THE UNITED STATES SUPREME COURT AND AFFIRMATIVE ACTION: A CRITICAL RACE, BLACK FEMINIST THEORETICAL AND TEXTUAL ANALYSIS

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To the Dean of the Graduate School:

I am submitting herewith a thesis written by Sharon Moore Henderson entitled "The United States Supreme Court and Affirmative Action: A Critical Race, Black Feminist Theoretical and Textual Analysis." I have examined this thesis for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Master of Arts with a major in Women's Studies.

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DEDICATION

For the women who continue to inspire me with their spirit:
Katie Lou Stansbury Davis, Virginia Vergie Moore, and Laura Etta Moore.
And for the future, my daughter, Katie Briann Light.

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ABSTRACT

SHARON MOORE HENDERSON

THE UNITED STATES SUPREME COURT AND AFFIRMATIVE ACTION:
A CRITICAL RACE, BLACK FEMINIST THEORETICAL
AND TEXTUAL ANALYSIS

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Fisher vs. University of Texas was heard before the United States Supreme Court twice: in the October 2012 term (*Fisher I*) and the October 2015 term (*Fisher II*). Abigail Noel Fisher and Rachel Multer Michalewicz filed suit against the University of Texas at Austin (UT) claiming that they were denied admission to the University based on their race. Both are white and female. Michalewicz dropped out of the suit after the Texas Fifth District Court of Appeals ruling. Fisher continued participating in the litigation. Fisher sued for equal protection as stated in the 14th Amendment of the United States Constitution. The question I immediately asked myself is whether there are racial considerations in the University's admission process that would have caused Fisher's application not to be selected? If so, did racial considerations result in her not gaining admission?

My hypothesis was that the Supreme Court was on the cusp of ending affirmative action in education. The research reported on in this thesis suggests that the Court was not seeking to end affirmative action, but seeking to maintain it. This thesis also shows that the litigants in the bulk of the affirmative action suits

that made it before the United States Supreme Court are white women. *Fisher* led me to review *Bakke*, *Grutter*, *Gratz*, and *Hopwood*, as they were cited as precedent-setting cases in the *Fisher* ruling. Thus, it's not *Fisher*, alone, that raises a question about the role of gender in affirmative action litigation. It's also *Grutter, Gratz*, and *Hopwood*, all of which include female plaintiffs. The only major case with a white male plaintiff is *Bakke*. The legal petition filed by Fisher leaves plenty of room for debate and analysis. Thus, I explored some of the arguments in the aforementioned legal cases using Critical Race and Black Feminist theories to understand *Fisher* generally, but affirmative action more specifically.

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CHAPTER I

INTRODUCTION

> [T]here will be cases that reach the Supreme Court in which the law is not clear. [I want a judge that has] a keen understanding that justice is not about abstract theory, nor some footnote in a dusty casebook. [I want a judge that has] the kind of life experience earned outside the classroom and the courthouse; experience that suggests he or she views the law not only as an intellectual exercise, but also grasps the way it affects the daily reality of people's lives in a big, complicated democracy, and in rapidly changing times. ~ President Barack H. Obama

This epigraph comes from the essay which President Obama provided to SCOTUSblog on the topic of selecting a new Supreme Court justice to replace the seat left vacant by the untimely death of Justice Antonin Scalia in 2016. President Obama's words help frame my discussion on what is needed in Supreme Court justices and society at large to understand the proper place of all three branches of the US government to work for the good of all citizens in the republic. My agreement with President Obama's position of needing justices that understand the reality of people's lives and how policy affects us frames the discussion in this thesis.

Some have long suspected the affirmative action ethos set in place by the Kennedy and Johnson administrations to be overreaching, and charge that it constitutes "reverse discrimination" against whites and unfair preference for people of color (R. Kennedy 24). Consequently, affirmative action laws are being challenged at the state and federal levels. Though these past presidents were undoubtedly sincere in pushing for "an affirming action" for those denied education and employment opportunities in the United States, the meaning of affirmative action itself has changed over time. There has never been a specific, universal definition given for an affirmative action program, just the words were uttered for what was expected by a company's actions: "affirming action." Society and implementers now understand affirmative action as a federally sanctioned preference for women and people of color to fill positions. Of concern to some opponents is the question of whether affirmative action is still needed, or whether it inappropriately privileges a few. The high profile of a few African Americans (in politics, film, sports, media) might be giving a false perception that opportunities for African Americans are readily available and that they need no preferential consideration. The argument today is about whether and how this federal mandate should continue to be implemented.

This thesis will examine how federal courts apply the US Constitution's 14th Amendment specifically to those seeking entrance to a university education. Are the current formulations of affirmative action in higher education fair to *all* students with higher education ambitions, regardless of race? Specifically, how does the Court and how

do individual justices interpret the 14th Amendment, especially compared to how critical race scholars interpret it?

Research Question

Subsequent to the rulings in the *Bakke*, *Grutter*, and *Gratz* cases that challenged the use of quotas and race in university admissions (but not as a direct result of these rulings), legal scholars have developed a formative body of theoretical analysis known as Critical Race Theory (CRT), and Critical Race Feminism (CRF), theoretical perspectives of race consciousness which considers how society situates and harms people of color when it ignores the complication of race. This thesis uses CRT to consider the voices and actual positions of people of color affected by the aforementioned court rulings. In the thesis, I ask: What can the courts learn from critical race and black feminist theorists? What new perspectives will CRT give the justices on the information they already have? And how might such information in turn persuade the justices to issue opinions that better reflect the perspectives of those deprived of higher education opportunities?

Literature Review

In their decisions, the justices refer to historical conditions and positions of the United States, arguments of legal scholars, and the Constitution. This high-level discussion underlies my research. Mari Matsuda (1995) posits that those who have been "harmed" in a way that aligns with, say, affirmative action legal cases, are the very ones that justices should be seeking out to give evidence about specific problems and to offer specific solutions. Matsuda reminds us in her writings that litigators have much to learn

from those who have felt the impact of our laws. To make decisions without input from "the bottom" risks a decision that does not necessarily help the people who most need help.

But getting before the courts those who have been harmed by affirmative action has been difficult. Indeed, Delgado (1995) outlines the problems of using an inner circle of writers and theorists to justify positions when the circle leaves out those who, through personal experience, are better able to give accounts about the nuanced way that society perceives race and treats those they perceive to be "other." Pushing for a larger circle of influence, and specifically pushing for inclusion of minority voices, is important for hearing and learning more about the lives and needs of "outsiders." Alexander-Floyd (2010) summarizes the ways "black feminist legal theorists have transformed the legal academy in particular and the academy more generally" with Critical Race Feminist theories that have been subsumed (adopted) into the majority society. What is problematic is when these theoretical positions posited by black women for black women are interpreted in such a way that makes those black women invisible. One such example is Kimberlé Williams Crenshaw's theoretical position of "intersectionality." Crenshaw (2003) discusses how she developed the theory as a criticism "of the tendency to treat race and gender as mutually exclusive categories of experience and analysis" (23). Not using race and gender to describe black women causes them to be lost in the general discussions of "blackness" to black men, and "woman" to white women. A "single-axis" analysis of how we are situated in America misses the point of the complications of race

and gender that is peculiar to black women specifically, and to women of color generally. Our judicial system takes a single view of an issue that is litigated. Crenshaw's theory suggests that a person's race and gender should be considered simultaneously. It is this "intersection" of race and gender that the law historically has not adjudicated. An African American woman is either a woman or Black, not both, in our judicial system. (This is true of all "intersections.") To better understand how complex our lives are, I offer a view of the flaws within feminist discourse as it may impact the judicial system.

