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Separating the Wheat from the Tares: the Supreme Court's Premature Strict Scrutiny of Race-based Remedial Measures in Public Education

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SEPARATING THE WHEAT FROM THE TARES: THE SUPREME COURT'S PREMATURE STRICT SCRUTINY OF RACE-BASED REMEDIAL MEASURES IN PUBLIC EDUCATION

I. INTRODUCTION

As I frequented the ironically named Martin Luther King, Jr. Boulevard through the eastern portion of Lubbock, Texas, during my time living in the area from 2010-2012, I found this major thoroughfare to be a physical separator of Lubbock's Black residents from the rest of the city.[1] This street became a tangible marker of the continued housing patterns caused by decades of legalized segregation among Lubbock's residents. I also found the city's Latino residents to be heavily segregated from many of the Black and White residents (who were concentrated in the nicer southwestern part of Lubbock), and remarked that there could be such a sharp tri-racial division in any American town decades after the Civil Rights movement in the 1960s and 1970s.[2]

In this article, I provide some historical context to Lubbock's *de facto* segregation patterns and use Lubbock's history as a microcosm to illustrate the failure of the desegregation movement in the United States during the 1970s and 1980s to create a long-term desegregation in public schools. I then seek to demonstrate that it is socially damaging when American jurists ascribe to the myth of post-racialism.

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1. *See* LLOYD POTTER, OFFICE OF THE STATE DEMOGRAPHER, TEXAS AND LUBBOCK: DEMOGRAPHIC CHARACTERISTICS AND TRENDS (2011), http://txsdc.utsa.edu/Resources/Presentations/OSD/2011/2011_12_13_Lubbock_Chamber_of_Commerce.pdf.

2. *Race and Ethnicity in Lubbock, Texas*, STATISTICAL ATLAS (Sept. 12, 2018), https://statisticalatlas.com/place/Texas/Lubbock/Race-and-Ethnicity; Potter, *supra* note 1.

This article is not intended as a comprehensive evaluation of the history of racism in the United States, affirmative action, or other remedial measures. Rather, I briefly discuss the complex relationship between race and the law in public education, and why American jurisprudence should continue to allow race-based remedial measures.

In this paper, I attempt to do the following: (I) briefly describe the history of *de jure* segregation in Lubbock schools, as an illustrative example of the complexities of race in the U.S. education system; (II) describe why the concept of "post-racialism" society is a harmful myth that distracts American jurists from allowing race-based remedial measures to counter continued damage both from past *de jure* segregation and continued *de facto* segregation; (III) describe the need for continued use of race-based remedial measures to establish "true" integration and diversity in the American public education system.[3]

II. LUBBOCK TEXAS: A CASE STUDY FOR THE NATION

There is significant damage done to a city's school system when cities take on a post-racial mindset while racism remains an significant issue in the community. This occurs when cities in the U.S. seek to focus on the future "after" racism, without actually eliminating, both "root and branch," the legal, political, and social effects of centuries of racist laws.[4] Jurists have a duty as guardians of the Constitution, with a duty to

3. See "true" integration and diversity defined *infra*, Section III.

4. *Green v. County School Board*, 391 U.S. 430, 438 (1968) ("We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."); *see also* MARGUERITE L. SPENCER, ET AL, THE BENEFITS OF RACIAL AND ECONOMIC INTEGRATION IN OUR EDUCATION SYSTEM: WHY THIS MATTERS FOR OUR DEMOCRACY, 6-11 (Kirwan Inst. for the Study of Race and Ethnicity: Ohio State Univ. 2009) (discussing the damage caused by de facto racial and socioeconomic segregation).

protect society from both overtly racist laws as well as law which undermine racial and ethnic minority groups through indirect disparate impact.

The situation of Lubbock, Texas provides an illustrative case study for the damage done when cities make such a premature jump to post-racialist mindset before actually eliminating the effects of racism.

A. Residential Segregation and Education in Lubbock

In 2006, the Lubbock City Council discovered that City Ordinance 225, which imposed race-based housing segregation, was still technically part of the city's code.[5] Ordinance 225 was passed by the city council in 1923, and imposed a fine up to $200 (the equivalent of $2,917.44 in 2018) for any Black resident of Lubbock who tried to live anywhere outside of the southeastern quadrant of Lubbock.[6] The 1923 city council's reasoning for Ordinance 225 was laid out in no uncertain terms. The ordinance stated that the "residence [of Blacks] is dangerous to the health and pollutes the earth and atmosphere."[7] The city council's blatantly racist reasoning is a mere snapshot of the social, political, and legal rhetoric that was written into city and state law throughout the United States during the Jim Crow era, which included the segregation of such places as parks, cemeteries, theaters, and restaurants.[8] While Ordi-

5. *City Council Repeals Segregation Ordinance,* KCBD NEWS CHANNEL 11 LUBBOCK, April 26, 2006, http://www.kcbd.com/story/4823976/city-council-repeals-segregation-ordinance; *Council to Get Rid of 83-Year-Old Ordinance Defining Segregation,* KCBD NEWS CHANNEL 11 LUBBOCK, April 25, 2006, http://www.kcbd.com/story/4818279/council-to-get-rid-of-83-year-old-ordinance-defining-segregation/.

6. *Calculate the value of $200 in 1923*, DOLLAR TIMES, https://www.dollartimes.com/inflation/inflation.php?amount=200&year=1923 (last visited April 19, 2018); *Council to Get Rid of 83-Year-Old Ordinance*, *supra* note 5.

7. *Council to Get Rid of 83-Year-Old Ordinance*, *supra* note 5.

8. Melvin I. Urofsky, *Jim Crow Law*, ENCYCLOPEDIA BRITANNICA (August 20, 2018), /https://www.britannica.com/event/Jim-Crow-law.

nance 225 had not been enforced for decades, the presence of the ordinance in the archives of the city's code as recently as 2006 indicates that Lubbock had not carefully sought to rid itself of even overt, albeit unenforced, racism in its communities.[9] As one legal scholar stated: "Post-racialism does not challenge this indifference, this sense that we are not responsible for or capable of remedying racial injustice. It rather reassures us there is no injustice there to be remedied. Surely such expiation can only delay racial justice."[10] Thus, despite the recognition of continued racial inequities and racial segregation by scholars and informed leaders in the country, leaders in Lubbock and too many leaders throughout the nation seem to continue to ignore and perhaps in some instances even perpetuate the myth of post-racialism.[11]

Perhaps even more concerning than the presence of an unenforced racist law in Lubbock is the euphemistic rhetoric surrounding the discovery of Ordinance 225. The author of the article reporting the discovery of Ordinance 225 states that "[y]ou can find signs of unity and integration across Lubbock today. However, a part of Lubbock's past *many would like to forget* is resurfacing. . . . [t]he nation has made great strides in the civil rights movement since 1923."[12] This language spurs the question: why are leaders in Lubbock, and throughout the nation, seeking to forget the racist past? Should not this awful, but true, part of the nation's history be remembered to avoid

9. *See e.g.,* Patrick McGrain*, The Myth of Post-racial America,* WHYY (February 24, 2018), https://whyy.org/articles/myth-post-racial-america/; Michael C. Dawson & Lawrence D. Bobo, *One Year Later and the Myth of a Post-Racial Society*, 6 DU BOIS REVIEW: SOCIAL SCIENCE RESEARCH ON RACE, no. 2, 247–249 (2009), https://dash.harvard.edu/handle/1/10347165; Ian F. Haney López*, Is the "Post" in Post-Racial the "Blind" in Colorblind?*, 32 CARDOZO L. REV. 807, 830-31 (2011).

10. López*, supra* note 9, at 831.

11. *See e.g.,* McGrain, *supra* note 9; Dawson & Bobo, *supra* note 9; López*, supra* note 9, at 830-31.

11. López, *supra* note 9, at 831.

12. *Council to Get Rid of 83-Year-Old Ordinance*, *supra* note 5 (emphasis added).

ever allowing legally sanctioned prejudice to exist in the United States again? Should not, then, the nation's racist history serve as a motivator to remove *de facto* racism and bigotry? The illusion of moving beyond racism is not only unhelpful but is actually harmful in the sense that it leads the American public to falsely believe that there is not more work that needs to be done in establishing racial equality.[13]

The article titled "Council To Get Rid of 83-Year-Old Ordinance Defining Segregation" provides the common rhetoric of post-racialists—that Lubbock has progressed since the civil rights movement—by citing the fact that the city has a major road named after civil rights leader Martin Luther King Jr. What the author fails to mention is that Lubbock's MLK Boulevard ironically follows the very border that was used to segregate Lubbock's Black residents for so many years.[14] The article betrays the author's ignorance, which they share with many other post-racialists, that may lead a reader to conclude that the mere fact of a city memorializing a civil rights leader on a street sign or a school equates to the city (and impliedly the entire nation where streets and landmarks throughout it at named after civil rights leaders) making "great strides" in combating racism and repairing the damage done by legally institutionalized racism.[15]

This ignorance extends to government leaders, as was apparent in a local Lubbock news article, where the author provided a quotation from two members of the 2006 Lubbock City Council. One councilmember stated that "[t]here are a lot of things *in our past* that none of us are proud of and we hope those get rectified and things get better as we move along as a

13. *See e.g.,* McGrain, *supra* note 9; Dawson & Bobo, *supra* note 9; López, *supra* note 9, at 830-31.

