrated how this shift in ideology occurred through reactionary colorblindness in the conflation of race and ethnicity and in the emergence of moral equivalence. I build on this argument with Frantz Fanon's theory of violence by showing how these ideologies and discourses enact violence against students of color by decoupling race from power. When post-racial discourses disconnect race from power, I call this racial difference as violence, because racial difference becomes hyper-visible while racial power becomes invisible. This is violent as it naturalizes the inherent privileging of Whiteness that exists in higher education institutions and locates the social reality of racism in the bodies, cultures, and actions of students of color.

While my analysis thus far has focused on the discourses of the Supreme Court, in my discussion I would like to turn my gaze onto a case study to demonstrate how racial difference as violence also can occur in the context of college campuses. In the previous chapter I argued that the oral arguments of anti-affirmative action court cases produced

discourses that were violent against students of color. The concept of diversity plays a significant role in constructing and deploying these violent discourses on college campuses as the meaning of diversity used by the Court depends on color-blind and post-racial conceptions of racial difference. Diversity in higher education operates in a similar fashion, decoupling race from power and protecting White privilege.

In this chapter I use the concept racial difference as violence to look at the meaning of diversity at one elite university. As stated in the introduction, I define racial difference as violence as the process of decoupling race and power through the hyper-visibility of racial difference and invisibility of racial power in order to reinforce a systematic racial domination that privileges Whiteness and subordinates people of color. This chapter focuses more directly on diversity by discussing how the Supreme Court and universities are connected through this concept of diversity and how diversity can be harmful to students of color. I argue that diversity in higher education enacts violence against students of color by using racial difference as violence to subvert the resistance of students of color to reinforce racist discourses. To make this argument I use Fanon's theory of violence and I do an analysis of an image and the story surrounding it that is currently the cover of a diversity brochure at a predominantly White, elite, selective liberal arts university.

Violence and Education

The U.S. schooling system has reached a "kind of apartheid" (DeLissovoy, 2007; Kozol, 2005) that can be explored as a colonial context that privileges Whiteness. For students of color in the U.S. education system, there is an increasing reliance on unfair

standardized testing, which characterizes them as failures (Ford, 2012). Students of color are denied access to higher education institutions and those who enter experience low retention rates. Similar to the discourse demonstrated in the previous chapter, deficit discourses are also deployed by institutions of higher learning, communicating messages of a cultural inferiority (Ladson-Billings, 2007; Swartz, 2009). This context can be understood as existing within colonial power relations as the social status of Whiteness, particularly at elite White institutions is protected by practices such as legacy admissions, Eurocentric curriculum, de facto segregated spaces, and the exploitation of students of color through diversity propaganda that maintain inequalities (Brayboy, 2005; Howell & Turner, 2004; Ladson Billings, 2000; Matsuda & Lawrence, 1998; Minor, 2008; Swartz, 2009).

Hate speech is a particular issue that is prevalent in U.S. colleges and universities continuing an ongoing history of racial violence against students of color. Symbolic assault and harassment, verbal abuse, microaggressions, and the lack of policies to protect the rights of students of color are prevalent on college campuses (Bell, 2009; Lawrence, 1993; Solórzano et. al, 2000). Students of color are not protected from hate speech and discrimination as freedom of speech doctrines are often characterized as more important. Institutions allow the proliferation of racist incidents as they consistently depict them as rare and isolated events (Lawrence, 1993), and universities pay little attention to the tremendous amount of psychological energy expended by students of color to manage and negotiate racial microaggressions and other forms of violence

(Solórzano et. al, 2000). These conditions become naturalized into the culture of higher education and result in discursive and material violence done against students of color.

Fanon (1963) looks at violence, analyzing the connection between culture and politics; he discusses how culture in the colonial context is permanently connected to power and violence. He discusses how the historical depiction of the Other through the eyes of colonials provides justification for the forms of violence that happen daily, as they become the norm. In response to the effect of these discourses he explains how the process of decolonization cannot occur without the use of similar violence. This theory of violence challenges the idea of a natural social order by claiming that status is inherently attached to racial difference:

> When you examine at close quarters the colonial context, it is evident that what parcels out the world is to begin with the fact of belonging to or not belonging to a given race, a given species. In the colonies the economic substructure is also a super structure. The cause is the consequence; you are rich because you are [W]hite, you are [W]hite because you are rich. (Fanon, 1963)

This quote describes racial difference as analogous or the same as belonging to a different species. In a colonial context, Whiteness is defined by economic and social superiority, which is also a basic assumption that governs the actions of the Court in relation to affirmative action.