Black Feminist Thought, the groundbreaking theoretical work developed by Patricia Hill-Collins, posits the social construction of "black identity." Collins (2009) substantiated the conditions of Black Americans by working with social scientists, politicians, and everyday people to create a quasi "black identity" to document how race affects people's lives, and suggested how to overcome inequities particularly in the political arena. Though not making direct connections to Hill-Collins, but noting distinct theoretical positions to be applied in this analysis, Kimberlé Crenshaw (2011) summarizes how particular events resulted in sustained positions of racial understanding that became the body of work known as Critical Race Theory (CRT). Not only events but also the leadership of key individuals pushed the new theoretical positions to the forefront with the result that CRT is now pervasive in most of academia. Crenshaw also discusses how the fight to hire professors of color at Harvard can be equated to the fight to admit students of color to universities. Concerns from that particular "fight" include how some universities used the "social construction of merit" as a defining point for

hiring against the "social construction of race" (1287). A key point here is that both "constructions" are flawed and that both keep people of color oppressed. Scholars have focused on being "color-blind" as a way to move past the issue of "race," but being color-blind is an issue, too.

Color-blindness, according to Gotanda (2000), reinforces "white racial domination" and is "self-contradictory" (37). It sees race but does not consider it in decision-making. Gotanda understands color-blindness as another form of white supremacy that can harm people of color psychologically by not recognizing the totality of a person. Charles Lawrence, III (1997) argues that, "[t]he assumption that Americans are no longer racist [is] central to the argument against race-based affirmative action" (69). Racism still exists at the individual level, but still more so at a societal or structural level. To ignore this position and continue to push a colorblind theory feeds into the "Big Lie" (69) he says. Lawrence goes on to argue that when the courts assume all is right with society, then the conversation ends and needed help does not reach those left behind. Color blindness prevents a person from recognizing that people of color are victimized. Alan David Freeman argues that because of the justices' color blindness, their rulings adopt the position of the perpetrators of racial injustice, not that of the victims (29). When the perspective of the perpetrator is the dominant view, the victim is left to prove he or she has been harmed (30). This oppressor view re-victimizes the victim. Further, the perpetrator operates from the notion that we live in a color-blind society (32). The

victim's position is very much affected by his or her color, and hence the victim constantly has to push against discrimination and for visibility and inclusion.

Randall Kennedy (2013) discusses the push for inclusion in his work that agues "for discrimination." The idea that our judicial system would look past the ills of society and not try to rectify some of those wrongs is unjust. To suggest that all will work itself out, in a color-blind-equal-treatment way, is likewise false and unjust. Kennedy argues that "constitutional color blindness is . . . a destructive jurisprudence" (14), and that a university education is the gateway to upward mobility that includes "opportunity, socialization, and certification" (14). However, Kennedy notes that the affirmative action fight in education is over a "paucity [of ethnically diverse] faces at leading universities" (248). Kennedy is concerned that this fight is only for a few seats at the table. If this is so, then is the affirmative action fight worth the massive court fights? And how can our judicial system advocate against including many of America's historically and systemically disadvantaged citizens? This fight simply reinforces the worst of America's past.

In another historical summary, Evan J. Mandery (2013) writes about Justice Goldberg's efforts to overturn the death penalty. We see how Justice Goldberg's life experiences and his quest to help others shaped his efforts. We learn that it was Goldberg who advanced the nuanced way we now consider the Constitution and Bill of Rights to be "an evolving document. It means something different today than it meant in 1792" (16). Mandery's work to show the "paradigm shift in American law" (16) and the

Constitution as evolving was as useful then as Critical Race Theory can be to this discussion today. Historian James T. Patterson (2010) acknowledges that our societal structures and laws are the key barriers to why many Americans are not full participants in society. The writings cited here offer an understanding of the social conditions of the times and suggestions of how to work together to move the country forward.

To help move our nation beyond this sullied past, I suggest building coalitions and alliances. For example, situating affirmative action needs within the broader community of another disadvantaged group—women (of all ethnicities)— enables us to see others' needs more broadly, and enlist help through coalition building to fight together, with a broader base, for inclusion and opportunity. For as Matsuda reminds us in her writings that the enemies we share can be (and should be) a place to form allies. While there is broad support in the intellectual community for coalitions, the general community of (white) women consistently side with the "enemy." And if the "enemy" is the father, husband, boyfriend, brother, I can understand the support just as I can see the support for black men from black women. However, when the male construction does not support the greater cause for women, we need to offer criticism. Likewise, when women fight *against* a cause that would be advantageous for people of color—in this case, affirmative action—that should be pointed out.

Much of the existing critical race literature addresses the various arguments made within the judicial rulings, indirectly, by addressing core arguments around race, merit, and institutional structures that limit access for many people of color. The discussion of

this issue by the feminist community has been minimal, at best. To begin to redress this imbalance, this thesis will directly connect critical race theory and feminist theory to the affirmative action debate. It is the hope that this research will prompt more white feminists to join this discussion in a supportive manner as they, too, the data shows, benefit from affirmative action ideals. Black Americans look for support from the Supreme Court and all feminists in a manner that pushes for inclusion and understanding.

Methodology

The methodological approach of textual analysis allows us to deal directly with pointed arguments and search for a more appropriate (current) perspective. I will explore the core arguments that the Supreme Court of the United States has made for and against affirmative action, and compare those with recent critical race theories. After reading *Bakke*, *Grutter*, *Gratz*, *Hopwood*, and *Fisher*, I examine the positions and decisions of each case for common factors and differences. The summary of these cases will serve as the focal point of my analysis.

I have selected these particular cases because of their prominence in the affirmative action debate. Four of the five cases have been argued before the Supreme Court of the United States. The one case that did not make it to the Supreme Court was a precedent setter for the last case, and thus also significant. It is to these cases that references are made when affirmative action is discussed. To gain a legal scholar's perspective on affirmative action as it relates to women as beneficiaries, I personally called Dr. F. Michael Higginbotham. Dr. Higginbotham is a professor of law at the

University of Baltimore. For the last forty years he has written extensively on race and affirmative action and how the later has been implemented in the United States and South Africa. We spoke for nearly twenty minutes discussing affirmative action in the United States and case laws, to date, that affirm the Supreme Court's position.

This thesis will compare and contrast these decisions by the courts using Critical Race and Critical Race Feminist Theory — legal theoretical positions posited by scholars who argue that the implications for racial and gender differences should be considered in assessing legal decisions. I also apply black feminist theory to these cases, as it theorizes the plight of African Americans in America and argues for a society that recognizes the societal structural inequality within which we operate.