14. *Council to Get Rid of 83-Year-Old Ordinance*, *supra* note 5.

15. *Id.*

country, as a state, and also as a city."[16] Another councilmember stated that "[w]e don't need anything like [Ordinance 225] on the books of Lubbock where people can go back and research and say this that and the other. We need to move forward, not stay back where we were in 1923."[17] While it is true that government leaders cannot merely refer to the past to improve the laws of the future, leaders should not ignore U.S. history in making legal and policy determinations. The nation's history contains vital context that government leaders must heed if they are to avoid the mistakes of past generations and make the right decisions moving forward.

While it is troubling, in and of itself, that it took close to a century for the Lubbock City Council to specifically remove Ordinance 225 from its record books, it is symbolic of an even larger issue: many political leaders and the electorate of the United States appear to ascribe to the claim that the U.S. is now in a "post-racial" period, without addressing the continued consequences of past centuries of *de jure* segregation and current *de facto* racism. One sociology and critical race theory scholar has explained the dichotomy between post-racial rhetoric used in public discourse (especially in the wake of President Obama's election and reelection as the first "Black" president) and the continued consequences of racism:

> Society appears to be experiencing confusion about the continued existence of racism. This confusion stems from the existence of clear inequalities in social outcomes, on one hand, and the election of an African American to the White House, on the other. Obama's own rhetoric has blinded Americans to the realities of continuing

16. *Id.*
17. *Id.*

> racial inequities. Using a CRT narrative, we can juxtapose Obama's rhetoric with reality and conclude that we are not, in fact, in a post-racial period.
>
> As our research demonstrates, Americans are confronted with two sides of a dichotomy: the promise of a post-racial narrative as well as the permanence of racism. Our participants revealed the emotional power contained in the post-racial narrative: Americans want to believe we are in a post-racial period, even to the exclusion of evidence of the contrary. On a larger scale, believing that we have entered a post-racial period may result in a lack of attention to the very real products of continued, systemic racism in society. These products include inequities in educational outcomes, incarceration rates, employment patterns, health care, housing availability and quality, and racial profiling.[18]

Consequently, political leaders in the United States and many of their constituents, continue to keep themselves ignorant of the ongoing consequences of past *de jure* racism and current *de facto* racism. The history and current situation of *de jure* and *de facto* segregation in Lubbock serves as a case study to provide essential insight into the ongoing damage inflicted on society by racism and segregation.

The harmful consequences of Lubbock's history of legalized residential segregation is perhaps most apparent in the effect it has had on the city's public-school system. Between 1950 and 1977, as the population of Lubbock (especially within

18. Bettina L. Love & Brandelyn Tosolt, *Reality or Rhetoric? Barack Obama and Post-Racial America*, 17 JEAN AIT BELKHIR, RACE, GENDER & CLASS J., no. 3/4, 19, 33 (2010).

the White community) significantly increased, the population also became increasingly more divided along racial lines.[19] White flight resulted in a large movement of Whites from the northeast and north-central portion of Lubbock to the southwestern part of town.[20] Many Black and Latino residents then filled the homes vacated by White tenants—creating extreme *de facto* residential segregation.[21] Lubbock maintained a complicated set of rules for transferring students, in order to discourage integration.[22] One of the primary deterrents that was imposed by these rules was the requirement that students desiring to attend integrated schools pay the cost of transportation.[23] By 1969, the Lubbock Independent School District (LISD) was still significantly segregated, which led the Department of Health, Education, and Welfare (HEW) to require that the school district submit a workable desegregation plan.[24] In order to fulfill this requirement, the LISD held open-community meetings to discuss integration strategies. On August 19, 1970, the United States Department of Justice (DOJ) Civil Rights Division filed a suit against the LISD in the U.S. District Court for the Northern District of Texas, alleging that the LISD had maintained a segregated school system in violation of the Fourteenth Amendment, and ordered the LISD to desegregate.[25] Unfortunately, there were road blocks to integration as tensions quickly arose between some of the students and between some of their parents in the newly integrated schools. Tragically, within a few months of integration, a White student shot

19. United States v. Texas Ed. Agency, 600 F.2d 518, 520-21 (5th Cir. 1979).

20. *Id.*

21. *Id.*

22. BEHNKEN, FIGHTING THEIR OWN BATTLES: MEXICAN AMERICANS, BLACKS, AND THE STRUGGLE FOR CIVIL RIGHTS IN TEXAS, 146-47 (2011).

23. *See id.* at 147.

24. *Id.*

25. United States v. Texas Ed. Agency, 600 F.2d 518, 520 (5th Cir. 1979).

and killed a Black student in class.[26] This event created a riot in which students and parents engaged in physical altercations in schools and shots were fired culminating in a "mass exodus" of both White and Latino students from the integrated schools.[27] Thus, after only a short period of integration, the LISD and Lubbock as a whole "resegregated as quickly as it had integrated."[28]

Despite the failure of the LISD to comply with court-ordered desegregation, no further legal action was taken until the spring of 1977 when the LISD applied to the district court for permission to build new schools in the district.[29] At that time, Lubbock's student population was 59.4% White, 27.3% Mexican-American, and 12.6% Black.[30] Despite a majority White population, the minority students in Lubbock were confined to schools with large minority populations and with high poverty rates.[31] The "Black schools" were segregated on every level of primary and secondary education in Dunbar High School, Struggs Junior High School, and Iles and Wheatley Elementary Schools.[32] Meanwhile, the Guadalupe School—previously termed the "Mexican School"—had retained the majority of Latino students.[33] "The [district] court found that the minority status of the Guadalupe Elementary School and of the all-Black schools built on or near the site of the old Dunbar Schools (Dunbar High School, Struggs Junior High School, and Iles and Wheatley Elementary Schools) was the result of School Board action."[34] Furthermore, "[i]t found that even after

26. BEHNKEN, *supra* note 22, at 212-13 n.26.
27. BEHNKEN, *supra* note 22, at 213.
28. *Id.*
29. United States v. Texas Ed. Agency, 600 F.2d 518, 520 (5th Cir. 1979).
30. *Id.* at 521.
31. *Id.* at 520-21.
32. *Id.* at 521.
33. *Id.*
34. *Id.*

De jure segregation ended, the School Board gerrymandered the attendance zones for these schools to retain their minority population."[35]

In order to determine the extent of existing segregation in the LISD, the district court held an evidentiary hearing.[36] After the hearing, the district court found that only nine of the LISD's twenty-two "minority schools" were caused by the LISD's policies.[37] Thus, the district court entered an order requiring the LISD to desegregate the nine specified schools and allowed the LISD to build new schools subject to the district courts approval of the LISD's desegregation plan for the nine specified minority schools.[38] The DOJ appealed the district court's ruling to the U.S. Fifth Circuit Court of Appeals based on two primary arguments: (1) "the district court erred in holding that the racial composition of the minority schools not included in the desegregation order was not the product of School Board action," and (2) "the desegregation plan adopted by the district court unfairly burden[ed] minority students."[39]

Upon appeal, the Fifth Circuit took issue with two aspects of the lower court's orders.[40] The first point of disagreement was the fact that the district court only required nine of the twenty-two schools to be desegregated, while it considered the remaining segregation to be the result of "racially neutral neighborhood school assignment plans."[41] The district court had incorrectly assumed that because the school boundaries were based on the proximity of the students' homes to the schools, this was a "racially neutral" assignment.[42] The Fifth

35. *Id.*
36. *Id.* at 520.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 525.
42. *Id.*

Circuit relied upon the important precedent of *Swann v. Charlotte-Mecklenburg Board of Education* (1970), during which the U.S. Supreme Court had heard a similar argument, to which it responded:

> All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation.
> . . . "Racially neutral" assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a "loaded game board," affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral.[43]

Thus, the Fifth Circuit acknowledged that because residential segregation was an issue for Lubbock, school boundaries based on housing patterns would only work to continue the pattern of school segregation.[44] The court provided the following reasoning:

43. Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 28 (U.S. 1971).
44. *Texas Ed. Agency*, 600 F.2d at 521.