Violence and the Supreme Court

In the *Bakke* (1978) case, Justice Clarence Thomas wrote the opinion of the Court which declared that "obtaining the educational benefits that flowed from an ethnically

diverse student body" was a governmental interest and "a Constitutionally permissible goal in view of the First Amendment's special concern for academic freedom" (*Regents of the University of California v. Bakke*, 1978). Justice Thomas uses language stemming from a color-blind focus on ethnicity instead of race, and he links affirmative action to diversity and academic freedom instead of redistribution and the remediation of past discrimination.

Justice Thomas's opinion transformed the meaning of affirmative action, originally described by Lynden B. Johnson in his Executive Order 11246 on September of 1965. This executive order significantly changed the requirements established by the Civil Rights Act of 1964 and the *Brown v. Board* (1954) decision which originally only required institutions to make a "good faith effort" to integrate and to document their practices especially upon the discovery of wrongdoing. Institutions were to take an affirmative action to ensure women and minorities were not denied access. However, with the transformation of its meaning affirmative action continued the privileging of Whiteness. Instead of focusing on access for people of color, the goal of affirmative action was to help institutions benefit from the diversity that people of color brought to the university. This shift in focus to diversity helped to change how race and affirmative action was conceived of on college campuses.

The connection between the Supreme Court and diversity on college campuses is both direct and abstract. As a larger national entity, the Supreme Court serves as a powerful institution that produces discourses and legal interpretations that impact the way that society is structured. Precedent set by the Court limit or condones the practices of

different institutions. This is no different in the context of higher education. In the oral arguments and decisions of past anti-affirmative action court cases, Justice O'Connor acknowledged how their decisions dictate the actions of universities across the country. Justice O'Connor states in the Supreme Court's decision for *Grutter v. Bollinger* (2003),

> Since *Bakke*, Justice Powell's opinion has been the touchstone for Constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views. (*Grutter v. Bollinger*, 2003)

This is an explicit and tangible correlation between the decisions of the Court around affirmative action, Constitutional analyses around race, and admissions practices on college campuses. However, there is more of a symbolic message sent by the Court as well, which explains the existing national tensions around race. Justice O'Connor goes on to explain how the precedents set by the Court are less rigid if those decisions are not unanimous.

> In the wake of our fractured decision in Bakke, courts have struggled to discern whether Justice Powell's diversity rationale, set forth in part of the opinion joined by no other Justice, is nonetheless binding precedent. (*Grutter v. Bollinger*, 2003)

The power of the Court is linked to use of binding precedents and these precedents are followed by institutions of higher education or they can be sued by students or other entities. As a result, college campuses often incorporate the language used in these anti-affirmative action court cases. Along with this, the ideologies that develop these

discourses continue to become more pervasive on these college campuses and within American society.

Under the *Bakke* case, the Supreme Court rejected several arguments used by the defendants to prove a compelling state interest. The Court's decision rejected historical inequity arguments while it stated that racial balancing was unlawful. The decision rejected the goal of remedying discrimination through affirmative action as it was not compelling enough for the harming of "third parties." The Court also rejected the assertion that there was a need to assist underserved communities as institutions of higher learning were described as not being developed to attain this goal. The only interest that was compelling according to the *Bakke* case was the governmental interest of developing a "diverse student body."

Embracing Differences, Enlightening Minds

Diversity has become a necessity on college campuses. To become an elite university a commitment to diversity must be demonstrated and often is shown through an institution's marketing materials. In this case study I look at a diversity brochure from an elite, medium-sized liberal arts institution in the Northeast region of the United States. Through this analysis I suggest that current higher education diversity discourses, similar to the discourses used by the Supreme Court, use racial difference as violence, decoupling race from power through the hyper-visibility of racial difference and invisibility of the social implications of race. This then is used for subverting the resistance of students of color.

The cover of this diversity brochure depicts four individuals. There are two Black students, one male and one female, one Asian-American female, and a White male. Overlaying this picture are the words “Embracing Differences, Enlightening Minds.” The four individuals appear to be at an event as they are in the act of clapping and the Black male and the White male are in the center of picture. The four students on the brochure are all wearing black and grey tops. This is because this image depicts an event on this particular campus surrounding Black Solidarity Day. An op-ed in the campus newspaper explained the event:

> Black Solidarity Day was created in 1969 as a day nationally observed by African-American men, women and students… Originally, the event brought

> Black people together to discuss their political status and the direction in which their future was going.[9]

A different op-ed from the same newspaper described the nature of Black Solidarity Day on that campus:

> The event brought together black students, their advocates and interested passers−by, as well as guest speakers…The rally, which dealt with identity and race−related issues nationally and at ___, departed notably from the Black Solidarity Day events of the past two years, during which speakers focused on the decades−old demand that the university create an Africana studies major. After last year's rally, approximately 60 students marched from the Campus Center to hold a sit−in at Dean of Arts and Sciences office. There, they worked to convince her and other high−level administrators to enter negotiations that led to the debut of the major this semester.