This study contributes to the field by continuing the discussion on the need for affirmative action and working for inclusion. It highlights the shortcomings within the feminist community of work toward implementing affirmative action. It is improbable that one single solution will be found that will satisfy all sides of this debate. Yet continuing to push for total inclusion is, I suggest, a worthy goal for a court that holds to the ideals of affirmative action as an important practice in a society seeking to achieve social justice.

In this chapter I review some of the scholarship on the legal fight by people of color for a more equal representation of their concerns and thus for their greater social inclusion. Yet court opinions rarely, if ever, mention the work of CRT, CRF, and black feminists. Being able to compare the work of these scholars with the legal positions of the

Supreme Court identifies a persistent contemporary issue: in what ways and to what extent to allow universities to make use of affirmative action strategies? This thesis also considers the potential conflict between the three branches of our government: judicial, legislative, and executive. It is within this triad – our three branches of government -- that changes to our laws are challenged. What prompts my interest in this comparative study is noticing in the legal cases after Justice Marshall's retirement that the voices of people of color are no longer fully expressed nor appreciated, and believing that affirmative action still has advances to make.

In the following chapters I explore some of the history of America's legal fights for education rights. I discuss the Supreme Court rulings on affirmative action in context with CRT. The focus in this chapter will be on the use of a person's race in admissions (historical and today) as applied to applicants seeking university admission.

The data to be used in this comparative analysis review five selected court cases: *Bakke*, *Grutter*, *Gratz*, *Hopwood*, and *Fisher*, which, with the exception of *Hopwood*, were argued before the United States Supreme Court. The high court refused to hear *Hopwood*, letting stand the decisions for it at the Fifth Circuit. This chapter explores details of the decisions and arguments that have become *stare decisis* since their ruling.

Each of the cases demonstrates overwhelmingly that a majority of the Justices work to interpret the Constitution as if it is a neutral document, blind to race, if not now, laying the groundwork for such a future argument. This chapter also isolates some of the

opinions delivered by various justices to highlight the court's position in comparison to those of the theoretical works I have selected.

Chapter Three explores coalitions and alliances. Here I examine the judicial positions and opinions through the lenses of critical race, critical race feminist, and black feminist theories to create a comparative analysis of theoretical positions against the courts' positions. The chapter makes use of the specific arguments highlighted in the prior chapter, about which the theorists I use can offer detailed understandings of societal positions of those potentially harmed and it compares those decisions with the perspectives that critical race and black feminist theorists advance.

To ground this research in Women's Studies, this chapter looks at the law with a perspective for diverse women and how they are linked to the affirmative action debate. This is not an issue the justices take on, but a reality that begs for scrutiny, for eighty percent of the plaintiffs in the legal cases discussed here are white women. This fact will help highlight the theoretical position of intersectionality as feminists grapple with how we support each other without harming each other in the process.

In the concluding chapter, I offer my personal experience with affirmative action. I also summarize how proponents and opponents of affirmative action in education might inform the courts and the associated scholarly debate. As an undergraduate student in the mid-1970s, my experience for four decades since has been that of witnessing students of color still fighting for support and understanding. I will draw on my personal experience as an affirmative action beneficiary – tied to a program specifically for people of color at

an "elite" university – to provide an analysis that supports the usefulness of affirmative action but notes its shortcomings, too. It will be in this space that I make a plea for others to join the fight for a more compassionate, inclusive, America that regards equal higher education opportunities as a necessity for all.

Fig. 1. Comic depicting road blocks to affirmative action at an Admission's Office. (www.aaanet.org/press/an/images/infocus/0309_margulies062403.jpg; Monday, November 22, 2010)

CHAPTER II

THE U.S. SUPREME COURT, AFFIRMATIVE ACTION, AND RACE

> I had no need to apologize that the look-wider, search-more affirmative action that Princeton and Yale practiced had opened doors for me. That was its purpose: to create the conditions whereby students from disadvantaged backgrounds could be brought to the starting line of a race many were unaware was even being run. ~ Sonia Sotomayor (2015)

Getting to the Civil Rights Legislation of the 1960s was a hard fought political battle. For more than two hundred years from the forming of the United States, this country had some form of legal servitude. Then from the 1860s to the 1960s we had legal segregation and laws that were not equal but immensely biased. During most of these years, women and minorities were categorically barred from education and employment opportunities because of their physical attributes, as women and minorities. From the mid-1960s to 2016, we have had some fifty years of fighting to maintain the rights gained in these later years: legislation and affirming actions specifically to include those that had been *intentionally* left out. Though we realize that when laws change, the implementation of those laws is not immediate, nonetheless it is unjust to expect those who have been disenfranchised for over three hundred years to be able to become "equal" immediately

on the signing of a law– literally having started with no rights at all as people that were enslaved.

The 14th Amendment to the US Constitution is being used to challenge the affirmative action court cases by reminding us that all citizens are entitled to equal protection. There is irony here in that the Fourteenth Amendment's initial intent was specifically to support African Americans after the Civil War. But we have evolved -- understanding that the Constitution's "great generalities . . . have a content and significance that vary from age to age" (*University of California v. Bakke*). (Hereafter, *Bakke*). We have to accept that we are far beyond 1868 and the equal protection clause of the Fourteenth Amendment has been demonstrated in many and various landmark decisions to apply to *all* of the people. What is clear is that the current judicial rulings want us to see that if the Fourteenth Amendment is to be applied equally to all citizens, then it must be applied without regard to a person's race, creed, or gender.

Of course there have been legal maneuvers to push for inclusion – to end slavery, to gain work parity, education access, and basic human decency – from early on in the forming of the United States to today. One such area of legal maneuvering for African Americans focused on access to educational opportunities at the elementary and high school levels. The *Plessy* (1896) and *Brown* (1954) cases fought for basic rights of inclusion (equal use) of facilities. (The *Plessy* ruling that facilities should be separate and equal stands. The *Brown* ruling overturned *Plessy* by demonstrating that facilities were not in fact "equal.") Later fights in the courts, from *Bakke* onwards, focused on the

implementation of various affirmative action programs for how government-mandated laws are to be implemented. (The affirmative action phrasing was not in our vocabulary until JFK's usage in 1961.)

Affirmative action in higher education (specifically university admissions) commenced with a challenge from *Bakke* in 1978, but hangs in the balance, still, by *Fisher* in 2013 and 2016. The ebb and flow of implementing more inclusive programs has been punctuated by some thirteen cases that challenged affirmative action goals, aims, and diversity challenges. Despite all of the cases that have made their way to the Supreme Court, none has totally ruled against some form of an affirming action for inclusiveness. While there are persistent challenges, we find that courts struggle to uphold the value of diversity.

Diversity projects that this thesis considers are cases in which universities sought to implement positive programs while at the same time they sought not to violate anyone's constitutional rights. While *Bakke* has become viewed as the controlling legal authority in this area by many, there was never a majority of opinions in the decision. *All* of the justices agreed that race was an appropriate consideration in admissions, but differed on the level of scrutiny (examination) that should be applied to affirmative action laws and programs. Powell's "plurality opinion" was truly singular, his own argument, but was joined in part and dissented in part by a majority of the other justices. Some of the arguments between the justices were about the level of scrutiny and what grounds (statutory or equal protection) to consider when reviewing *Bakke*. Because a majority

opinion was not reached over the standard of review, for race, when applied to affirmative action, we are still arguing this point today.