> To treat a school located in an urban area as an isolated unit free from the effects of acts taken with regard to other schools in the district is unrealistic and contrary to the policy underlying the progeny of *Brown* that the effects of intentional segregation be eliminated "root and branch.[45]

The second aspect of the district court's order that the Fifth Circuit found problematic was that it unjustly placed the burden of proof upon the plaintiffs to prove that segregation actually existed.[46] In making this decision, the appellate court relied upon the precedent set by *Keyes v. Denver* (1973),[47] which had shifted the burden of proof from the plaintiffs to the Denver School District to show that discriminatory policies did not exist.[48] With the essential precedent of *Keyes*, the LISD was not only guilty of *de jure* segregation but was also found guilty of a number of more subversive *de facto* segregation methods that led to further segregation:[49]

> The gerrymander of attendance zones and the building of schools of certain sizes at certain locations, against the historic backdrop of a De jure system of segregation of long standing, can have the effect of designating certain schools as minority schools and of marking the areas of the city in which those schools are located as minority areas.
>
> Intentional school segregation in the past may have been a factor in creating a natural environ-

45. *Id.* at 525.
46. *Id.* at 521.
47. Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189 (1973).
48. *Texas Ed. Agency*, 600 F.2d at 521.
49. *Id.* at 524-25.

> ment for growth of further segregation. Thus, if the respondent School Board cannot disprove segregative intent, it can rebut the prima facie case only by showing that its past segregative acts did not create or contribute to the current segregated condition of the core city schools.
>
> We could hold that any segregative effect caused by an intentionally segregative act violates the Constitution.[50]

Thus, it became clear that the LISD had gerrymandered attendance zones across geographic boundaries, which had resulted in racially segregated schools due to the *de facto* residential segregation that existed throughout Lubbock.[51] These actions by the school district exacerbated segregation to the point that by 1978, of the 50 total schools in the district, 12 schools had minority (Black and Latino) populations exceeding 70%, while 19 had White populations greater than 70%.[52] Complicating the school segregation dynamic in the LISD is that Black and Latino students were not only desegregated from White students, but also from one another, thus further exacerbating the tri-racial divide that was occurring on the ground in Lubbock.[53] Desegregation, then, became a complex matter of integrating all three groups of students into the same schools. Astoundingly, twenty years after the *Brown* decision, more than 60% of Lubbock's schools maintained this extensive tri-racial segregation.[54]

50. *Id.* at 527.
51. *Id.* at 521.
52. *Id.*
53. *Id.*
54. *Id.* at 527.

The Fifth Circuit also identified several other indirect causes of segregation by the LISD, including: the use of optional attendance zones for White students to attend schools outside of their area, the manipulation of bus routes to make integration more difficult, and the adjustment of school capacities to allow more White students to concentrate in certain schools while confining Black and Latino students into other schools.[55] Ultimately, the Fifth Circuit found the district court's "conclusory statement that no [constitutional] violation had occurred at the minority schools unaffected by the order, the district court made no specific findings on the effects on the schools and on Lubbock's housing patterns of the intentional segregative acts it found the School Board had committed."[56] Thus, the case was remanded to the district for further findings of fact to determine "how much 'incremental segregative effect' the School Board's intentional discriminatory acts had on the residential distribution of the Lubbock school population" as "compared to what [the residential distribution] would have been in the absence of such intentional segregative acts.[57] The Fifth Circuit stated held that upon remand, any "segregative effect caused by an intentionally segregative act" would be held to violate the Constitution.[58]

Despite the judicial intervention in the LISD in the 1970's, the LISD has continued to suffer from the effects of *de facto* residential segregation. This continued *de facto* segregation is highlighted in the next section.

55. *Id.* at 529.
56. *Id.* at 527.
57. *Id.* at 527-28.
58. *Id.* at 527.

B. Students in Lubbock Today

The following table (Table 1) shows the demographic and socioeconomic makeup of (1) the Lubbock Independent School District's (LISD) as a whole, (2) Lubbock High Schools, and (3) Lubbock Middle Schools. The bolded percentages show disproportionate rates of non-White and White students and subsequent rates of economically disadvantaged and at-risk students.

Table 1: Demographic Makeup of LISD

Entity	"African American" Population	"Hispanic" Population	"White" Population	"Economically Disadvantaged" Students	"At-risk" Students [59]
LISD[60]	13.5%	59.2%	23.2%	66.8%	45.8%
Lubbock High Schools					
Coronado High School[61]	12%	51.1%	32.9%	46.9%	41.9%
Estacado High[62] School	**48.5%**	**47.3%**	**2.5%**	**89.7 %**	**65.5%**
Lubbock High School[63]	5.6%	61.8%	24.8%	44%	33.8%

59. *About the Data*, THE TEXAS TRIBUNE, https://schools.texastribune.org/about/#at-risk (last visited February 23, 2019) (providing the Texas Education Agency's definition of "at-risk" students).

60. *Lubbock ISD*, THE TEXAS TRIBUNE, https://schools.texastribune.org/districts/lubbock-isd/ (last visited February 23, 2019).

61. *Coronado High School*, THE TEXAS TRIBUNE, https://schools.texastribune.org/districts/lubbock-isd/coronado-high-school/ (last visited February 23, 2019).

62. *Estacado High School*, THE TEXAS TRIBUNE, https://schools.texastribune.org/districts/lubbock-isd/estacado-high-school/ (last visited February 23, 2019).

63. *Lubbock High School*, THE TEXAS TRIBUNE, https://schools.texastribune.org/districts/lubbock-isd/lubbock-high-school/ (last visited February 23, 2019).

Monterey High School[64]	11.8%	58.6%	26.4%	54.1%	46.3%
Lubbock Middle Schools					
Atkins Middle School[65]	13.7%	**74.4%**	**10.1%**	**81.6%**	**62.5%**
Cavazos Middle School[66]	4.5%	**91.6%**	**2.6%**	**92%**	**63.5%**
Dunbar Middle School[67]	**53.4%**	**43.3%**	**1.7%**	**89.3%**	**78.6%**
Evans Middle School[68]	10.5%	**47.5%**	**38.2%**	**45.6%**	**35.8%**
Irons Middle School[69]	6.6%	**38.7%**	**49.8%**	**39.7%**	**34.4%**
Mackenzie Middle School[70]	14.3%	60.6%	21.4%	68.2%	50.8%

64. *Monterey High School*, THE TEXAS TRIBUNE, https://schools.texastribune.org/districts/lubbock-isd/monterey-high-school/ (last visited February 23, 2019).

65. *Atkins Middle School*, THE TEXAS TRIBUNE, https://schools.texastribune.org/districts/lubbock-isd/atkins-middle-school/ (last visited February 23, 2019).

66. *Cavazos Middle School*, THE TEXAS TRIBUNE, https://schools.texastribune.org/districts/lubbock-isd/cavazos-middle-school/ (last visited February 23, 2019).

67. *Dunbar Middle School*, THE TEXAS TRIBUNE, https://schools.texastribune.org/districts/lubbock-isd/dunbar-middle-school/ (last visited February 23, 2019). (Dunbar is somewhat of an anomaly as it was established as a historical "Black" high school, initially started to help black students attend college during the time of *de jure* racial discriminatory laws).

68. *Evans Middle School*, THE TEXAS TRIBUNE, https://schools.texastribune.org/districts/lubbock-isd/evans-middle-school/ (last visited February 23, 2019).

69. *Irons Middle School*, THE TEXAS TRIBUNE, https://schools.texastribune.org/districts/lubbock-isd/irons-middle-school/ (last visited February 23, 2019).

70. *Mackenzie Middle School*, THE TEXAS TRIBUNE, https://schools.texastribune.org/districts/lubbock-isd/mackenzie-middle-school/ (last visited February 23, 2019).

Smylie Wilson Middle School[71]	15%	**68.6%**	**14.2%**	**89.5%**	**58.6%**
Slaton Middle School[72]	13.3%	**78.3%**	**6%**	**90.1%**	**70.6%**

Table 1 lists all of the LISD's high schools and middle schools, and the percentages of "African American," "Hispanic (or Latino)," and "White" students by school as compared to the LISD as a whole, and the percentage of "Economically Disadvantaged" and "At-risk" students in each school as compared to the LISD as a whole. The LISD has 13.5% African American/Black students, 59.2% Hispanic/Latino students, and 23.2% White/Caucasian students, with 66.8% of the students as economically disadvantaged and 45.8% of the its students considered "at risk."[73] While most of Lubbock's high schools have fairly proportionate demographics compared to the LISD as a whole, Estacado High School has disproportionately higher rates of non-White students (48.5% African American students and 47.3% Hispanic students) compared to White students (2.5% White students). Furthermore, Estacado High School's rate of economically disadvantaged students is 89.7% and its rate of at-risk students is 65.5% (which are nearly double the rates of students in the same categories in Lubbock High School). The effect of *de facto* segregation becomes even more apparent when comparing Lubbock's middles schools, which

71. *Slaton Middle School*, THE TEXAS TRIBUNE, https://schools.texastribune.org/districts/lubbock-isd/slaton-middle-school/ (last visited February 23, 2019).

