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ESSAYS

BEEN IN THE STORM TOO LONG, WITHOUT REDEMPTION: WHAT WE MUST DO NEXT

© BRYAN K. FAIR*

INTRODUCTION

A. *Making History*

As Southern University Law Center marks fifty years and celebrates its legacy as one of only four remaining accredited historically black law schools, I am honored to share this essay with its supporters throughout the tumultuous years since its founding.¹ Despite its tribulations, Southern Law Center has thrived, reshaping the Louisiana judiciary with its fine, capable graduates. It is my sincere hope that Southern Law Center will flourish during the next century. However, that future is uncertain in light of the current political climate, most notably the vituperative assault on the civil rights gains for Americans of

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1. Black law schools emerged in the United States during the separate but equal century following the Civil War as whites were forced by litigation either to open public schools on a nonracial basis or to build separate facilities for blacks. Many states, including Louisiana, chose the latter, creating law schools like Southern University in 1947. Another prevalent practice was for states to pay out-of-state tuition costs for blacks to attend law school in other states at schools that admitted blacks until the Court held that such procedure was a denial of equal protection. See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). For an incisive discussion of the growth of black public schools, see Gil Kujovic, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 MINN. L. REV. 29 (1987); for a related discussion on the establishment of black law schools, see Denise Wallace-Haymore, *Black Law Schools: The Continuing Need*, 16 S.U. L. REV. 249 (1989).

color achieved since the 1960s. More precisely, no advancement for Americans with darker skin is safe given the way many commentators and judges trivialize the history of racial inequality in the United States and recent false comparisons between our past and present.

Unfortunately, one of the great ironies of education in the United States is that few Americans learn anything about racial inequality and current racial caste. Consequently, most Americans are blind to racial privilege, never thinking about racism as a compelling national problem. If we are to make progress in the next century, we must meet this significant educational challenge, teaching more Americans about our sordid history.

This educational function is one of the great contributions that schools like Southern University Law Center have made and must continue to make. Because of its unique history, Southern Law Center is well situated to teach the world about America's racist legacy and to help lead the United States out of its current racial quagmire. This is so because Southern knows both the degradation of exclusion from Louisiana State University, as well as the necessity for educational institutions like Southern that are not hostile to students of color. Southern understands that because of America's segregative past, schools like LSU will never recreate safe, nurturing environments like the one at Southern. So rather than close or merge Southern Law Center, I hope that all the people of goodwill in Louisiana will recognize Southern's vital teaching role and provide it with more support so that it can become an even greater beacon of educational excellence, *open to all*.

B. *Healing Wounds Through Community*

Looking to the next century, I am reminded of the prophetic words attributed to Pastor Martin Niemoller who, writing about the Nazis, said,

In Germany they came first for the Communists, and I didn't speak up because I wasn't a Communist. Then they came for the Jews, and I didn't speak up because I wasn't a Jew. Then they came for the trade unionists, and I didn't speak up because I wasn't a trade unionist. Then they came for the Catholics, and I didn't speak up because I was Protestant. Then they came for me, and by that time no one was left to speak

up.²

I do not expect a reversal in the severe retrenchment in civil rights protection unless more Americans embrace one another as community across the traditional divides of race, gender, religion, sexual orientation and class, recognizing within each other the ways in which we have been privileged and the ways we have been subordinated.

Specifically, as black folk, this means recognizing intraracial privilege and subordination, as well as the tendency of some of us to act on attitudes that disparage others on the basis of race, gender, religion or sexual orientation, for example. We need a new Black Power that serves to eliminate our racial caste, but one that also helps us build community among others who experience caste differently. We must listen to each other's stories, acknowledging, as Stephanie Wildman brilliantly explains, that "attacking privilege alone cannot end subordination, because systems of privilege regenerate the discriminatory patterns that maintain the existing hierarchies of oppression."³ Put differently, we need a power to persuade others that no person has a constitutional right to maintain caste over others in the United States. At bottom, we must see that those who interpret our laws do so in a way that permits efforts by government to eliminate every vestige of caste, root and branch.⁴

C. *Curing the Disease*

As the child of one of this nation's black ghettos, I am quite fortunate to have escaped poverty and a potential life of crime. As one of America's racial caste babies, I know that too many Americans have lived a fairy tale, denying the reality of racial privilege and the presumed property value of being clas-

2. For one version of the quote, see *EXILE IN THE FATHER-LAND: LETTERS FROM MOABIT PRISON* (Hubert Locke ed., 1986). Niemoller formed the Pastors' Emergency League to resist the Nazi takeover of church life. As an outspoken preacher against the regime, he spent eight years in Nazi prison camps. See also *THE OXFORD DICTIONARY OF WORLD RELIGIONS* 699 (John Bowker ed., 1997); JAMES BENTLEY, *MARTIN NIEMOLLER* (1984).

3. STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 28 (1996).

4. The Court implied this anti-caste doctrine in *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954), adopting a constitutional interpretation consistent with Justice John Marshall Harlan's dissents in *Plessy v. Ferguson*, 163 U.S. 537, 558 (1896), and the *Civil Rights Cases*, 109 U.S. 3,71 (1883).

sified as white, male persons. Why else would color or gender matter? Those socially constructed categories, whiteness and maleness, have meant despair for so many nonwhite, nonmale Americans. Hereafter, my focus is racial caste, saving for another discussion a fuller discussion of other forms of American caste.

Theories of racial supremacy have poisoned the American well for too long. It was racial privilege for whites and racial subordination of colored Americans that animated Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*,⁵ it was racial caste against colored children that galvanized a unanimous Court in *Brown v. Board of Education*.⁶ Governmental policies or devices that have the purpose or effect of treating some citizens as second-class persons—creating or extending their caste—violate the equal protection principle. On the other hand, government policies designed to eliminate caste or subordination do not run afoul of the Constitution. Indeed, the Constitution mandates them. The current United States Supreme Court majority is misguided, rejecting this fundamental distinction between caste-producing legislation and policies designed to eliminate caste. Therefore, in race matters, the problem of the Twenty-first century will be the problem of colorblindness—the refusal of legislators, jurists, and most of American society—to acknowledge the causes and current effects of racial caste and to adopt effective remedial policies to eliminate them.

My thesis is that this Court is dismantling recent constitutional and federal statutory decisions the way its predecessor did during Reconstruction.⁷ The best hope to reverse this modern civil rights retreat is new appointments to the Court, which now seem unlikely before the next presidential election in 2000. We must insist that new Court appointees understand the difference between advancing racial supremacy and eliminating racial caste.

Beyond the Court's membership, another challenge is the Court's perverse, ineffectual interpretation of the equal protection clause, construing it against historically disfavored minori-

5. 163 U.S. 537, 558 (1896).

6. 347 U.S. 483, 493-95 (1954).

7. Between 1873 and 1896, the Supreme Court emasculated the Civil War Amendments and related civil rights laws. BRYAN K. FAIR, NOTES OF A RACIAL CASTE BABY: COLOR BLINDNESS AND THE END OF AFFIRMATIVE ACTION 96-103 (1997).

ties. One reason we have lost so much ground is because the Court has returned to the definition of equality captured in *Plessy*, while, at several turns, explicitly undermining the anti-caste meaning of *Brown*. We cannot concede this interpretive ground; we need to define equality in a consistent, substantive way that aids traditionally disfavored persons in their efforts to eliminate their caste.

My proposal is to read the Fourteenth Amendment's equal protection clause as a prohibition on states from placing any person or group into a or maintaining any person's or group's caste on the basis of animus to some arbitrary characteristic such as race, gender, religion, sexual orientation, poverty, or disability. That clause's meaning should not be contingent, hinging on the axis of discrimination. Rather, the clause's meaning must be determinate.

Finally, as the winter closes on remedial affirmative action, whether in voting, employment, or education, we must reassert its legal and moral defenses at every opportunity.⁸ Remedial affirmative action has none of the *invidious* attributes that defined the United States as a white country, privileging persons who could claim a white racial ancestry. Today, no job category is closed to whites, no college/university excludes whites from enrollment solely on the basis of race, and no voting devices are designed to keep whites from the polls, denying or diluting their votes. Neither American legal nor public policy is anti-white, as they have been decidedly anti-black.

The purpose of this essay is to strip bare the current Court majority's masterful dissection of the principal, too-short-lived, civil rights gains realized during the past thirty years. Tragically, a majority of the current Supreme Court has turned its back on its most caste-vulnerable constituents in recent decisions that all but forbid remedial action in education, voting, and employment. I dissent to this attack on the constitutional rights of those who for too long have been forced to wait for justice. Part I addresses more fully shortcomings of the current Court. Part II examines how this Court's activist interpretive methodology portends great harm to America's perennial outsiders. Finally, Part III contains a personal assess-

8. I offer an unequivocal defense of remedial affirmative action in NOTES OF A RACIAL CASTE BABY. FAIR, *supra* note 7, at 115-75.

ment of remedial affirmative action, explaining why I am an unequivocal defender.

PART I

THE COURT OF LAST RESORT

Our first problem is the Court itself. It is the Court's province and duty to say what the Constitution means⁹ and nothing precludes the Court from interpreting the equality provision as an anti-caste clause, that is, nothing save its current membership. This Court is the product of Nixon, Ford, Reagan, and Bush appointments, and it illuminates effectively why it matters who is elected President and why we must vote. When Democrats lost the White House in 1972, 1980, 1984, and 1988, they also lost the Court. Republicans control Congress and the Supreme Court, even though a Democrat is President.

In Appendix A,¹⁰ I have organized the votes of each current justice in many of the principal affirmative action cases since 1978. The results illustrate a stark pattern of hostility by five current justices to claims for racial remediation and justice, leaving this writer wondering whether, at the close of this century too, the Court has not again become an agent of the same racial supremacy so clearly ensconced in *Plessy*.