What resulted from *Bakke* in 1978 was the ruling against the use of quotas for admissions, but the decision that race (as a compelling interest) would be allowed, provided there was also strict scrutiny to adjudicate racial discrimination. The cases of *Croson* (1989) and *Adarand* (1995) affirmed this ruling.

The political leanings of the justices tend to affect their decisions quite strongly. Before and since the 1978 *Bakke* ruling, the Supreme Court has leaned to the political right. Seven justices were appointed by republican presidents and two by democrats. It was only in 2009 and 2010 that the left-leaning appointments rose from two to four. With the court more balanced politically, it would seem there we could expect the court's stronger support of affirmative action programs. But to be clear, the goal of affirmative action clearly held in Republican courts. The partisan politics during President Obama's terms, while arguably some of the worst ever, were also evident during the build up to President Regan's tenure. Berry Goldwater's strict conservative edge and Richard Nixon's Southern Strategy fueled the racial divide that was on display in the 1960s. Much of what Americans witnessed, as a result of conservative negative campaigns, was a pushback on the civil rights laws, executive orders, and national support for African Americans that was gained during the 1950s and 60s.

While the "how" of implementation of affirmative action programs is voluntary, the litigation challenges more clearly define affirmative action. For example, *Grutter*

helped to define a diverse student body as including both diverse race and diverse gender representation—an evolution of affirmative action from LBJ to today (F. M. Higginbotham, personal communication, March 16, 2015).

This right to implement affirmative action programs is described as an "ethos" that university presidents, chancellors, and department chairs have quietly put into effect through formal and informal ways of enforcing these affirmative action goals of the federal government (R. Kennedy). In short, universities did see the good in having a diverse student body, and they opened their doors to non-traditional students. Many of the scholars I studied advocate for universities to develop communities reflective of our country's demographics. For not to embrace our diverse nation reinforces the worst of our history – the continued exclusion of people of color and women, the very people affirmative action works to include.

As with the First Amendment and holding true with quotas, these conversations are pretty much settled. Yes, you can have a program at your institution for broader inclusion (with caveats), but no, you cannot have quotas. Quotas have not been used as specific, nor singular, criteria for university admissions since *Bakke*. For affirmative action since *Bakke*, the courts have consistently ruled that quotas (set-asides) are not constitutional. The courts' logic here is that when a block of seats is specifically set-aside for a specific group, it shuts the door on all other students that may want to attend the university – all students are held back from competing for the slots that were set-aside.

And admittedly UC Berkley, the challenger to *Bakke*, had separate admissions' criteria for this set-aside group than it did for the general body, as a whole.

Not only *Bakke*, but also the 1989 ruling in the *City of Richmond v. J. A. Croson Co.* case, solidified the ruling and reemphases the point that the government feels that it has no compelling interest to allow race to be a factor and pushing companies to use quotas when filling contracts. Again, our government does not feel that quotas will help remedy past wrongs, past wrongs that some justices heavily suggest cannot be measured. The suggestion here is: if we cannot measure the wrong, how do we fix it?

From *Bakke* forward, quotas became the bad word not to be mentioned nor used as a remedy to help correct racial wrongs. Along with Coates (2015), I support that racial wrongs in fact can be empirically known and quantified. And Critical Race Theorists argue that you can measure the harm inflicted upon African Americans, if you really want to, by collecting "personal histories" of the victims "to convey our message" (Lawrence III et al., 1993). The United States has yet to decide that it wants to understand the extent of that harm, set about doing the work to determine what it is, and rectifying it.

Race as Historical

Recent studies however do support the notion that race plays a significant part in how and whether one is able to advance, without bias, in societal pursuits. One such sociological study, the Baltimore Beginning School Study Youth Panel, documented in the book *The Long Shadow*, ran for twenty-five years starting with children in the first grade and ending just before the participants' thirtieth year. The study followed nearly

eight hundred children attending public school in Baltimore, Maryland, in a diverse middle- to low-income neighborhood. Researchers Alexander, Entwisle, and Olson help us to understand better the actual ways in which communities are formed, changed, and thrive despite the political strife that surrounds them. The community they studied, containing similarly situated blacks and whites, documents how race affects students, and how it becomes a key (and even *the* key) attribute that isolates black citizens. They found that race does indeed matter: "A family's resources and the doors they open cast a long shadow over children's life trajectories . . . [and this position] is at odds with the popular ethos that we are makers of our own fortune." For example, they found that one's mobility is directly related to connections within corporations that are almost always white. White workers' direct connection to each other had a way of not allowing blacks access to available positions. Typically, blacks were excluded from skilled unions and not allowed in trades programs. In Newark, NJ, in 1963, with blacks making up near twenty-five percent of the population only 2 of 3500 apprentices in all trades were black. The resulting earnings and mobility gaps were measurable -- the differences were significant and not favorable to African Americans. The resulting finding was that race matters.

Race is paramount to critical race theorists. Commitment to a race-conscious perspective, argues Peller, does not jeopardize having a fair society. Duncan Kennedy, standing with Peller, advocates for "race-consciousness" (159). Race should not be considered one of the "arbitrary social characteristic . . . that right-thinking people . . . learn to ignore," says Peller (150). The fault in how our society views race today is that

society makes race one of a person's attributes. Peller uses examples of "gender and physical ability," not to minimize gender and ability, but to argue that race is much more than an attribute—it trumps everything (150). The implication here is that there's a multiplying effect on a person when race is added. (This view of a complication of race is support by Crenshaw's writings in Critical Race Feminist theories, covered in Chapter 3.) These theorists are committed to the hardship of race and are focused on ways to highlight the issue. So how do we tackle race? Justice Blackmun suggests we tackle the issue head-on. He argues,

> it would be impossible to arrange an affirmative-action program in a racially neutral way and have it be successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently (*Bakke*).

Justice Powell, in *Bakke*, on behalf of the whole court (for on this point all of the justices agreed) wrote that race can be used in admissions when it "serves a compelling governmental interest" (*Bakke*). One such interest is a student body that is diverse. It is the aim that a diverse student body serves all students. A classroom with differing views and opinions only helps to strengthen our educational pursuits. However, in subsequent cases, some justices pushed back on the notion that our government should be in the business of seeking "the educational benefits of a more diverse student body" (*Fisher*). For some reason, when the preference being granted is based on race there's a problem

that doesn't appear with other attributes. Our country still displays hesitancy in dealing with race. The Supreme Court clearly accepts the fact of race, and wants the citizens of the United States to see this too. Hence, the court reminds us that

> governmental preference has *not* [emphasis mine] been a stranger to our legal life. We see it in veterans' preferences, . . . aid-to-the-handicapped, . . . [our] progressive income tax, . . . Indian programs, . . . [and programs based on] geography, athletic ability, anticipated financial largess, [and] alumni pressure . . . these preferences exist and may not be ignored. (*Bakke*)

But race, that's a preference that is totally different, apparently. The

> confusion about affirmative action's aims, along with our inability to face up to the particular history of white-imposed black disadvantage, dates back to the policy's origins. 'There is no fixed and firm definition of affirmative action, . . . [it] is anything that you have to do to get results. But this does not necessarily include preferential treatment.' (Coates)

Thomas Sowell and Justice Clarence Thomas would have us believe that no preferences are necessary. Sowell and Thomas suggest that the stigma associated with a preference for race is greater than what the preference would yield.