72. *Smylie Wilson Middle School*, THE TEXAS TRIBUNE, https://schools.texastribune.org/districts/lubbock-isd/smylie-wilson-middle-school/ (last visited February 23, 2019).

73. *About the Data*, THE TEXAS TRIBUNE, https://schools.texastribune.org/about/#at-risk (last visited February 23, 2019) (providing the Texas Education Agency's definition of "at-risk" students).

are located in smaller areas of the city. All of Lubbock's middle schools (with the exception of Mackenzie Middle School) have disproportionate numbers of non-White and White students, and, subsequently, higher rates of economically disadvantaged and at-risk students. Therefore, higher rates of *de facto* segregation between White and non-White students directly correlate with higher rates of "economically disadvantaged" and "at-risk" students.[74]

The damage done by racial segregation is further demonstrated by lower high school graduation rates and lower bachelor's degree attainment among racial and ethnic minority students in Lubbock. The high school graduation rate is 9.31% lower for Black students than for white students, and 24.73% lower for Latino students than for White students.[75] Furthermore, college bachelor-degree attainment rates for White students are 40.11%, compared to only 11.45% for Black students and 11.93% for Latino students.[76] While there are several factors that determine high school graduation rates and bachelor-degree attainment for students, and causation is difficult to establish with certainty, the rates represented above can be interpreted as some evidence of the effect of racial and socio-economic *de facto* segregation in schools.[77]

74. *See* Lubbock Independent School District, PROPUBLICA, Miseducation (2017) https://projects.propublica.org/miseducation/district/4828500 (identifying LISD as a district with high rates of segregation, achievement disparity, discipline disparity, and opportunity disparity between White and non-White students).

75. *Lubbock Population*, WORLD POPULATION REVIEW (June 12, 2018), http://worldpopulationreview.com/us-cities/lubbock/.

76. *Id.*

77. *See generally* Richard Rothstein, *For Public Schools, Segregation Then, Segregation Since: Education and the Unfinished March*, ECON. POLICY INST., 5–15 (2013), http://www.epi.org/files/2013/Unfinished-March-School-Segregation.pdf; Aaron Williams, et al., *America is more diverse than ever — but still segregated*, THE WASH. POST (May 10, 2018), https://www.washingtonpost.com/graphics/2018/national/segregation-us-cities/?utm_term=.f8da453776d1; Mario L. Barnes, et. al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 988–91 (2010).

With the case study of Lubbock's history as an important contextual preface, the next section of this legal note analyzes how race and the law have grown together and influenced the judicial interpretation of racial issues in the United States.

III. RACE AND THE LAW

As the renowned historian Winthrop Jordan so eloquently stated: "It is now clear that mankind is a single biological species; that races are neither discrete nor stable units but rather that they are plastic, changing, integral parts of a whole which is itself changing."[78] Thus, in a sense, race is *not* a scientific truth based in biological evidence (despite past attempts by eugenicists to "prove" race).[79] As one racial historian stated:

> ". . .race is *not* a scientific fact but a social, cultural, and ideological 'construction'—a set of ideas—through which societies have sought to organize, structure, and understand themselves. . . . [S]ocieties have used ideas about race to reserve wealth and power for those members defined as 'white' and to deny those goods to members defined as 'black' and 'brown.'"[80]

Despite the fluctuating nature of "race" as social concept, throughout the history of the United States the Supreme

78. WINTHROP D. JORDAN, THE WHITE MAN'S BURDEN; HISTORICAL ORIGINS OF RACISM IN THE UNITED STATES, ix-xii (Oxford Univ. Press, 1974).

79. Howard Markel, *Column: The false, racist theory of eugenics once ruled science. Let's never let that happen again,* PBS (Feb. 16, 2018), https://www.pbs.org/newshour/nation/column-the-false-racist-theory-of-eugenics-once-ruled-science-lets-never-let-that-happen-again.

80. GEORGE REID ANDREWS, AFRO-LATIN AMERICA, 1800-2000, 6 (Oxford Univ. Press, 1st ed. 2004).

Court has employed a "background rule" of race as a biological reality in its race-law jurisprudence.[81] While the background rule has remained intact, the Court has added and modified various "foreground rules" to change its approach to race-law interpretation.[82] The Court's approach is best categorized as three phases of judicial interpretation: (1) Classic Liberal, (2) Modern Liberal ("Colorblind"), and (3) Neoliberal ("Post-racial").[83]

A. Phase 1: Classic Liberal

Race was established as a social, economic, political, and legal reality by imperialist European nations and their colonies, to justify the oppression and colonization of non-Europeans.[84] Thus, the biological construction of race was first developed by European nations and then imported to its colonies as an over-arching social construct, or "background rule."[85] Furthermore, European colonies and their nations developed various local laws to reify the biological concept of race into their respective legal systems.[86] Thus, the overarching background rule of race as a biological concept existed in the North American colonies for centuries before the advent of the United States under a unified constitution.[87]

81. *See* Justin Desautels-Stein, *Race as a Legal Concept*, 2 COLUM. J. RACE & L. 1, 4, 42 (2012).

82. *Id.* at 5. (defining foreground rules as "those rules believed to be responsive to a pre-existing activity. . . [which] regulate, manage, and control").

83. *Id.* at 4-5.

84. *See* MARTHA MENCHACA, RECOVERING HISTORY, CONSTRUCTING RACE: THE INDIAN, BLACK, AND WHITE ROOTS OF MEXICAN AMERICANS, 10–20 (Univ. of Tex. Press, 2001); RICHARD KLUGER, SIMPLE JUSTICE; THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY, 32 (Alfred A. Knopf, 1st ed. 1994).

85. Desautels-Stein, *supra* note 81, at 3 (citations omitted).

86. *Id.*

87. *See* GEORGE REID ANDREWS, AFRO-LATIN AMERICA, 1800-2000, 6 (Oxford Univ. Press, 1st ed. 2004).

The construction of race-law during the United States' first two centuries of existence was primarily a continuation of the overtly racist background rule imported from Europe.[88] Despite the turmoil caused by legalized racism, which culminated in the Civil War, the Court continued its overtly racist approach to judicial interpretation by allowing a system of state laws to develop based on the "separate but equal" legal theory in *Plessy v. Ferguson*, until the mid-twentieth century.[89] This period of judicial race-law interpretation is referred to as the "Classic Liberal" phase.[90]

In the decades leading up to the Civil War, the nation faced challenges caused by rapid changes in the economic and social structure of the United States. A rapid influx of immigration and territorial expansion into what became the American Southwest forced the American electorate to face the question of slavery in the wake of the Compromise of 1850.[91] It was during this politically tumultuous time, in 1857, that the background rule of race as a biological construction was formally entrenched in the federal legal system by the U.S. Supreme Court.[92] In its now infamous *Dred Scott* decision, the Court wrote "that neither the class of persons who had been imported as slaves, nor their descendants, *whether they had become free or not*, were then acknowledged as a part of the people" and "had no rights which the white man was bound to respect."[93]

88. *See generally* Desautels-Stein, *supra* note 81, at 18-20.

89. Kimberly Jenkins Robinson, *Resurrecting the Promise of Brown: Understanding and Remedying How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787, 834 (2010).

90. Desautels-Stein, *supra* note 81, at 3.

91. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment,* U.S. CONST. amend. XIV. *See also* Melvin I. Urofsky*, Compromise of 1850,* ENCYCLOPEDIA BRITANNICA*,* (February 4, 2019)*,* https://www.britannica.com/event/Compromise-of-1850; Desautels-Stein, *supra* note 81, at 7.

92. RICHARD KLUGER, SIMPLE JUSTICE; THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY, 32 (Alfred A. Knopf, 1st ed. 1994).

93. *Dred Scott*, 60 U.S. at 407 (emphasis added).