This rally was an annual event, and it was a pivotal moment in the student protests against the university that ultimately resulted in the creation of an Africana studies major and an Asian-American studies minor. With Fanon this resistance represents an attempt at decolonization. Students redefined and asserted their racial difference (Black and in solidarity) in an attempt to pressure the university to provide more resources to students of color. The op-ed articles demonstrated that this event was strongly connected to a

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[9] I have omitted this citation in an attempt to keep the institution anonymous. Following quotes also omit the name of the institution and institution officials to protect this anonymity. Though this is a specific context its example relates to violence that is pervasive throughout institutions of higher learning.

particular history of oppression of Black people and that the nature of the event encompassed activism and protest against the administrators.

This university took an image of these four students at the event and used it for the cover of their diversity brochure[10]. No caption described where the image was from and no explanation existed in the brochure about Black Solidarity Day. The sole message demonstrated from this image was "embracing differences, enlightening minds." As a result, this act of celebrating differences resulted in taking power away from the resistive message of students of color in an active process that subverted their message to serve the interests of the institution. Along with this, the action disregarded the role that these students played in creating social change within the culture of the university.

This case study connects to the Court's use of diversity. With the Court's focus on the "education benefits of diversity" affirmative action's purpose of remedying past discrimination was displaced by the goal of a "diverse student body". In both of these instances, diversity serves as the tool used to silence resistance intended to create educational opportunities for students of color. This subversion of their message disconnected the empowerment of students of color from the diversity discourse. However, the bodies of these same students of color are used to represent the diversity of the institution on the brochure. This is an example of racial difference as violence as race and power are decoupled. De Lissovoy (2007) describes this hegemonic process.

[10] Students sign a form at the beginning of the year giving permission to the university to use their photographs, though these particular students were not informed of their picture being used

> To be colonized is to be forced to identify with the oppressor; to resist this the colonized person must assert his or her absolute difference; to do so is to discover that this difference is empty and immediately recuperated in the logic of domination; against this recuperation, the self must be asserted again, not as a simple negation of the oppressor but as something new; but with what resources can that be imagined? (De Lissovoy, 2007, p. 365)

The students of color on this particular campus used racial difference as a site for political coalition and advocacy, asserting collective goals that pressured the university to redistribute material resources. Upon this assertion, the institution used racial difference as a site of violence, commodifying the bodies of the students of color to sell their message of diversity with their marketing materials. However, this message of diversity ignored the historical oppression and racial subordination that was exposed through the Black Solidarity Day event.

By neglecting the history of subordination and power relations related to race, the university takes on a color-blind or post-racial conception of diversity. By operating under these ideologies, discourses like the race-neutral aspiration, cultural deficit, and White racial innocence discourse are produced and reproduced. This process worked to keep these students of color outside of the fabric of the institution as their actions were restored to the "logic of domination" (DeLissovoy, 2007, p. 360) and silenced by diversity.

Students of color then have the choice of accepting this appropriation of their message or continuing to resist despite the fact that their resistance will be subverted to

serve the interests of the institution. As a result, students of color have less capacity to resist their mistreatment. Without the material capacity for continued resistance there is an increased force pushing students outside of the institution. This active force can be understood further as De Lissovoy explains, "difference here is not an arbitrary effect of identification but the result of racism, colonialism, and capitalism as encompassing structures and processes." Diversity becomes a tool used to colonize. Diversity produces a meaning of racial difference that excludes and violates students of color.

Fanon's (1963) words connect to the nature of higher education as students of color are often not included into the larger fabric of an institution and he discusses this separation of Whites and Others with the analogy of two separate zones.