To suggest that our political system (Judicial, Executive, and Legislative) is not the place for this remedy is puzzling. As Coates forcefully points out in his George W. Polk Award-winning article that focuses on reparations, the white middle class that came to be in the mid-to-late twentieth century was the result of government policies, policies

that perhaps did not explicitly exclude black folk, but did so by default thanks to the ways they were constructed and the laws that existed on the books at the time. Not being able to benefit from these policies systematically held back black people. Low-interest home loans were made available to all veterans. But most blacks (including black veterans) couldn't get a loan from a bank and were denied access to large swaths of living communities in many cities. Social security was created, but excluded maids and field hands, the majority of whom were black. Education loans and grants were plentiful, but blacks could not take advantage of them because they were systematically denied access to most mainstream universities. Coates lays out the many ways in which Blacks were left to take care of themselves. When blacks did gain a foothold, the work was probably already under way to push them back down. This is where laws are challenged, not enforced, or slowly implemented – concerted efforts to deny access. Thus, "plunder" appears to be the name of the game when it comes to affirmative action policies, voting rights, and the fair housing policies. These laws are barely on the books before the work begins to take it all back – dismantle the programs.

Katznelson has documented this acknowledgement of historical white privilege, too. His scholarship studies the false notion that affirmative action began in the 1960s when its beneficiaries started to include blacks. Our historical memories about the federal government's deployment of the New Deal and the Fair Deal tends to not dwell on how they created programs of affirmative action for white Americans. Thus, a persistent reminder as to what affirmative is, means, and does for our society is sorely needed. In

fighting for affirmative action in "legal academia," D. Kennedy's perspective can be translated to a like need in most, if not all, colleges. He argues that schools "should abide by the general democratic principle that people should be represented in the institutions that have power over their lives. [L]arge-scale affirmative action would improve the quality and increase the value of [all] scholarship" (159). Instead of shrinking affirmative action programs, they should be expanded. With that we need a Supreme Court that fights more vigorously for such programs' continued use in higher education.

Race as Colorblind

This complexity begs the question: Is the Constitution colorblind? Better put: *Should* the Constitution be colorblind? And who gets the "edge" in legal decisions if all other things are equal? Is there a way to advantage those that have been systematically denied most of what our country has to offer?

I suggest that our Constitution should not be colorblind, but should reflect the needs of the society. For one group of people to be denied access to our country's spoils based solely on their race is shocking. And the framers of the Fourteenth Amendment basically agreed that such support was needed, specifically for black people. Kennedy does the groundwork in reconstructing the intent of the Fourteenth Amendment along with subsequent laws (and actions) passed/declared in support of "blacks," "relief of destitute colored women and children," and "heads of families of the African race." R.

Kennedy's study of affirmative action identifies *Plessy* as having the "single most widely cited statement associated with the idea of color blindness":

> In respect of civil rights, common to all citizens, the Constitution of the United States does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. . . . There is no caste here. Our Constitution is colorblind, and neither knows nor tolerates classes among citizens (149).

These are the words of Justice John Marshall Harlan in 1896, a dissenting voice from *Plessy*. (The *Plessy* case upheld the equal-separate doctrine in a suit related to seating in passenger trains.) But today, the political wonks push for something other than what the framers intended. The "new" colorblindness being put forth by "originalists" of the constitution suggests that our country should not give weight to those systematically left behind. They would probably have it that the changes to the constitution (say the 14th Amendment, providing citizen protection to the once enslaved) are not appropriate and that we should all become colorblind.

Summary

The law is slow to reflect the complicated ways in which race affects our lives. It is puzzling that the courts do not want the universities to mention race as a factor in admissions, for there can be no doubt that race *is* a factor in society — to suggest otherwise is both dishonest and problematic. The notion of not wanting to mention race suggests that we have not come far enough, that race should not be a factor, and as a

result we should be colorblind when seeking university admissions. It also does not seem fair that the courts do not take up the banner of working toward remedying past discriminations when that would seem to be the obvious place to do so. Ensuring that we have more diverse student bodies may seem like a small thing but it does begin to address the "past discrimination" need. If the courts will not take up the banner for past discriminations, who will? And when will they do so?

The systematic way our society has been and is structured perpetuates the crippling effect on those citizens that have been left behind for over three hundred years. The fight for inclusion is real, hard, and necessary. The fight in the courts is one that may not shape the minds of society at large, but will provide the framework for society to work toward. Politics play a pivotal role in how we make changes. The make-up of the Supreme Court says a lot, too, as to what course of action our laws will take. As this thesis focuses on education, the laws for inclusion have been fraught with issues -- especially the time it takes to affect changes via the courts. Higginbotham, a professor of law, reminds us that political changes at the executive, legislative, and judicial branches of government tend to lose focus and momentum when their compositions change . . . we need all of our branches of government working toward a more just society.

The citizens of the United States must demand inclusion, that our voices be heard. The views of inclusion, especially from that of Critical Race Theorists, has been that of trying to push the need for many voices in the room, discussions, to help fight for inclusion. Matusda has noted that no CRTs, nor alliances, are on the president's

commission; that this omission is not by accident. She suggests that the work of CRTs is intentionally omitted in meetings and discussions. The suggestion is made that the confusion on the complexity of race and inclusion continues while CRTs are "absent" from "the national conversation." It is my assessment that the work of CRTs has been marginalized, thus ignored in the courts, for most of its existence. CRTs know that they have been ignored, but are "undeterred" and see it as their duty to continue to "identify and critique the entrenched and enduring evils many would prefer to ignore" (Bell).