William Rehnquist,¹¹ who was appointed to the Court by Nixon in 1971, is the most senior justice, in terms of years of service. As Chief Justice, he is in the enviable position of running the Court, including, when he is in the majority, of assigning opinions to the other justices. By all counts, Rehnquist is a constitutional conservative who usually has read the Constitution narrowly when minority persons have challenged restrictions on their rights. Rehnquist has been aided by Justices Scalia and Thomas, and often, Justices Kennedy and O'Connor, to re-write the meaning of many significant constitutional deci-

9. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

10. In Appendix A, I set out the voting record of each of the current justices in 14 affirmative action cases since *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978). Only *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987), was not a race case. The justices have displayed a remarkable consistency for or against remedial policies. See *infra* Appendix A.

11. For brief profiles on current and former justices, see *THE OXFORD COMPANION TO THE SUPREME COURT* (Kermit L. Hall ed., 1992).

sions, including, for example, *Brown, Gomillion v. Lightfoot*,¹² and *Fullilove v. Klutznick*.¹³ Rehnquist has never recognized the difference between *remedial* affirmative action and *invidious* racial discrimination, voting against the traditionally-disfavored minority interest in all the significant affirmative action cases since *Regents of the University of California v. Bakke*.¹⁴

Next in seniority is John Paul Stevens, who was appointed by Ford in 1975. Ideologically, Justice Stevens has traveled the farthest of all the current justices in terms of his judicial opinions on remedial affirmative action. In early affirmative action cases in education and employment, Justice Stevens routinely voted against the remedial programs as violations of equal protection.¹⁵ Yet, today he believes, as I do, that there is an important constitutional difference between policies that promote white supremacy and policies designed to eliminate it.¹⁶ Equality, then, does not mean that everyone is always treated identically; context matters, a remedial context is not the same as a demeaning one. Government intent is important because only invidious purposes or methods violate constitutional interests. This important contextual distinction has been a cornerstone of constitutional jurisprudence, frequently used by the Court to tell minorities they had not proved intentional, purposeful discrimination. Today, Stevens usually votes in favor of remedial programs aiding traditionally-disfavored minority persons.¹⁷

Sandra Day O'Connor joined the Court in 1981, fulfilling a campaign promise from Reagan to appoint the first woman to the Court. When Justice O'Connor graduated law school very near the top of her class, the best job offer she obtained was as a legal stenographer.¹⁸ Her story is similar to that of millions of white women who were excluded from America's

12. 364 U.S. 339 (1960).

13. 448 U.S. 448 (1980).

14. 438 U.S. 265 (1978). See also *infra* Appendix A.

15. See, for example, *Bakke*, 438 U.S. at 408-21 (Stevens, J., dissenting), and *Fullilove*, 448 U.S. at 532-54 (Stevens, J., dissenting).

16. *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200, 242-64 (1995) (Stevens, J., dissenting).

17. Appendix A reveals that Stevens has voted for remedial affirmative action in 10 of the 14 cited cases. See *infra* Appendix A.

18. KAREN BERGER MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT* 194 (1986).

promise, not by inability, but by caste-producing, gender preferences for men, who were relieved of any requirement to compete with half the population. For women of color, at least one other axis of discrimination relegated them to a racialized sub-caste, excluding them from limited opportunities available to their white sisters. Nonetheless, O'Connor has displayed a remarkable misunderstanding of the purposes of remedial affirmative action, especially in race cases. Justice O'Connor is chiefly responsible for the artful destruction of *Fullilove* and *Metro Broadcasting v. FCC*,¹⁹ as well as *Gomillion*. Although O'Connor claims strict scrutiny review is necessary to distinguish legitimate from nonlegitimate governmental uses of race, she has voted against remedial race-based affirmative action, never finding a compellingly justified, narrowly-tailored plan.²⁰

In 1986, while Democrats slept, Reagan fortified Republican domination of the Court, appointing Rehnquist, Chief Justice, and Antonin Scalia to Rehnquist's old seat. Foreshadowing his opinions, Justice Scalia once wrote an article condemning remedial affirmative action in which he asserted that his father had come to this country as an immigrant and had never earned a dime off the sweat of a black man. Therefore, Scalia concluded, affirmative action was unfair to innocent whites like him.²¹ Of course, what he and other beneficiaries of white privilege ignore is that for much of its history, U.S. immigration law privileged whiteness, explicitly limiting naturalization to persons classified as white until 1870.²² As the current Court member who most often takes readers on a journey through American history and tradition in the states, Scalia has ignored America's long history of officially privileg-

19. 497 U.S. 547, 602-31 (1990) (O'Connor, J., dissenting).

20. See *infra* Appendix A. The one exception to O'Connor's consistent voting pattern against affirmative action was in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987), a gender affirmative action case brought by a white male against a white female.