Three years after *Dred Scott*, the nation broke out into the Civil War, leading to the end of slavery and the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution. Despite these inroads, the biological background rule of race remained the foundation of race jurisprudence in the United States.[94] Despite slavery being outlawed, Southern states immediately established a system of laws to continue its oppression of Blacks, which were quickly sanctioned by the Court.[95]

Just eighteen years after the end of the Civil War, in the *Civil Rights Cases*, and later in *Plessy v. Ferguson*, the Court began asserting "post-race-like principles," as it "interpret[ed] the scope of the Reconstruction Amendments."[96] In fact, constitutional legal experts have noted that while the Court could hardly discount the importance of race in the decades after the Civil War, "the language and the reasoning that the Court employed in its opinions to justify both racial segregation and the limited use of the law as an affirmative mechanism for change were decidedly post-racial in that the Court's analysis denied the continuing significance of past racial oppression and the ongoing presence of racism."[97] Thus, the Court "attempted to negate the importance of race, alternatively finding it to be either of no moment or a legitimate basis to segregate."[98]

B. The Modern Liberal "Colorblind" Phase

The Modern Liberal phase is essential in understanding that the legal concept of race was not only reinforced by the

94. Desautels-Stein, *supra* note 81, at 4.

95. KLUGER, *supra* note 92, at 31-42.

96. Mario L. Barnes, et. al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 969 (2010).

97. *Id.* at 969–70.

98. *Id.* at 969.

Supreme Court's use of race to justify harmful laws (e.g. *Plessy*), but also by its attempt to undo the damage of those laws (e.g. *Brown*).[99] Thus, instead of eliminating the background rule of race as a biological reality, the Court added foreground rules to address the damage that was caused by racial categorization.[100] Even the so-called "colorblind" approach by the Court jurists was rooted in the idea of race as a biological concept.[101] The difference was that the modern liberal approach was to establish foreground rules (e.g. the civil rights statutes established in the second half of the twentieth century) based on race in order to regulate the old background rules.

Some researchers have identified "race" not as something built into a person's DNA, but is instead a social categorization.[102] The Court identified racism as "prejudice against *discrete and insular minorities*" and as a "special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[103] Thus, by the Supreme Court's use of "discrete," "insular," to reinforce the biological construct of race, the Supreme Court reified the biological concept of race, which laid the foundation for the foreground rule of "strict scrutiny" decidedly established in *Adarand Constructors, Inc. v. Pena*.[104]

The springboard of the Modern Liberal phase of judicial interpretation was *Brown v. Board of Education,* decided in

99. Desautels-Stein, *supra* note 81, at 5-6.

100. *Id.* at 5-6.

101. *Id.* at 5-7.

102. *See* WINTHROP D. JORDAN, THE WHITE MAN'S BURDEN; HISTORICAL ORIGINS OF RACISM IN THE UNITED STATES, ix-xii (Oxford Univ. Press, 1974); GEORGE REID ANDREWS, AFRO-LATIN AMERICA, 1800-2000, 6 (Oxford Univ. Press, 1st ed. 2004).

103. United States v. Carolene Prod. Co., 304 U.S. 144, 152, n. 4 (1938) (emphasis added); *See also* Desautels-Stein, *supra* note 81, at 40-41.

104. *See* Desautels-Stein, *supra* note 81, at 43; *See also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995).

1954.[105] This case explicitly recognized the damage done by a system of separate public schools for children of White and Black children, and that this per se disadvantaged Black students. Later, the Civil Rights Amendment of 1964 and the Voting Rights Act of 1965 solidified federal protections for Blacks, and the Court began enforcing desegregation efforts.[106]

These civil protections, however, were not extended to Latino students until the Court's decision in *Keyes v. Denver School District* decision in 1971.[107] This delay in extending civil rights protections to Latinos was due to the complex history of Latinos attempting to "pass" as legally "White" for several decades, but being discriminated against as a "White" underclass nonetheless.[108] Historian Brian Behnken describes this phenomenon as follows:

> Mexican Americans throughout the twentieth century had done a great deal to convince Anglos that they were white. In many cases, Anglos resisted. In the Chicano movement, Mexican Americans had to go to great lengths to convince whites of their brownness. Interestingly, Anglos resisted reclassifying Chicanos, preferring instead to categorize them as white so they could use them as integration's 'pawns, puppets, and scapegoats.' In the 1940s and 1950s whiteness had offered Latinos the best chance for ending racism. In the 1960s and 1970s, brownness became the best hope for doing so.[109]

105. *See* Desautels-Stein, *supra* note 81, at 4.

106. *See generally* Desautels-Stein, *supra* note 81, at 40-41.

107. *See* Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189, 197 (1973).

108. BEHNKEN, FIGHTING THEIR OWN BATTLES: MEXICAN AMERICANS, BLACKS, AND THE STRUGGLE FOR CIVIL RIGHTS IN TEXAS, 4 (2011).

109. *Id.* at 206.

Thus, the school districts involved in *Keyes* in Denver attempted to comply with court-ordered desegregation by defining Latino students as "White" and putting all the Black and Latino students in the same schools, while leaving White students in their own schools.[110] Thus, the Court utilized the same Modern Liberal (Colorblind) approach to Latinos.

While the Court's Modern Liberal (Colorblind) approach allowed the Court to identify and protect the constitutional rights of racial minorities by adding foreground rules to judicial interpretation, the approach still relied upon the background rule of race as a biological reality. By retaining the background rule, the Court allowed the future argument to be undercut by post-racialist rhetoric.[111]

C. Phase Three: Neoliberal Post-racialism

In contrast to modern liberalism, neo liberalism is hostile to the foreground rules of race.[112] Neoliberal proponents are "notoriously hostile to the use of foreground rules, claiming that racial dynamics in the United States have progressed to the point where much of equal protection jurisprudence is actually fostering racial discrimination instead of remedying it. It is in this sense that this most recent phase is *post-racial*."[113] Neoliberal proponents have also turned the principle of "colorblindness" on its head in the context of equal protection interpretation.[114] Because the Neoliberal ideology takes racial classifications to be

110. *Id.* at 198. *See also* Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189, 197 (1973).

111. Mario L. Barnes, et. al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 972 (2010).

112. Justin Desautels-Stein, *Race as a Legal Concept*, 2 COLUM. J. RACE & L. 1, 5–6 (2012).

113. *Id.* (citations omitted).

114. *Id.*

a biological reality instead of a man-made construct, "the post-racial view of colorblindness makes the claim that because race is a natural, pre-political sphere of human identity, it is wrong for the state to make regulations on the basis of racial identity."[115]

Those who assert the myth of post-racialism essentially state that in society, "overt individual discrimination has waned" sufficiently so that judicial intervention is no longer necessary; yet, the reality is that "institutional and structural barriers still result in disparate life outcomes along racial lines."[116] The problem with post-racialism is that it ignores the continued issues caused by the United States' racist past.[117] It also perpetuates ignorance of current issues of racism by creating a "revised understanding of equality, one that will result in a significant change in constitutional race jurisprudence."[118]

Indeed, the very reactionary rhetoric used by the Supreme Court in the last three decades is similar to the language perpetuated by the Court during the Reconstruction Era in the decades after the Civil War—the time when overt legalized racism became entrenched in U.S. law apart from slavery.[119] It is this Neoliberal myth of post-racialism that led to the demise of school desegregation litigation, and which has allowed the resurgence of *de facto* school segregation in urban centers.[120]

There were two primary cases that relied on the myth of post-racialism and which marked the end of court-mandated desegregation: *Board of Education v. Dowell* (1991) and *Free-*

115. *Id.* at 6.

116. Barnes, *supra* note 111, at 972.

117. *Id.* at 967–68.

118. *Id.* at 969.

119. *Id.*

120. *See generally* Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597 (2003); Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation*, (The Civil Rights Project: Harvard Univ., 2001) https://files.eric.ed.gov/fulltext/ED459217.pdf. *See* Justin Desautels-Stein, *Race As A Legal Concept,* 2 COLUM. J. RACE & L., 42–50 (2012).

man v. Pitts (1992). These two cases established three ambiguous requirements before a school district could be relinquished from court-mandated segregation: (1) the school district must have complied with all aspects of the court's desegregation order; (2) the school district had to be able to maintain desegregation without additional judicial intervention; and (3) the school district had to prove to the previously disfavored race its "good faith" commitment that it had complied with the court desegregation order.[121] Ultimately, the desegregation came to an end with *Missouri v. Jenkins* 1995.[122] In that case, the U.S. Supreme Court struck down "desegregation attractiveness," or magnet, programs, which had previously been an essential prescription of court orders.[123] Even worse was the court's decision to reduce the standard of desegregation compliance from *Green's* prescription of eliminating racial discrimination both "root and branch," to merely requiring school districts to eliminate "the vestiges of past discrimination . . . to the extent practicable" demonstrated by a vague "good-faith commitment to the whole of the court's decree and to those provisions of the law . . . that were the predicate for judicial intervention in the first instance."[124]

1. The Neoliberal myth of post-racialism has led to the demise of school segregation litigation despite continued discrimination

The federal judiciary was not the only government branch to succumb to the myth of post-racialism. The 1964

121. *See* Charles T. Clotfelter, *Public School Segregation in Metropolitan Areas*, NATIONAL BUREAU OF ECONOMIC RESEARCH (1998), http://www.nber.org/papers/w6779.pdf; Barnes, *supra* note 111, at 989.