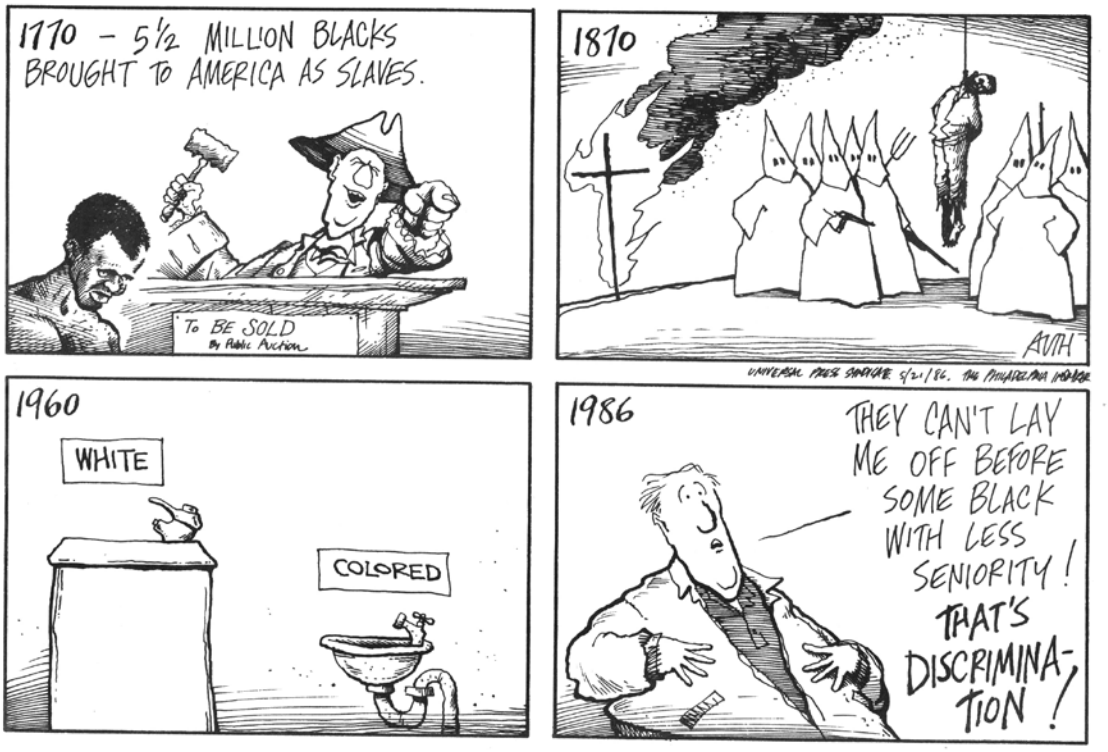

Fig. 2. Editorial cartoon depicting the historical nature of race in America from slavery to the 21st century. (www.tonyauth.com/archives/black-america; Tony Auth, Oct. 27, 2016 by dleopold.)

CHAPTER III

THE U.S. SUPREME COURT, AFFIRMATIVE ACTION, AND WOMEN

"Affirmative action has been generally cast in terms of race. I think women themselves are not as cognizant of the role affirmative action has played in opening the doors for women." Faye Wattleton

"I regard affirmative action as pernicious – a system that had wonderful ideals when it started but was almost immediately abused for the benefit of white middle-class women." Camille Paglia

The rise of women in business and education parallels and is in direct correlation to the rise of blacks in the same areas. However, the penetration for white women in these areas is greater than it is for blacks, collectively. When the affirmative action laws were enacted, they included a path for white women. Today some allege that when we speak of affirmative action we are referring mainly to African Americans and people of color, generally. White women do not look at themselves as beneficiaries of "preferential treatment," – à la affirmative action – but they are. And by not seeing themselves as direct beneficiaries, many neither claim it nor support it.

Minorities and women were the programs' target early on, and remain so today. Affirmative action in the labor market was made a federal law in 1961 by President John F. Kennedy with Executive Order 10925, mandating that government contractors "take affirmative action to ensure that applicants are employed and employees are treated during employment without regard to their race, creed, color, or national origin" (Kurtulus 217). The order also established the Committee on Equal Employment Opportunity. In 1965, President Lyndon B. Johnson's Executive Order 11246 expanded affirmative action to cover women.

However, there was a dramatic reversal in federal support for affirmative action in the 1980s. In 1981, the OFCCP [Office of Federal Contract Compliance Programs] came under new leadership that was neither committed to the organization nor to affirmative action. In 1982, a fervent opponent of affirmative action, Clarence Thomas, was appointed to head the EEOC [Equal Employmnet Opportunity Comission]. "During the presidency of Ronald Reagan a serious effort was made to rescind Executive Order 11246 and when that failed, steps were taken to weaken affirmative action enforcement" (Kurtulus 218). During the Reagan years, the OFCCP rarely issued sanctions for noncompliance and the number of employment discrimination lawsuits plummeted. Enforcement activity increased a bit in 1989 when President George H.W. Bush took office, and accelerated with the inauguration of President Bill Clinton in 1993.

While quiet work was done to try to dismantle affirmative action efforts—not supporting it, but holding back on claims—white women still thrived…in the name of

diversity. And for his "great work" at the EEOC in dismantling affirmative action policies, Thomas was promoted to the Supreme Court. And it is at the Supreme Court that we find ourselves fighting white women in affirmative action claims.

The five cases studied here show that white women filed eighty percent of the cases. Does it make sense always to distinguish between sex and race when it comes to equal protection? Maybe we don't have to distinguish between sex and race, but we should be sure to acknowledge that they are inextricably linked. The law does not consider two categories at once. It tends to focus on either a person's sex or their race, not both. The standard or default position is that of white male privilege. Being female, a suspect class in law, also has its privilege. Fisher, being part of a suspect class/group, also had a "gender advantage." In making the claim of denied admission, Fisher is asserting and arguing the "but for" analysis to admission; "but for" my race I would have been admitted to such-and-such a college (Crenshaw). In short, none of us operates in an environment where only one of our "identities" operates singularly – there is always a multiplying effect. Kimberlé Williams Crenshaw makes the argument that, "Black women are sometimes excluded from feminist theory and antiracist policy discourse because both are predicated on a discrete set of experiences that often does not accurately reflect the interaction of race and gender" (24). Her suggestion is that the intersectionality of race and gender is more pronounced when dealt with honestly. Crenshaw states, "any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated" (24). By extension, I would

also argue that Fisher's intersectionality of race and gender (white and female) typically gives her greater protection. Greater protection, if not in law, then in society, in general. Crenshaw tells us that:

> For white women, claiming sex discrimination is simply a statement that but for gender, they would not have been disadvantaged. For them there is no need to specify discrimination as white females because their race does not contribute to the disadvantage for which they seek redress. The view of discrimination that is derived from this grounding takes race privilege as a given (26).

I use Crenshaw's theory of intersectionality only to demonstrate how women of color are harmed when their gender and race, collectively, are not accounted for in legal or social matters. Then, as a corollary, I argue with Crenshaw that when white women claim "but for their race" they should not have a strong argument with white privilege being the standard position. Crenshaw, again, gets us to understand that one's race and gender "become significant only when they operate to explicitly *disadvantage* the victims; because the *privileging* of whiteness or maleness is implicit, it is generally not perceived at all" (29). For me, Fisher, in claiming her race as a *disadvantage*, is seeking a theoretical "double protection."

Fisher disrupts Crenshaw's theory of intersectionality as a place for Black women to understand their woes. If overturned, the case would question the critical race theory of intersectionality, here, in regards to race and gender. For Fisher to claim, essentially, that "but for" my race I would have been admitted, continues to puzzle me. Does Fisher not

see herself as a suspect class within the framework of the 1964 civil rights legislation Title IX, seeking education parity? Reverse discrimination? Affirmative action? (Affirmative action is justified by disparate impact.) All of this begs the question as to against whom Fisher is really pushing back in her suit? Is it the law? the university? or other oppressed individuals? By default I would suggest that the pushback is actually against other oppressed individuals. Mackinnon sees this false internal fight between women and minorities as a distraction:

> There seems to have been little or no awareness that sameness and difference are the two roads to nowhere that mainstream equality theory confines the unequal to walking . . . failure to see this has crippled much antiracist legal work, including the fight for affirmative action, miring it in the sameness/difference equality trap that can only maintain white male power as is and fail to confront white male supremacy as such. (75)

Some feminists of color argue that we should not be fooled by the women's movement claiming connections with the black movement, as if they want to help. Some see this "connection" as really being about white women wanting to help themselves. Early in the 1970s, La Rue noted that "[t]he surge of 'common oppression' rhetoric and propaganda may lure the unsuspecting into an intellectual alliance with the goals of women's liberation," where such an alliance is suggested to not be wise (La Rue 164). La Rue sees the alliance as self-serving for white women and a mix of oppressions. More so than a mix of oppressions, La Rue suggests that by definition "Blacks are oppressed . . .