21. Antonin Scalia, *The Disease as Cure*, WASH. U. L.Q. 147, 152 (1979). Even if one opposes remedial affirmative action, Scalia's defense of his father is misplaced. The fact is that the sweat of millions of black men and women helped build this nation, affording millions of European immigrants a better place to come. One does not need to have owned slaves or to have sponsored segregation to benefit from those systems of racial privilege.

22. IAN HANEY LOPEZ, *WHITE BY LAW* (1996) (chronicling racial bias in U.S. naturalization rules). For an insightful reader on anti-immigrant policies, see *IMMIGRANTS OUT: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* (Juan Perea ed., 1997).

ing whiteness until only thirty years ago. Today, Justice Scalia privileges whiteness through opinions that in substance dispatch blacks to modern lives under Jim Crow-like subordination to whites. Scalia is unwilling to eliminate racial caste, always voting against remedial race-based affirmative action.²³

Anthony Kennedy, Reagan's final appointment, joined the Court in 1988, after the failed Robert Bork and Douglas Ginsburg nominations. Justice Kennedy has been difficult to predict, sometimes joining the Court's conservative bloc to curtail Congress' power, but other times breaking with it to insist that the state not improperly aid religion. To his credit, Kennedy wrote the Court's opinion in *Romer v. Evans*,²⁴ the landmark decision forbidding Coloradans from treating gays or lesbians as second-class citizens. That opinion reflects an anti-caste interpretation of the equal protection clause. Nonetheless, Justice Kennedy does not analyze racial caste claims through the same lens. This is especially remarkable since the clear purpose of the Fourteenth Amendment was to prevent whites from keeping blacks in caste conditions. With Justice O'Connor, Kennedy's vote has been pivotal in affirmative action litigation. It is impossible to prevail without the vote of one of them.²⁵

David Souter was appointed to the Court by Bush in 1990. Souter may be a huge disappointment to Republicans, but for me he is almost the perfect justice, usually writing about the Constitution as Earl Warren, Thurgood Marshall, and William Brennan did; it is not a set of empty words. As much as any other current Justice, he has eschewed partisan views and embraced precedent as worthy of respect, even when he has disagreed with it. Souter writes well-reasoned opinions and one never gets the feeling that he is pulling the wool over one's eyes.²⁶ Souter recognizes the difference between policies advancing racial supremacy and ones designed to dismantle it.²⁷

23. See *infra* Appendix A.

24. 517 U.S. 620 (1996).

25. See *infra* Appendix A. Since *Croson*, Kennedy has regularly voted against remedial affirmative action.

26. For example, in *Shaw v. Reno*, 509 U.S. 630, 679-87 (1993) (Souter, J., dissenting), Souter provides a persuasive review of voting rights precedent that reveals the majority's claim that *Gomillion* was controlling was simply wrong and inconsistent with another case with more similar facts.

27. See *Adarand*, 515 U.S. at 264-71 (Souter, J., dissenting).

We all recall the agonizing Anita Hill/Clarence Thomas hearings, and Thomas' narrowest appointment to the Court by Bush in 1991. Groomed by Reagan and Bush handlers, Thomas was moved strategically from the Equal Employment Opportunity Commission, to the D.C. Court of Appeals, and to the Supreme Court. Despite Bush's claims otherwise, Thomas was not the most qualified African American to replace Thurgood Marshall. That assertion was an insult to Marshall and at least a couple dozen other black federal judges who had far longer tenure than Thomas in law generally and on the bench specifically, but they had the wrong ideological stripe.²⁸ Justice Thomas votes against affirmative action, *always*.²⁹ I suspect that is chiefly why Bush wanted him there. From all indications, Thomas is intent on undermining Marshall's legacy.

In 1993, Clinton appointed Ruth Bader Ginsburg to the Court. Justice Ginsburg has remained a consistent champion of gender equality. She was the principal advocate or on brief in most of the significant gender discrimination cases before the Court between 1971 and 1980 when she was appointed a federal judge by Carter.³⁰ In most race and gender cases, she has sided with those justices who interpret the Constitution to permit the elimination of caste, including through remedial affirmative action. Like Souter, Justice Ginsburg is one of the least partisan of all the current justices. She rejects colorblindness theory, embracing instead a contextualized meaning of equality that is substantive, not formalistic.³¹

Clinton chose Stephen Breyer to replace retiring Justice Harry Blackmun in 1994. In the Rose Garden ceremony where Breyer was introduced to the nation, Breyer said, "I will certainly try to make the law work for the people, because that is its defining purpose in a government of the people."³² For Justice Breyer, the phrase 'the people' seems to include all Americans, including those at the bottom of America's economic and

28. According to the ABA Judicial Division, there are some 1,680 black judges in the United States, many on state supreme courts or on the federal bench. See THE DIRECTORY OF MINORITY JUDGES OF THE UNITED STATES (2d ed. 1997).