122. Missouri v. Jenkins, 515 U.S. 70, 150 (1995).

123. *Id.*

124. Board of Ed. of Oklahoma City Public Schools v. Dowell, 498 U.S. 237, 249–250 (1991).

Civil Rights Act is an important starting point in understanding how integration policy failed to meet the needs of people of color. The initial Civil Rights Act "required the Office of Education to investigate school districts that failed to integrate."[125] In order to prevent Southern members of Congress from striking the act down, the Johnson administration diluted this part of the policy. Instead, the plan was for the Office of Education to ask regional attorneys in highly segregated areas to report any instances of resistance to integration.[126]

In 1964, the Office of Education commissioned a leading sociologist, James Coleman, to conduct the survey. Coleman analyzed—based on a 600,000 student sample survey[127]—student and family attitudes as well as their social and economic circumstances. The survey also included a math and reading test for the students. The result of the survey was that there was not a large correlation gap between resource disparities and racial achievement.[128] Rather, economic disparity and the level of education of parents had a greater effect upon the success of students.[129] As such, the survey found that the fact that Blacks were economically marginalized was the primary damaging factor in poor student success.[130] Therefore, integration policies only benefited Black students if they were integrated into schools with middle class families. Thus, it became clear that in order to improve student achievement, both the racial and the socioeconomic situation of Blacks had to be addressed.

125. Richard Rothstein, *For Public Schools, Segregation Then, Segregation Since: Education and the Unfinished March*, ECON. POLICY INST., 3 (2013), http://www.epi.org/files/2013/Unfinished-March-School-Segregation.pdf.

126. *Id.*

127. *Id.*

128. *See* Charles T. Clotfelter, *Public School Segregation in Metropolitan Areas*, NATIONAL BUREAU OF ECONOMIC RESEARCH (1998), http://www.nber.org/papers/w6779.pdf.

129. *See id.*

130. *See id.*

Unfortunately, the Johnson Administration succumbed to political pressures and downplayed the Coleman report to ensure that they could move their agenda forward in the Elementary and Secondary Education Act.[131] As a result, instead of emphasizing economic and class integration of neighborhoods through federal subsidies, the Johnson Administration focused on putting money into fruitless efforts to improve central city neighborhoods. A similar failure occurred with the Nixon Administration. Initially, the Department of Housing and Urban Development, led by George Romney, agreed to withhold funds from White suburbs who refused to subsidize lower-middle-income and low-income public housing for Black families.[132] This policy, however, caused a rift in the Nixon Administration.[133] The opponents to housing integration eventually won out on the argument that Nixon would lose too many conservative supporters.[134] Nixon denounced federal interference in local housing authority disputes, and his selection of federal court judges essentially eradicated the last major push for economic integration in bettering the lives of marginalized racial minorities.[135]

Furthermore, in the early 1970s the National Assessment of Educational Progress (NAEP) was established to provide an overall indication of how students were doing both intellectually and emotionally.[136] The assessment was very comprehensive at the outset, but with funding cuts it was reduced to a basic in-school written reading and math test.[137] As

131. Richard Rothstein, *For Public Schools, Segregation Then, Segregation Since: Education and the Unfinished March*, ECON. POLICY INST., 4 (2013), http://www.epi.org/files/2013/Unfinished-March-School-Segregation.pdf.

132. *Id.*

133. *Id.*

134. *Id.* at 5.

135. *Id.*

136. *See id.* at 5.

137. *See id.* at 5-6.

such, policy was overwhelmingly focused on the numbers that students produce, and was based on the premise that increasing school resources would boost test scores rather than addressing the actual needs of students.[138] This misuse of benchmarks to achieve greater funding instead of helping students has continued to the present day, as many educational policy-makers and high-level administrators continue to use a backwards theory of cognitive development in creating educational policy.[139] Many post-racialists argue that if children merely get the education that they need, then they will escape poverty.[140] Thus, many educational reformers focus only upon improving school resources and teachers, claiming that this alone will solve the problem of the student achievement gap and racial isolation.[141] This ignores the pattern of intergenerational poverty and the external economic climate.[142] Former New York City Mayor Michael Bloomberg summarized the all too familiar post-racial argument of today when he said, "a lot of what Dr. King wanted to accomplish in our society will take care of itself" if schools improve.[143] This echoes the apathy of post-racialists, who have allowed "racial fatigue"[144] to blind—and sometimes willfully so—leaders who convince themselves and their constituents of the great post-racial myth: that "[r]acism is not the norm, and

138. *See id.* at 17.

139. *See id.*; *See* Mario L. Barnes, et. al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 980-992 (2010).

140. *See* Barnes, *supra* note 139.

141. *See* MARGUERITE L. SPENCER, ET AL, THE BENEFITS OF RACIAL AND ECONOMIC INTEGRATION IN OUR EDUCATION SYSTEM: WHY THIS MATTERS FOR OUR DEMOCRACY, 9-11 (Kirwan Inst. for the Study of Race and Ethnicity: Ohio State Univ. 2009); Barnes, *supra* note 139.

142. *See* Richard Kahlenberg, *The Return of Separate but Equal*, *in* INEQUALITY MATTERS: THE GROWING ECONOMIC DIVIDE IN AMERICA AND ITS POISONOUS CONSEQUENCES, 55-64 (James Lardner & David A. Smith eds., 2005).

143. Richard Rothstein, *For Public Schools, Segregation Then, Segregation Since: Education and the Unfinished March*, ECON. POLICY INST., 16 (2013), http://www.epi.org/files/2013/Unfinished-March-School-Segregation.pdf.

144. Barnes, *supra* note 139, at 976, 979.

that which remains is limited to the random, isolated acts of bigots."[145] This is not so.

While the United States, as a whole, has become more racially integrated since 1990, many of the nation's major urban areas have experienced an increase in *de facto* residential, and subsequently school segregation. In fact, in large metropolitan areas, minority students are often more concentrated in schools with peers of the same race than they were during the active integration movement of the 1970's.[146] Researcher Richard Rothstein points to economic disparity between White and racial minority families as the primary culprit for concentrations of minorities in low-income neighborhoods, and subsequently in the schools to which those neighborhoods are assigned.[147]

Moreover, as education funding is often tied to the local tax base of the families within school districts, and Latino and Black students are disproportionately concentrated in neighborhoods with lower incomes, these students attend schools that are increasingly segregated in the sense that they consistently have less educational funds.[148] To make matters more complicated, the Court refuses to recognize education as a fundamental right, and only reviews claims of discrimination based on socioeconomic status under the lower standard of "rational basis" review.[149] Thus, many Latino and Black families become trapped in the vicious cycle of intergenerational poverty, lower high school and college graduation rates, and lower rates of income accumulation.[150]

145. Barnes, *supra* note 139, at 998.

146. Rothstein, *supra* note 143, at 13; *See also* Aaron Williams, et al., *America is more diverse than ever — but still segregated*, THE WASH. POST (May 10, 2018), https://www.washingtonpost.com/graphics/2018/national/segregation-uscities/?utm_term=.2f43738ba56f.

147. Rothstein, *supra* note 143, at 16-17.

148. Barnes, *supra* note 139, at 989. *See generally* Kahlenberg, *supra* note 135.

149. Barnes, *supra* note 139, at 993-94 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-35 (1972)).

150. Barnes, *supra* note 139, at 989 (citations omitted).

Effective education today cannot come from meeting the bare minimum requirements and only teaching students the state-sanctioned curriculum to meet a threshold for test scores. Rather, students need material that they can connect with. For some students, this most effectively comes through bilingual or dual immersion programs. For others, they desire material that applies to their specific culture that is so often minimized in the White-centric literature that is most commonly used in primary and secondary education. Professor Emdin recently discussed the importance of teaching to the needs of students.[151] He discussed education and equity, asserting that equity is not achieved merely by providing students with what administrators and state school board members recommend.[152] Instead, equitable education involves counseling with parents and teachers in order to give students the educational experience that they truly need to be successful.[153]

Residential and school segregation continue to hinder United States social and economic progress.[154] As will be discussed in the next section, the law will continue to be an ineffective remedy to prevent individual discrimination in the United States until the Court allows local schools to remedy the effects of past race-based discrimination.

2. Parents Involved: The Epitome of Neoliberal Post-racialism

Parents Involved in Community Schools v. Seattle provides the quintessential example of Neoliberal post-racial rhetoric in the twenty-first century: "Writing for the majority,

151. *Reality Pedagogy: Christopher Emdin at TEDx Teachers College*, YOUTUBE (Aug 23, 2012), http://www.youtube.com/watch?v=2Y9tVf_8fqo (accessed September 3, 2018).