> The zone where the natives live is not complementary to the zone inhabited by the settlers. The two zones are opposed, but not in the service of a higher unity. Obedient to the rules of pure Aristotelian logic, they both follow the principle of reciprocal exclusivity. (Fanon, 1963, p. 38-9)

Though there are distinctions between Fanon and the context of higher education, this quote closely relates to the state of diversity in higher education. Despite the fact that interaction occurs across race on college campuses, we can see these zones as describing those who are meant to enter college campuses in the first place. With regard to predominantly White institutions, Fanon's quote relates as there are "zones" where students of color exist and "zones" for their White peers. These zones are separate, and not equal, but are distinguishable through the underrepresentation of students of color in elite universities and through the lack of support and resources for students of color. This

violence and this separation is often understood by students of color as they enter into the higher education context and often these students resist. Fanon states, "The natives' challenge to the colonial world is not a rational confrontation of points of view. It is not a treatise on the universal, but the untidy affirmation of an original idea propounded as an absolute" (Fanon, 1963, p. 41). Though students of color cannot be collapsed with colonial natives, the process of resistance described by Fanon is the same. With stereotypical depictions of students and people of color, hate speech, and a lack resources and outlets, many students of color challenge the violence they experience by actively resisting it in whatever way they can. This can also be seen as an "untidy affirmation" as protests on college campuses by students of color are often a process for students to reinvent themselves into an "original idea" that is in opposition to the racist violence they experience." This image captures the use of racial difference as violence. In this image, racial difference as violence is necessary for the maintenance of this institution's process of racial subordination, just as this diversity brochure could not show diversity without the bodies of people of color.

Fisher Case and a Post-racial Diversity

The meaning of diversity constructed in anti-affirmative action court cases relates to how diversity is used in the case study of this diversity brochure. Both construct racial difference in a way that is decoupled from power using racial difference as a site of discursive and material violence against students of color. As discussed in chapter 3, the Court's effort to move away from race in the Fisher case and to focus on the "end point" is characteristic of the Court's move toward post-racialism and a retreat

from race. In this post-racial context, the violence as described by the case study in this chapter has the capacity to increase and transform as the discourse of diversity takes up race-neutral universalism. A race-neutral approach to diversity can result in institutions employing discourses that overturn race-conscious policies that provide material resources to students of color.

People of color within institutions of higher learning and those barred from entrance as a result of race-neutral universalism both are impacted by the discursive and material violence that is found in the Fisher case. Faculty and curriculum are potential targets as well as an institutional definition of diversity that is race-neutral can impact the hiring of faculty of color and can devalue knowledge production that focuses on race. Efforts to recruit and retain faculty of color will transform as universities utilize a definition of diversity that disregards race throughout the institution and with less students of color accessing institutions of higher learning, the numbers of faculty of color can decrease as well. Curriculum and research from critical fields of study have the potential of being silenced through post-racial institutions that provide funding for these scholars. Within a post-race era, scholarly works that focus on race and power can be characterized as relics and artifacts of past racism, making it harder to in challenge or examine power dynamics in curriculum and pedagogy.

The *Fisher* case will have tangible effects through its emphasis on race-neutral policies that will govern affirmative action. In this new era there will also be the emergence of more post-racial institutions that are justified through court cases like *Fisher*. With this, discourses surrounding students of color will continue to reinforce their

subordination. The naturalization of racial domination that occurs through violent discourses can further dispossess students of color as post-racial institutions pretend to be progressive. By further exploring how racial difference serves as a site of violence in diversity discourses, scholars and activists can map out strategies to further understand and disrupt the violence that occurs against students of color, particularly in higher education.

Discussion and Conclusions

In his June 4th, 1965 commencement speech at Howard University, Lynden B. Johnson pronounced the need for the country to take a more affirmative approach in working toward equality. In this speech he discussed racial difference:

> For Negro poverty is not white poverty. Many of its causes and many of its cures are the same. But there are differences-deep, corrosive, obstinate differences--radiating painful roots into the community, and into the family, and the nature of the individual. These differences are not racial differences. They are solely and simply the consequence of ancient brutality, past injustice, and present prejudice. They are anguishing to observe. For the Negro they are a constant reminder of oppression. For the white they are a constant reminder of guilt. But they must be faced and they must be dealt with and they must be overcome, if we are ever to reach the time when the only difference between Negroes and whites is the color of their skin. (Johnson, 1965)

These words described a difference that was beyond that of skin color and the social constructions that are connected to phenotype. They acknowledged a history and a

present that that was “deep” and “corrosive” that was not connected to racial difference; one forged with “ancient brutality.” These words jarringly coincide with language Fanon used as he described the violence of colonization as “dehumanizing” and as strictly using the “language of pure force” (Fanon, 1963). However, in describing this difference, in emphasizing this difference, and detaching it from racial difference, we can see the existence of problematic ideologies emerging since the inception of affirmative action that would essentially guide its development. Racial difference is the site of which this “ancient brutality” was and is enacted. The power dynamics are embedded in a racist system that is parceled out and separated in a way that privileges Whiteness and subordinates people of color.