29. See *infra* Appendix A.

30. For articles about Ginsburg, see Stephanie B. Goldberg, *The Second Woman Justice: Ruth Bader Ginsburg Talks Candidly About a Changing Society*, A.B.A. J. Oct. 1993, at 40; Deborah L. Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law*, 11 WOMEN'S RTS. L. REP. 73 (1989).

31. See, for example, *Adarand*, 515 U.S. at 271-75 (Ginsburg, J., dissenting).

32. Jeffrey Rosen, *Even Stephen*, NEW REPUBLIC, June 6, 1994, at 11.

political well. I am encouraged that Breyer has joined Stevens, Souter, and Ginsburg, justices who view the Constitution as a living, breathing document, one that can do for equality and the elimination of caste what it once did so fully for inequality. Justice Breyer has supported remedial affirmative action, noting its continuing need given our tragic history.

A few other general observations can be made. This is a young Republican Court: six justices are under age 65 and have been appointed since 1986. Most of the current justices will likely remain on the Court for the next decade. At 50, Clarence Thomas is the youngest member, potentially remaining on the Court beyond the first quarter of the Twenty-first century. Like Rehnquist, who was appointed to the Court in his forties, in time, Thomas could find his way to the position of Chief Justice. Can you imagine the Court led by Thomas? For me, that is a frightening thought.

The real strength of the Court is in an elusive, unpredictable middle group among Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer. More precisely, Justices Kennedy and O'Connor are in the center of two other groups, with their swing votes producing numerous devastating 5-4 or 6-3 decisions against minorities over the past several terms.

In race-based remedial affirmative action cases, there is a sharp 5-4 split against, sending civil rights groups scrambling to avoid any more losses there.³³ This fear and despair are appropriate if, as I argue below, this Court has set out two proof-of-discrimination standards, one for white plaintiffs like Sharon Taxman, and another more rigorous standard for plaintiffs of color.

PART II

THE COURT'S WAR AGAINST CIVIL RIGHTS

A second problem is this Court majority's tendency to write opinions that reverse significant, hard-won civil rights gains, while barely citing relevant historical context or precedent.³⁴ This Court has abandoned the initiatives started just

33. Consider *Piscataway v. Taxman*, 91 F.3d 1547 (1996), *cert. dismissed*, 139 L. Ed. 2d 431 (1997), for example, where civil rights groups proposed a financial settlement of Taxman's lawsuit rather than endure this Court's review on the merits.

34. Two significant recent examples of this sidestepping of precedent are found

over thirty years ago, dismantling those legal victories of the 1960s and 1970s in the same way that its predecessor gutted the Civil War Amendments and federal civil rights statutes during the late Nineteenth century.³⁵ Indeed, the parallels to the post-Reconstruction Court portend the emasculation of the 1964 Civil Rights Act³⁶ and the 1965 Voting Rights Act.³⁷

The principal difference between then and now is that today not only are we embattled with a revisionist Court, we also have a Congress that is intent on ending remedial affirmative action. In July 1997, a House subcommittee approved along party lines the 1997 Civil Rights Act which would abolish federal affirmative action programs. Although the House Judiciary Committee has tabled the bill until 1998, at last count there were ninety Republican co-sponsors.³⁸ Republicans, controlling Congress and the Court, have declared war against remedial affirmative action.

Using rhetoric of federalism, equal opportunity, and colorblindness, the current Court majority has run from precedent and turned its interpretive power against citizens who have only in the last generation begun to live the "American Dream." This Court writes too often as if race discrimination never happened in the U.S. or that it occurred so long ago that nothing can or should be done about it. Thus, Justice Thomas tells us government cannot make the races equal; it can only recognize, respect, and protect us as equal before the law.³⁹ Similarly, Justice Scalia writes that in this country there is only one race—American.⁴⁰

For the current Court majority, the Constitution cannot do for equality what it has done for inequality. Under such thinking, this Court has abandoned the schoolchildren that it prom-

in the Court's opinions in *Adarand* which failed to reconcile the earlier decision in *Fullilove*, as well as *Shaw* which was written as if the Court had not faced a similar claim in *United Jewish Organizations*.

35. The parallels between 1872-1896 and 1973-1997 are remarkable. The current Court is rereading modern civil rights statutes and reinterpreting constitutional provisions against the very persons the revised laws were designed to protect, just as the post-Reconstruction Court did a century ago in its repudiation of the Civil War Amendments and related federal civil rights laws.

36. 42 U.S.C.A. §§ 1971, 1975a to 1975d, 2000a to 2000h-6 (West 1997).

37. 42 U.S.C.A. §§ 1971, 1973, 1973a to 1973p (West 1997).

38. U.S.L.W., 2294 Nov. 18, 1997.

39. *Adarand*, 515 U.S. at 240 (Thomas, J., concurring).