152. *Id.*

153. *Id.*

154. *See* MARGUERITE L. SPENCER, ET AL, THE BENEFITS OF RACIAL AND ECONOMIC INTEGRATION IN OUR EDUCATION SYSTEM: WHY THIS MATTERS FOR OUR DEMOCRACY, 4-11 (Kirwan Inst. for the Study of Race and Ethnicity: Ohio State Univ. 2009).

Chief Justice Roberts repeated the constitutional mantra: whenever a public actor administers a racial classification, it will be viewed with strict scrutiny. . ."[155] Strict scrutiny is the highest standard in civil litigation and cases only survive constitutional review "when it serves a strong social need and it has been articulated in the narrowest of ways."[156] Thus, even though the Seattle school districts were seeking to promote racial integration, diversity, and provide more opportunities for students of each racial background to benefit from shared experiences, the Court struck the school district's remedial integration plan down because it was not "narrowly" tailored.[157]

The Court's majority opinion in *Parents Involved* is an instructive example of how the Supreme Court continues to hide behind pretended neutrality by taking a hard "colorblind" approach—even to important state and local programs which remedy the damage of past legalized racism. Chief Justice Roberts' statement is the quintessential post-racial argument of "false universalism," which asserts that every person is born on equal ground and "requires no state-provided advantage."[158] This allows the Court to avoid remedying past damage in the name of interpreting the "original" intention of the Constitution to limit the judiciary's powers. But, as has already been discussed at length in this paper, the original intention of the Constitution and the power granted to the judicial branch was distorted by the background rule employed in the *Dred Scott* decisions.[159]

155. Justin Desautels-Stein, *Race as a Legal Concept*, 2 COLUM. J. RACE & L. 1, 46 (2012).

156. *Id.* at 47.

157. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 726 (2007).

158. Mario L. Barnes, et. al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 972 (2010) (citations and quotation marks omitted).

159. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment,* U.S. CONST. amend. XIV.

To continue to take a hard "colorblind" approach to remedial programs in the context of false universalism is a poor justification for avoiding judicial remedies in promoting civil rights. In fact, the Court contradicts itself: while the Court purports to hold fast to "colorblind" decisions, the court never once questioned the concept of race itself.[160] Instead, the Court held on to the fundamental background rule that has existed since the nation's founding: that race is a biological reality.

If the Court had truly relied upon a "race-neutral" decision, the Court should not have merely relied upon its *Grutter* decision and continued the façade of "colorblindness."[161] This is especially true as *Grutter* dealt with a public institution of higher education (and a selective law school at that), whereas *Parents Involved* dealt with public primary and secondary schools. Furthermore, Professor Desautels-Stein explains how questions, which are essential in utilizing true race-neutral judicial interpretation, were never addressed by the Court in *Grutter:* "[i]f the law school had decided to challenge [the claimant's] standing" and "argue that she had not been injured by the policy because she had failed to prove she was 'White,' what forms of proof would have satisfied the Court? 'Cultural performance'? As long as these sorts of standing questions are left in abeyance, decisions like *Grutter* and *Parents Involved* are able to proceed."[162] Desautels-Stein further notes the "dramatic shift in the jurisprudence away from a focus on racism and towards a focus on ethnic or cultural diversity" that "was picked up and hammered home in *Grutter* and *Parents Involved*."[163] This shift in race jurisprudence has caused a difficult problem "where we still have urgent needs in repairing the social effects of neo-racism," but "courts have taught themselves to gaze

160. *See* Desautels-Stein, *supra* note 155, at 48-49.
161. *See* Desautels-Stein, *supra* note 155, at 48.
162. *Id.* at 44.
163. *Id.* at 53-54.

elsewhere: into the hazy shade of a diverse and politically safe multicultural landscape."[164] Consequently, the Court's shift from acknowledging race at all does not function to address contemporary racism; rather, it ignores reality and deflects the court's attention from addressing discrimination in the United States today.[165] Thus, "the jurist needs to understand how calls for racial diversity have persistently obscured calls for racial justice."[166]

Instead of following the conflicted opinion expressed in *Grutter*, the Court in *Parents Involved* could have utilized a caveat like that expressed by the district court in *Ortiz v. Bank of America*:

> I begin with the fact most widely agreed upon by modern biologists, anthropologists, and other students of human diversity. The notion of race is a taxonomic device and, as with all such constructs, it exists in the human mind not as a division in the objective universe.[167]

Thus, if the Court in *Parents Involved* had undertaken true race-neutral judicial interpretation, the Court would have challenged the very concept of race to be defined by local school district. Even more disturbing than the majority's determination to hold onto a false sense of constitutional originalism is Chief Justice Robert's criticism of the notion that racial diversity and integration actually have benefits. In spite of the fact that there exist many benefits of diversity in education,[168] Roberts

164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 49 (quoting *Ortiz v. Bank of America*, 547 F. Supp. 550, 565, (E. D. Cal. 1982)).
168. *See generally*, Daryl G. Smith & Natalie B. Schonfeld, *The Benefits of Diversity: What the Research Tells Us*, 5 ABOUT CAMPUS, no. 5, 16 (2000).

glosses over the amicus briefs supporting such diversity measures.[169] In sum, Professor Desautels-Stein explains the Court's neoliberal approach expressed in *Parents Involved* as follows:

> Though Roberts hardly is explicit about the racial question (as very few court decisions are), the *Parents* analytical framework clearly presumes that the kind of thinking about race in *Ortiz* was wrong-headed. School boards in Seattle and Louisville sought to better integrate certain high schools, presumably on the belief that there is something valuable about the idea of racially integrated schools. That value might consist in all sorts of things, ranging from anti-racist attacks on the Racial Contract, to utilitarian arguments in favor of everyone being better off when more kinds of people are in contact with one another, to the desires to do justice with regard to a social system that systematically privileges certain people at the expense of others, to the desire of more powerful actors to neutralize potential threats through the use of relatively benign political strategies. Whatever value might have been in the minds of the regulators, however, Roberts very clearly believed that "racial balance" had nothing to do with power and domination, but was instead a question about the

169. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 731–32 (2007). With regard to the benefits of diversity, s*ee generally* Christine Chambers Goodman, *A Modest Proposal in Deference to Diversity*, 23 NAT'L BLACK L.J. 1, 5 (2010); Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation*, (The Civil Rights Project: Harvard Univ., 2001) https://files.eric.ed.gov/fulltext/ED459217.pdf.

> allocation of seats based on ancestry and heredity.[170]

Researchers have demonstrated that between 1996-2006, rates doubled of nearly all-minority schools (defined as less than 5% of students as White), and that, on average, White students attended schools in which 77% of the population was White.[171] Furthermore, between 2005-2006, approximately two-thirds of minority-majority schools were in areas with "very high levels of segregation."[172] Thus, minority students become "trap[ped] in an inescapable, generational cycle" of "racialized poverty," which "decreases life opportunities . . . limits educational attainment, constrains future earning potential, and negatively impacts health and safety."[173] In contrast, decades of scholarship has established that "racially and economically integrated education can promote individual lifelong success, stabilize communities, and secure the economic viability of the nation."[174]

Despite these very real barriers for impoverished minority students, the Court concluded that "remedying past societal discrimination does not justify race-conscious government action."[175] In other words, the Court does not consider remedying the effects of societal discrimination as its responsibility; and yet the Court has not provided a viable avenue for state or federal legislatures to allow for programs to remedy the continued

170. Desautels-Stein, *supra* note 155, at 49.

171. *See* MARGUERITE L. SPENCER, ET AL, THE BENEFITS OF RACIAL AND ECONOMIC INTEGRATION IN OUR EDUCATION SYSTEM: WHY THIS MATTERS FOR OUR DEMOCRACY, 4-5 (Kirwan Inst. for the Study of Race and Ethnicity: Ohio State Univ. 2009).

172. *See id.* at 4.

173. *Id.* at 1.

174. *See id.* at 4.

175. *See e.g.,* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 731 (2007).

social and economic issues caused by past legalized racism.[176] So, what can be done?

IV. WHAT AFFIRMATIVE ACTION RESEARCH TELLS US

Despite all of its flaws, *Parents Involved* does lay "promising legal groundwork for addressing racial isolation across and within opportunity structures, including housing, public health, economic development and transportation."[177] Attempts by universities to implement affirmative action have produced the most extensive research and analysis regarding the benefits of diversity in education. Some of the primary educational benefits of diversity include: "a positive impact on attitudes toward racial issues, . . .enhance[d] cognitive development, and . . . [an increase in] overall satisfaction and involvement by students with their educational institution."[178] Furthermore, students who engage in a more diverse educational environment experience "increased commitment to civic engagement, democratic outcomes, community participation during and after college," and increases the likelihood of students "living in less segregated communities after college."[179]

Despite its demonstrated benefits, affirmative action has been an increasingly controversial topic of discussion for the last two decades since William Bowen and Derek Bok published their book *The Shape of the River*.[180] While affirmative action has often been celebrated for its alleged benefit of increasing diversity in higher education institutions, in 2004 Pro-

176. *See generally* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

177. SPENCER, *supra* note 162, at 2.

178. Daryl G. Smith & Natalie B. Schonfeld, *The Benefits of Diversity: What the Research Tells Us*, 5 ABOUT CAMPUS, no. 5, 19 (2000).