[and] . . . White women . . . are only suppressed" (166). Again, with Fisher *not* acknowledging the affirmative action fight within society sets women back, too.

To acknowledge that "women of color in the United States are the worst-off women, due to racism, and are in fact hit harder by virtually every social problem that also afflicts white women, . . . is hardly an invidious white observation, although its reality reflects plenty of invidious white practices" (MacKinnon, 74). In this vein, why would Fisher seek to show racial bias by the university? If it was a woman of color that "took her spot," why complain? Does it make sense if women of color are worse off that someone would trample them yet further? Based on UT's own statistics, whites make up 49% of the student population, blacks 4%, and Hispanics 16%. With percentages so lop sided, at what point do we stop and say that whites are not impacted by the inclusion of minorities and that the goal is social justice? And as a community of feminists, how do we support all oppressed groups? Again, MacKinnon, states that, "[a]nti-"essentialism," . . . corrodes group identification and solidarity and leaves us with one-at-a-time personhood: liberal individualism" (75). When we move to this "liberal individualism," women as an identified group lose out – because the group becomes fragmented. Many feminists of color would argue that essentialism has its place and time, but when fighting affirmative action the solidarity is just not there; definitely not in *Grutter*, *Gratz*, *Hopwood*, and *Fisher*. *Fisher* is Abigail Fisher; *Hopwood* is Cheryl Hopwood; *Grutter* is Barbara Grutter; *Gratz* is Jennifer Gratz. The only major case that is male based is *Bakke*, Allen Bakke. And this is where we are.

The argument for the white women mentioned in the cases may be that they do not see themselves as feminist that support affirmative action – if they even claim the title of feminist. And they clearly do not see that they have benefited from affirmative action and diversity efforts. This could be another way that a "split" in the women's movement disrupts the community. Deborah Waire Post thus acknowledges in her university classes that, "white women . . . who articulate arguments that trivialize the experiences of subordinated communities… assert a sense of entitlement that I associate with white men" (137). Post continues by questioning herself, her colleagues, and the reader when she inserts a series of questions that get at the pain she feels in the disconnect between herself and her students: "Why don't these young white women feel some sense of connection to the struggle waged by their mothers and aunts? Why don't they have a sense of their own history? Why can't they see they have something in common with other oppressed peoples?" (137). There is a real feeling of despair that emanates from the pages of Post's essay. For me, one of the messages in the essay is that the "fight" in the classroom to educate the coming generations could come at a high price to the professors – by damaging their professional records. I'm sure there are many well positioned women that do not view themselves as feminists, that have benefited greatly from the work of civil rights groups and women's organizations but fail to acknowledge this lift in academia or otherwise. For historically marginalized groups, it is troubling that those within these groups and communities do not see that they benefited from the struggles of others.

Linda La Rue makes a connection in discussing how black women are not "fooled" by the women's movement claiming connections with the black movement as if they want to "help" blacks. La Rue tells us, "women's liberation not only attached itself to the black movement, but did so with only marginal concern for black women and black liberation and with functional concern for the rights of white women" (166). This is where *Grutter*, *Gratz*, *Hopwood*, and *Fisher* sits – a concern for Grutter, Gratz, Hopwood, and Fisher.

R. Kennedy places Fisher's concern in the space of white privilege. When we consider *Fisher* . . . "whites innocent of racial wrongdoing remain beneficiaries of it to the extent that they profit, albeit involuntarily, from historically embedded racial inheritances and the many privileges that accrue with the mere status of being white in a society that remains to a large extent a white-oriented pigmentocracy. Vocal about the ways in which they perceive themselves to be victims of reverse discrimination, whites angered by affirmative action rarely concedes the advantages they enjoy by dint of their white-skin privilege" (113). And many white females feed into this narrative. I suggest our task is to resist theoretical positions that essentialize the lives of women and recognize that some women are better positioned in societal relations.

This, then, is an appeal to white women, and especially to women of the feminist bent: as feminists (and women) we need to build stronger alliances and coalitions. It's important for us to acknowledge that there truly is strength in numbers and variety. While you may not think affirmative action laws and its ethos affect you, our paths are linked.

Much as Dr. M. L. King Jr., appealed to the clergy to help in the Civil Rights movement, I appeal to those that are fighting my same fight to jump in and help one another. There is a coordinated state-by-state fight that is on-going, pushing back on affirmative action as it relates not only to minorities, but also to women. California, Michigan, and Oregon all have state laws against affirmative action. This state-by-state strategy was used to push same sex marriage to the forefront. Why not use the same strategy to push against affirmative action laws that specifically call out minorities and women? We need a more formal alliance between racially diverse women organizations.

Fig. 3. Admissions showing ways of privilege. Editorial cartoon depicting the perceived fault in a white male not getting admission to the university – titled "Admissions." (http://www.cartoonistgroup.com/subject/The-Affirmative+Action-Comics-and-Cartoons-by-Signe+Wilkinson's+Editorial+Cartoons.php; Signe Wilkinson. Published 2003, January 17.)

CHAPTER IV

AFFIRMATIVE ACTION DEMONSTRATED

I am . . .

I am curly haired and brown skin[ned].
I wonder [what are] the seven worst things about wearing glasses.
I hear screams across the neighborhood.
I see why everyone wants to be a Disney [P]rincess.
I want to have a gay best friend.
I am curly haired and brown skin[ed].

I pretend to have the best day ever.
I love to feel [B]arney.
I touch thing[s] that say, "do not touch."
I worry if I'll die at twenty-five.
I cry when I chop onions.
I am curly haired and brown skin[ned].

I understand expectations vs. reality.
I say, "A girl doesn't need anyone who doesn't need her."
I dreamed of floating in space-time continua.
I try to make pizza.
I hope to paint and file my nails.
I am curly haired and brown skin[ned].

~ Katie Light

My daughter created this portrait poem at the age of thirteen. While portrait poems come in the form of a template (only the first few words are given: I am …, I see …, I want…, etc.,), I can see that she gave the assignment real thought and was able to provide an interesting and insightful world view at thirteen—something I never did, not in the seventh grade. Nor did I have a class in structural design before entering the

university. My daughter had structural design in ninth grade, whereas my first exposure was as a freshman at the university level.

While the high school I attended was not considered to be in the top five in the city, I graduated well within the top ten percent in my class. That distinction helped me to secure a spot in a top tier university. I know today that preparation classes would have benefited me in my undergraduate studies at the university level. For sure, affirmative action policies and programs enabled me to attend college. My drive helped me to complete my degree. As a result of both of these factors, I was afforded opportunities in corporate settings that allowed me to provide a better life for myself, which in turn allowed for a better education for my daughter.