40. *Id.* (Scalia, J., dissenting).

ised to protect in *Brown*.⁴¹ The same five justices have decided that in most situations it is illegal to create majority-minority voting districts, where race is the predominant factor used to create the district.⁴² A third area of retrenchment is in modern affirmative action. There, Justice O'Connor has displayed a shocking insensitivity to race-based remedial policies, implying that there is no constitutional difference between policies designed to eliminate racial caste and those which promote white supremacy.⁴³

Consider the Court's education cases. The Court has all but abandoned its mandate to desegregate schools or to promote educational diversity. Today the Court has lost the meaning of *Brown* and *Swann v. Charlotte-Mecklenburg Board of Education*.⁴⁴ *Brown* was a command to eliminate dual educational systems, a superior one for whites and an inferior one for minorities, entirely. It held that segregated schools placed black children in a caste, stigmatizing them in ways likely to ever be undone. Such publicly sponsored caste was inherently unequal, violating the equal protection clause.⁴⁵ Regrettably, the Court did not state directly the connection between white supremacy and segregation, but *Brown's* implicit meaning is unmistakable. For me, *Brown* meant that policies promoting racial supremacy were unconstitutional. *Swann* was a belated order to recalcitrant school officials, who for almost twenty years thumbed their noses at the Constitution, to adopt desegregation plans that would work immediately.⁴⁶

Now, twenty-five years later, we still have many segregated schools throughout the country and unequal educational opportunity. Nonetheless, in *Oklahoma City v. Dowell*,⁴⁷ Rehnquist has set out a new test for ending district court supervision: whether the school board had complied in good faith with the court order since it was entered and whether the vestiges of past discrimination had been eliminated *to the extent practicable*. Reminiscent of the "all deliberate speed" proviso

41. See *Missouri v. Jenkins*, 515 U.S. 70, 98-101 (1995).

42. See *Miller v. Johnson*, 515 U.S. 900, 916-19 (1995).

43. See *Adarand*, 515 U.S. at 223-37.

44. 402 U.S. 1 (1971).

45. See *Brown*, 347 U.S. at 493-95.

46. *Swann*, 402 U.S. at 13.

47. 498 U.S. 237, 249-50 (1991).

in *Brown II*,⁴⁸ *Dowell* reveals that the Court will no longer force school officials to prove much at all.

Moreover, in *Freeman v. Pitts*,⁴⁹ the Court held that a district court is permitted to withdraw judicial supervision with respect to discrete categories in which a school district has achieved compliance with a court-ordered desegregation plan. Justice Kennedy's opinion clarified *Dowell* by listing specific factors to examine before relinquishing supervision.⁵⁰ These standards are important because once federal authority is dismissed, plaintiffs must initiate costly new lawsuits, rather than simply petition the court for a hearing. They must also presumably meet the difficult burden of showing invidious, purposeful discrimination.

Finally, in *Missouri v. Jenkins*,⁵¹ the Court held that the remedial power of the federal court does not extend to orders to fund salary increases or remedial education programs, where student achievement levels remained below national norms at many grade levels. Unlike *Swann*, *Jenkins* cabins federal court remedial power narrowly, to eliminating the identifiable vestiges of the de jure segregation, to the extent practicable. Thus, these new cases release school districts from the evidentiary burdens established in *Brown*.

The Court's mandate today is not desegregation, but restoring local control quickly. Therefore, no matter what schools look like, as long as no one can prove resegregation is the result of invidious discriminatory intent, local school officials can do whatever they want, leaving *Brown* as essentially meaningless.

This Court's record in recent voting cases is no less retrogressive, reflecting the same ahistoric, revisionist confusion found in recent education cases. Historically, the Court had identified two types of voting rights claims—deprivation or dilution. Either a plaintiff was prevented from voting entirely—through a device such as a grandfather clause, poll tax, literacy test, or white primary—or districts were drawn to reduce minority strength. For example, in *Smith v. Allright*⁵² and

48. *Brown*, 349 U.S. at 301.

49. 503 U.S. 467, 491-92 (1992).

50. *Freeman*, 503 U.S. at 491-92.

51. 515 U.S. 70, 98-101 (1995).

52. 321 U.S. 649 (1944).

Terry v. Adams,⁵³ blacks could not vote in the primary, the only election that mattered. The primary was opened to members of the Jaybird Democratic Organization, which only whites could join. Also, in *Gomillion*, all but a half dozen of the 400 black residents of Tuskegee were gerrymandered out of the municipality and *excluded* from voting.⁵⁴

In other voting cases, minority plaintiffs challenged legislative districting, alleging that districts were shaped and sized to minimize the impact of minority voting. For example, in *Reynolds v. Simms*,⁵⁵ the Court reminded us that the right to vote can be denied by a debasement or dilution of the weight of a citizen's vote as effectively as by wholly prohibiting its free exercise. The Court held the right to vote can neither be denied outright, nor can it be destroyed by alteration of ballots, nor diluted by ballot-box-stuffing.⁵⁶ *Reynolds* guaranteed one person one vote. After the decision, the Alabama Legislature could no longer apportion one Senate seat for 15,000 persons and another for 600,000. Districts had to be roughly the same size numerically.