In this thesis I demonstrated the Supreme Court’s transition from color-blind Constitutionalism to post-racialism, showing how reactionary colorblindness serves as a precursor to post-racialism. With this in mind I discussed the Court’s use of violent discourses. I show how these discourse use racial difference as a site of violence against students of color. I then expand the conversation of racial difference as violence in this chapter to attach it to the concept of diversity on college campuses.

I worked to build on the foundations set by CRT scholars that reframed affirmative action conversations by disputing claims of privileging Blacks or harming Whites. Scholars like Cheryl Harris discussed Whiteness as property and how affirmative action was a policy focused on antisubordination. To expand on this we can think of affirmative action as a form of anti-colonial violence that attempts to engage students in a process of decolonization. In looking at affirmative action in this way, I also view

affirmative action as a tool to remedy past discrimination and to disrupt racial difference as violence against students of color. In looking at Cho's (2009) concept of post-racialism, this thesis's discussion of violence can further expand our understanding of post-racialism. In understanding how violence operates under post-racialism, violence can be disrupted. In using Fanon, the goal becomes a question of power distribution and decolonization within education systems that is connected to material realities. With this understanding, we can view diversity as something that is beyond the personal exchange of knowledge that is captured in the phrase "the educational benefits of a diverse student body" (*Grutter v. Bollinger,* 2003). Under this framework, diversity, integration, and affirmative action can become tools of disruption and containment that work to allot power to racialized Others who consistently exist within an atmosphere of violence. With a focus on power, practitioners have the potential to further work towards access for students of color to these selective institutions that can be described as the "guardians" of societal power (Guinier, 2003), and currently in higher education, post-racial diversity discourses disrupt or subvert the resistance of students of color in the push for equity.

Johnson's words about the experiences of Black Americans appeared to demonstrate promise as he stated,

> 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. (Johnson, 1965)

These words demonstrated an understanding that the "starting line" was not the same for those who embodied racial difference in White normative spaces. However, this was coupled with aspirations that one day we would "reach the time when the only difference between Negroes and Whites is the color of their skin." Post-racialism represents a belief that this context is reached.

Bowen and Bok (2000) describe the 1960s and 1970s as eras that were successful in recruiting particularly Black students to elite post-secondary institutions as from 1967 to 1976 as the percentages of Blacks in Ivy Leagues grew from 2.3 percent to 6.3 percent (p. 7). However they also describe how few institutions saw rectifying past racial injustices as a purpose for accepting more students of color. Largely the two reasons for the increased recruitment of students of color was to "enrich the education of all their students" with the inclusion of race to the diverse student body and the increased "need for more members of minority groups in business, government, and the professions" (p. 7)

Along with increasing access, in exploring the education system as an institution that produces meaning, understanding the discourses that it employs and the ideologies that govern it practices, we can work to find how these meanings are created. These discourses and ideologies influence and are influenced by other institutions such as the Court. Laws, policies, and institutions exist in a system of power relations that build off of one another, and the Court and the education system are closely linked in the power relations they develop in the name of knowledge production.

Further areas of study can explore institutions such as prisons or the media that connect closely in the emergence of new discourses within a post-racial era. Closely looking at post-racialism also becomes especially crucial as bodies that produce and deploy these deficit, racist, and violent discourses are increasingly people of color as post-racialism is a new trend that has appealed to the masses. Many scholars of color, youth of color, and White liberals have connected strongly to the redemptive messages of post-racialism and distanced themselves from analyses of power and historical oppression (Cho, 2009). Along with expanding the discussion around post-racialism, conversations of violence also become relevant. By focusing on other sites of difference or in intersectional[11] frameworks, scholars can look at how violence occurs in different contexts and how it operates on different bodies. In this exploration of how violence is enacted, a basis for expanding tools like affirmative action to address inequitable conditions for various intersectional identities can be made. This analysis of violence can inform our strategies for support in higher education and help us to redefine our meaning of diversity, constantly revisiting how our definitions, our discourses, our language, impacts people of various backgrounds without collapsing those experiences.

Lastly, a pivotal role for the critical scholar and educator concerned with race in higher education will be to continually unveil the progressive mask of post-racialism to expose the violence inherent in racial difference, and to disrupt and attempt to contain

[11] Intersectionality is a conceptual framework made popular by CRT scholar, Kimberle Crenshaw which emphasizes the need to understand the political, social, and economic realities of identity politics and developing spaces for intersectional identities in group politics and forms of resistance.

this violence in a way that provides material benefits to students of color. There is a need to do this while enacting the least amount of harm in our own practice. An awareness of the discourses that we use and the ideologies that we hold onto can assist us as we work toward a meaning of diversity that is connected to liberating practices in education.

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