I was born four years after Professor Randall Kennedy. He has written about his experience growing up in that heightened time just when the window of opportunity for "affirming actions" were taking hold and he, too, benefitted from affirmative action. My first-hand accounts of family dysfunction because of racial constraints and decisions based squarely on race laws in the United States align with his story. While I was born and reared in Wisconsin and my parents immigrated to the state with my three older siblings in the early 1950s, my dad had made scouting trips to Wisconsin with his family in the mid to late 1940s. Everything about Wilkerson's description of black Americans that "migrated North" matched immigration stories of families from European countries – they sought comfort foods, neighbors, and familiar ways of their home countries. They, for the most part, were welcomed, accepted. But for us blacks, once relocated, instead of

being supported like many European immigrants, my parents faced limitations on where they could live, work, and educate their children. This personal account, and our segregated living conditions, informs how I see and understand the world.

The problem with much of the argument about affirmative action in education is that this fight, while important, is over a few seats at "elite," highly sought after universities. Some scholars wonder whether this is an appropriate focus, or whether time and money would be better spent getting students into good but not elite schools (R. Kennedy, Gladwell). They wonder whether, in addition to lessening the fight for access, the students themselves might actually do better at these "alternate" schools. Oftentimes being a small fish in a big pond is a struggle. It may be better to create your own best way by attending a lesser-known school and becoming a "big fish" there (Gladwell).

I have found that it is not always the student that understands the prominence of a particular school nor the student who is the primary force trying to gain access to such an elite school. It is the parents (or other adults) that tend to push this. The historical significance of minority students finally gaining access to elite schools, after being systematically denied only because of their race, is typically lost on the young, as Sotomayor has noted. She stated:

> I had no need to apologize that the look-wider, search-more affirmative action that Princeton and Yale practiced had opened doors for me. That was its purpose: to create the conditions whereby students from

disadvantaged backgrounds could be brought to the starting line of a race many were unaware was even being run. (2015)

Many eighteen-year-old kids barely understand their need for a university-level education let alone the need to obtain one at an elite school. While I was elated to receive a scholarship to such a school through a program that targeted minority applicants, the prominence of the school I was to attend was lost on me. I now know that I am not the only one to experience this. How an affirmative action (or diversity desiring) program is implemented is left to each university's admissions board to create and is supported by the First Amendment in the U.S. Constitution.

Fisher, being the latest of the affirmative action cases to wind its way through the Supreme Court, is fighting a position that only accounted for ten percent of the University of Texas' admissions, allocated to the general application pool. (Eighty-five to ninety percent of applicants were admitted using UT's Top Ten Program. Fisher graduated in the top twelve percent of her class, thus missing the cut-off for the Top Ten program.) That this sliver of places is being fought over to this extent again begs the question of whether the court time, costs, and how we treat each other are worth this level of scrutiny by the Supreme Court. The Top Ten Plan does tend to "equalize" the admissions process but is being criticized by opponents of affirmative action who argue that feeder schools are not academically equal. CRTs like D. Kennedy argue against the ways merit is measured and speaks to a "pervasive skepticism about 'standards' according to which we have achieved success . . . we just don't believe that it is real

'merit' that institutions measure." My life's experiences have shown that success is not just a function of where someone is from or attends school, but how they are driven to apply themselves. America must get to a place of having a sustained program that is inclusive and acknowledge that blacks have been unsupported for centuries.

The importance of programs that affirm that people of color are included in the mainstream of American life gets us to a place of advancing the generation that is immediately affected, and their descendants after them. I went from belonging to a family of poor immigrants from Teoc, Mississippi, located in the southern United States, to becoming a solid middle-class wage earner and employer. I went from a neighborhood whose schools were marginalized to being able to pick up and move my daughter to a school where she will obtain a high school education more advanced than mine. It is those successive generations that will blend with others and eventually erase the stigma of race, I hope.

Most arguments against affirmative action ignore the prior four hundred years of history that held black people back from educational pursuits and want to put everyone at the same starting line – as if there is nothing in the past that makes this unfair. Or as one feminist, Crandall, suggests "[a]ffirmative action seeks to undermine discrimination by promoting the interests of women and minorities at the expense of equality" (5). Affirmative action, if clearly understood, is seeking inclusiveness for those intentionally left out. To argue for inclusion based on race just simply says include us.

However, the discussions on seeking race and gender equality continue to be lightning rods in our goals to achieving equality or social justice in our society, though great strides have been made toward this end. Theoretical ways of achieving social justice (such as by neutralizing oppressive identities) are desperately needed. Most theories are not perfect, but the goal to try, to continue theoretical pursuits to a balanced and shared world, is worth fighting for. The work being done in the frames of Critical Race Theory and Intersectionality are places where a "single categorical axis" (Crenshaw 23) of oppression are rejected. Getting those that have typically been oppressed (women and people of color) to maintain a level of solidarity can be difficult as the coming generations have no connections to past struggles. Subordinated groups must resist the temptation to turn on each other, and instead look at "racism not as inevitable but as something to resist and overcome" (Franklin 426). When we consider what it took to create an enslaved mindset and then to move from there to where we are today is nothing shy of an amazing strength and will to be. Yerby weaves a balanced "historical sociological" tale in *The Dahomean* to show the tragedy of slavery and how it destroyed "the high . . . culture of the African, reducing in the process the proud, industrious, warlike people . . . to the state of tortured, neurotic, self-hating caricatures of humanity" (vii). This is a four hundred-year tale that may very well take another four hundred years to undo. The same is probably true of civil rights legislation.

What is important is that the conversation continues. It is important that the discussion on the consideration of race, vigorously supported by Critical Race Theory, is

continuously brought to the forefront. In the United States, freedom of speech is the law, hate speech or otherwise. CRTs, like feminists, push those that are subordinated to speak up and out. The more voices pushing back, arguing for inclusion, telling their stories, the better. Matsuda, a leading voice in CRT tells us:

> Critical race theory uses the experience of subordination to offer a phenomenology of race and law. The victims' experience reminds us that the harm of racist hate messages is a real harm to real people. When the legal system offers no redress for that real harm, it perpetuates racism (50).

A balance of speech is hard to achieve, but my hope is that those that have been harmed historically are helped now through telling their stories. America is not unique in its openness to speech and symbols, no matter how hateful. Some countries, like Germany, for example, when Hitler was toppled, put in place legal restrictions or banned Nazi flags or swastika symbols. In the United States our system still allows all voices access to the airwaves. It has taken us 150 years to *start* removing the Rebel flags from our state houses. While some have argued "it's a flag with state history," we must also acknowledge that this flag allows vestiges of hate to linger. And it is this hate that will bubble up from time to time, with visual images of the past, this hate that has caused real harm to real people. Theory is just theory. Experience is truth. The truth becomes a fact when unrelated people can tell the same story of harm, repeatedly. And as Matsuda reminds us, "looking to the bottom" for voices of the unheard will only improve our legal discourse and legal decisions.

Fig. 4. Justice is Blind. Cartoon strip depicting "justice is blind." (www.intoon.com/toons/2003/keefeM20030625.jpg; Keefe, Mike. The Denver Post, 2003. Posted November 22, 2010.)

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