In *Shaw v. Reno*,⁵⁷ the Court created a novel voting rights claim, requiring no proof of invidious discriminatory injury. None of the plaintiffs in *Shaw* claimed either an abridgement or a dilution of their voting rights. Instead, they claimed that their rights had been violated essentially because they were placed in a majority-minority district—a majority black district. What was the constitutional harm alleged in *Shaw*? That the new district was so strange-looking, so ill-shaped, that, on its face, it had no explanation save as an effort to separate voters on the basis of race.⁵⁸ Of course, when Hasidic Jews made the same claim fifteen years earlier in *United Jewish Organizations v. Carey*,⁵⁹ the Court told them they had not asserted an equal protection claim.⁶⁰

Shaw is another example of the Court's deceptive comparison of cases out of context. The only point that *Gomillion*

53. 345 U.S. 461 (1953).

54. 364 U.S. 339, 341 (1960).

55. 377 U.S. 533, 555 (1964).

56. *Reynolds*, 377 U.S. at 555.

57. 509 U.S. 630, 659 (1993).

58. *Shaw*, 509 U.S. at 659.

59. 430 U.S. 144, 162-68 (1977).

60. *United Jewish Orgs.*, 430 U.S. at 162-68.

and *Shaw* shared was a reference to race in drawing a district line. The motives for using race and the consequences following its use were completely different. Under *Shaw*, any separation of voters by race is invidious, despite the motives or results. This interpretation, of course, makes an inquiry into motives redundant and unnecessary, implicitly rewriting the Court's holdings in cases such as *Washington v. Davis*⁶¹ and *Arlington Heights v. MDHC*⁶² where the Court said that to prove discrimination, plaintiffs had to show evidence of purposeful, invidious conduct by the government. Is it possible that the current Court majority applies one standard for minority plaintiffs, but a different standard for white complainants? It is difficult to reconcile *Shaw* and its progeny otherwise.

Since *Shaw*, majority-minority districts in Florida, North Carolina, Georgia, Louisiana, and Texas have all been invalidated under this modern racial gerrymander theory.⁶³ A *Shaw*-plaintiff presents an equal protection claim if he establishes that race was the predominant factor motivating the legislature's decision to place a significant number of voters in or outside a particular district.⁶⁴ Obviously, in any case where a legislature intentionally creates a majority-minority district, the *Shaw/Miller* standard will be met. So, in my mind, majority-minority districts are presumptively unconstitutional for at least five current justices. This result turns voting rights history against minority groups seeking to elect the candidate of their choice. It makes it much easier for white plaintiffs to challenge majority-minority districts. As bad, it opens the door to a direct constitutional challenge to the role of the Department of Justice (DOJ) in voting cases. The Court has told the DOJ it cannot force states to maximize the number of majority-minority districts.⁶⁵ The next step is a rereading of the Voting Rights Act itself, already suggested by Justice Thomas.⁶⁶

61. 426 U.S. 229 (1976).

62. 429 U.S. 252 (1977).

63. The Court's recent decisions since *Shaw v. Reno* have effectively taken the Court out of its role of protecting minority voting rights. See, e.g., *Hunt v. Shaw*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *United States v. Hays*, 515 U.S. 737 (1995).

64. See *Miller*, 515 U.S. at 915-16.

65. See *id.* at 921-22.

66. See *Johnson v. DeGrandy*, 512 U.S. 997 (1994); *Holder v. Hall*, 512 U.S. 874 (1994).

Here, I think the Court has given those of us interested in a more racially diverse national legislature no alternative but to challenge selected majority-white districts under the *Shaw* standards. Our challenge is to show that race has been as predominant a factor in creating majority-white districts as it is in creating recent majority-minority districts. Even though I do not expect the Court to recognize these proposed claims, such challenges would accomplish several valuable results, including testing my hypothesis that the Court applies different proof standards for plaintiffs advancing minority interests.

PART III

AFFIRMATIVE ACTION AND ME

The final area that I want to mention briefly is affirmative action. The road from *Bakke* to *Adarand Constructors, Inc. v. Pena*, was tortuous, with numerous closely divided Court opinions. *Bakke* rejected quotas, but embraced promoting educational diversity as a compelling interest. *Adarand* does not overrule *Bakke*, but it reveals this current Court majority's disdain for race-based affirmative action and its disregard for precedent. How will this Court decide the next educational diversity case? Is *Bakke* still the controlling case? How does it operate in areas where lower federal courts have announced different standards? Can the Fifth Circuit, for example, reverse *Bakke*? The Court's recent affirmative action cases have created more uncertainty than they have resolved.

More than a collection of cases, however, affirmative action is personal for many of us and we must share our stories.⁶⁷ I was born, the eighth of ten children of a single mother, in a black ghetto in Columbus, Ohio, in 1960. My mother at times worked two jobs, but her wages were low, she received no job benefits, and none of our fathers helped her. We needed welfare—I cannot imagine what we would have done without it. Even with it, my family went weeks without regular meals at home. We ran out of food each month, eating sugar or mayonnaise sandwiches until they too ran out.

67. The following is an excerpt from FAIR, *supra* note 7, at xv-xvii, reprinted with permission.

Our housing was old and small, but rent in the ghetto was high-priced. We occupied every square foot of space: bedrooms, the basement, and the attic. We never had individual bedrooms and frequently shared beds. Our houses were poorly insulated and frequently infested with roaches and rats. At night, I remember sitting on the couch and being afraid to put my feet on the floor fearing that a rat or mouse might scurry across them. Our campaign against roaches was futile; they were the permanent residents, we were the transients, moving every couple of years in search of cheaper rent or when we fell behind to the landlord.

Sometimes during the frigid, below-zero Ohio winters my family had no gas heat. To stay warm, we huddled under blankets and slept in our clothes. To bathe, we either took icy showers or boiled pots of water on our single-burner, electric hotplate. A few times my mother could not pay the electric bill. I thought we were the poorest people in Columbus. Of course, we were not.

I started hustling jobs when I was seven. For the next eleven years, after school and on weekends, I ran errands, shoveled snow, cut grass, cleared trash, cleaned bathrooms, swept floors, cooked, stocked groceries, sold candy, and cleaned animal cages. My survival depended on those jobs. They enabled me to buy food, a few clothes, school supplies, and to help my mother pay bills.

I attended elementary school regularly and earned A's and B's in most classes. However, when I participated in a voluntary busing program during junior high that moved black kids from the ghetto into predominantly white schools, the work seemed much harder and my grades declined. My reading skills were inadequate and I struggled through homework. I was only a C student.

When I started high school, one of my teachers told me that I had an appealing personality, but that I didn't know very much. He gave me history and literature books to read. I couldn't comprehend them without constant searches through the dictionary for words whose pronunciation and meaning I didn't know. I was scared, angry, and felt trapped.

Many blacks in Columbus and elsewhere in the United States are born into such conditions. Most remain there. I escaped. I attended Duke, then UCLA School of Law. I am not poor nor dependent on welfare. Neither are any of my siblings.

I support myself and help support my mother. How did this happen? One important factor was remedial affirmative action. No one can tell me that affirmative action does not work. It did for me, as it has for many other Americans.

One motive for telling this story is to expose tales about the hazards of affirmative action, whether the myth-making is done by whites, blacks, or others; another is to make clear that remedial affirmative action is not the same as the whites-only, caste-producing legislation that has been so prevalent throughout America's history. My life experiences persuade me that remedial affirmative action and hard work, plus the support and direction of many people, best explain how, even though the odds were decidedly against me, I got out of that Ohio ghetto. Without those educational opportunities, I would have been trapped by circumstances and conditions significantly beyond my control.

CONCLUSION

For too long, the Court has read the Constitution to protect white privilege encapsulated in slavery, segregation, and their present effects. One need only recall the candid language of the first Justice Harlan, for a reminder that even sympathetic justices have not always hidden their allegiance to racial supremacy in theory and fact:

The White race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in the view of the constitution, in the eye of the law, there is in this country no superior, dominant ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.⁶⁸

The current Court majority's recent decisions threaten even more harm, interpreting the Constitution now to allow whites to defeat modern remedial policies that are only beginning to show positive results, under standards far less rigorous than those faced by plaintiffs of color who for centuries could

68. *Plessy v. Ferguson*, 163 U.S. 537, 558 (1896) (Harlan, J., dissenting).

obtain no relief, no justice. We must illustrate the Court's double standards at every turn.

America has never adopted any policies designed to promote white caste. No current remedial affirmative action policy has the *invidious* purpose or effect of excluding whites from public accommodations, voting, employment, education, or housing. They were enacted because of their *remedial* effect. Therefore, *reverse discrimination* is a bitter hoax.

As the great legal minds of the Twentieth century conquered the color-line, we must advance their work and dismantle caste so that our children's children will not live lives demeaned by color or caste. I hope that Southern University Law Center will keep teaching its graduates about racial caste and a sensitivity to other forms of caste as we try to reclaim America's conscience.

Congratulations on the first fifty years. You have given substance to the phrase "equal justice under law."

APPENDIX A

	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer
Bakke	N	N							
Weber	N								
Fullilove	N	N							
Wygant	N	Y	N						
Johnson	N	Y	Y	N					
Paradise	N	Y	N	N					
Crosby	N	N	N	N	N				
Metro	N	Y	N	N	N				
Dowell	N	N	N	N	N				
Freeman	N	N	N	N	N	N			
Shaw	N	Y	N	N	N	Y	N		
Adarand	N	Y	N	N	N	Y	N	Y	Y
Miller	N	Y	N	N	N	Y	N	Y	Y
Jenkins	N	Y	N	N	N	Y	N	Y	Y

NOTE: N -Vote Against Affirmative Action
 Y -Vote For Affirmative Action