179. *Id.* at 19-20.

180. Elizabeth Anderson, *From Normative to Empirical Sociology in the Affirmative Action Debate: Bowen and Bok's "the Shape of the River,"* 50 J. LEGAL EDUC. 284 (2000).

fessor Richard Sander, a legal scholar and economist, published an infamous criticism of affirmative action and the allegedly negative effect of affirmative action on black law students.[181] In fact, Sander asserted that he had conclusive evidence negative impact on the numbers of qualified Black law students and Black attorneys.[182] Sander's statistical methodologies and subsequent conclusions, however, were later deemed to be flawed.[183] Part of this statistical analysis problem was exacerbated by his paper being published in a law review, which is a publication forum in which papers are edited by students instead of undergoing the same rigorous, peer-reviewed evaluation that academic journals undergo in other fields. Despite the many flaws of Sander's work, his paper has forced the academic community to take a hard look at the use of affirmative action policies, which has led to important information about the continued value of these policies in the process of universities attracting diverse student bodies.[184]

It is important to note that while affirmative action can help promote diversity, "[i]f all we do over the [next] twenty-five years is affirmative action, then we will still need affirmative action."[185] In other words, the current state of affirmative action policies will never be sufficient to achieve a fully equal United States, due to its limited focus on education and employment. However, in spite of such weaknesses, affirmative action policies appear to be one of the only legal options left in

181. *See* Michele Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899, 1903 (2005); *See* Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807, 1809 (2005).

182. *See* Dauber, *supra* note 181; *See* Ayres & Brooks, *supra* note 181.

183. *See* Dauber, *supra* note 181; *See* Ayres & Brooks, *supra* note 181.

184. *See* Ayres & Brooks, *supra* note 181; David L. Chambers et. al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study,* 57 STAN. L. REV. 1855, 1857 (2005).

185. Kevin R. Johnson, *The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171, 188, n.82 (2004) (quoting Nat Hentoff, *Sandra Day O'Connor's Elitist Decision*, VILLAGE VOICE (July 29, 2003), at 30 (quoting Lisa Naverette)).

this era of neoliberal strict scrutiny of race-based remedial programs, thus suggesting the need to improve our current affirmative action policies.

Improving affirmative action will require new perspectives about the purpose of remedial programs (created to increase the academic success of racial minorities) and about new approaches to diversity. "At a bare minimum, the crisis in the public schools must be addressed before true integration of colleges and universities is a possibility."[186] This "crisis" in public schools seems especially concerning regarding the correlation between socioeconomic status and race.[187]

One compelling approach to improving affirmative action policies to promote diversity is that of Christine Goodman's "True Diversity Experience" based on: Access, Environment, and Self-Interest.[188] Goodman defines these three elements as follows:

> [S]chools at each level will provide greater Access, and more consistently attract diverse students and students who appreciate and value diversity. Participating schools will also learn how to retain more of their diverse students, as they create and foster an Environment conducive to maintaining diversity. The participating schools will be motivated to succeed in this experiment through their own Self-Interest, which will include providing access and opportunities for un-

186. *Id.* at 188.

187. MARGUERITE L. SPENCER, ET AL, THE BENEFITS OF RACIAL AND ECONOMIC INTEGRATION IN OUR EDUCATION SYSTEM: WHY THIS MATTERS FOR OUR DEMOCRACY, 6-9 (Kirwan Inst. for the Study of Race and Ethnicity: Ohio State Univ. 2009).

188. Christine Chambers Goodman, *A Modest Proposal in Deference to Diversity*, 23 NAT'L BLACK L.J. 1, 69 (2010).

> derrepresented groups, cultivating a diverse learning environment, and increasing their attractiveness to the kinds of diverse students that they want to enroll.[189]

This push for a more holistic approach to diversity is supported by other research regarding the need for "true" integration, as one researcher found that "simple desegregation efforts often fail" and instead result in "assimilation, segregation within schools, ability grouping and tracking."[190] Instead, comprehensive racial and socioeconomic approaches to integration and diversity will give American "students the knowledge and skills necessary to become full members of our democratic society, and to strengthen and legitimize our democracy."[191] Ultimately, a move toward diversity is a move toward a more democratic society.

V. CONCLUSION: THE WAY FORWARD

Like a sliver embedded deep in a person's skin with layers of skin having grown over the top, race has been embedded in American Jurisprudence since the *Dred Scott* decision. Although it may be tempting to try to simply pluck out race (the sliver) from the law (the skin), this is impossible to do at this point in our history, as layers of law have grown around the foreign object of race (e.g. the Supreme Court's *Parents Involved* decision). And just as an embedded sliver causes a lingering pain in the flesh, the ongoing spectre of race (with all the attendant individual and collective pain it has caused) must prompt the Court to continue to consciously consider race in

189. *Id.*
190. SPENCER, *supra* note 187, at 2.
191. *Id.* at 3.

its decisions if educational institutions are to fix the damage caused by the past two and a half centuries of legalized racism in the U.S. I believe much of this damage can be remedied by focusing efforts on racial and socioeconomic "true" integration efforts, through the use of the "True Diversity Experience" proposed by Christine Goodwin.[192]

It appears that the current state of American law is like that of the biblical parable of the wheat and the tares.[193] The work of our collective "enemy" of the highest ideals of American democracy—the effect of past bigoted jurisprudence—has sown the "tares" of racism in the laws of the United States.[194] Those Supreme Court justices who supported Chief Justice Roberts' opinion in *Parents Involved* appear to be making the argument of the servants in the parable: "The servants said unto him, Wilt thou then that we go and gather [the tares] up?"[195] Chief Justice Roberts' decision reflects a narrow reading of past precedent that prematurely "roots up" both the "tares" (the use of race in the law) as well as the "wheat" (the goal of race-neutral school policies). While it is noble for the Court to seek to end of the use of race in education at all, that is separation must come at a time when there is no longer a need for race-based remedial measures under the law—when the proverbial "harvest" comes and the "tares" of race-based policies can be properly separated from the "wheat" of race-neutral school policies, due to greater equality in public education.[196]

192. Goodman, *supra* note 188, at 69.

193. *Matthew* 13:24-30 (King James).

194. *Id.*

195. *Matthew* 13:28 (King James).

196. *See generally* Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597 (2003); Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation*, (The Civil Rights Project: Harvard Univ., 2001) https://files.eric.ed.gov/fulltext/ED459217.pdf. *See* Justin Desautels-Stein, *Race as a Legal Concept,* 2 COLUM. J. RACE & L., 42–50 (2012); MARGUERITE L. SPENCER, ET AL, THE BENEFITS OF RACIAL AND ECONOMIC INTEGRATION IN OUR EDUCATION SYSTEM: WHY THIS MATTERS FOR OUR DEMOCRACY, 6-9 (Kirwan Inst. for the Study of Race and

Bigotry is an enemy to American democracy, for it blinds the minds of those who have a duty to protect our nation's most cherished ideals: "Life, Liberty and the pursuit of Happiness."[197] While we as a nation are not accountable for the sins of our ancestors, we are responsible to correct the legacy those sins have left us – a legacy that is still alive and well in the form of past *de jure* segregation, and continued *de jure* segregation in the present. As American law is iterative, and is therefore built on layers of precedent, the jurists of today have a duty to promote our democracy by, first, healing the damage done by past jurists' abuse of the law; and, second, restoring the integrity of American law as the backbone of American democracy.

As I have demonstrated in this article, race and the law have grown together in a complex knot throughout the history of the United States. This knot will only be disentangled when jurists admit that the damage caused by past centuries of racist laws continues to exist, and when so-called "colorblind" neoliberal jurisprudence no longer ties the hands of any legislative and local political leaders from instituting policies which effectively remedy past discrimination.[198] The Supreme Court should not now wash its hands of legal precedent by claiming that race must be ignored in developing solutions to this problem, as significant legal damage was caused by judges functioning in legally racist paradigms for centuries.[199] As one scholar put it, it is "unconscionable to imagine our equal protection doctrine as ultimately having no power to cure the lingering effects of this nation's horribly racist past."[200]

Ethnicity: Ohio State Univ. 2009).

197. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

198. *See generally* Mario L. Barnes, et. al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 980-91 (2010).

199. Justin Desautels-Stein, *Race as a Legal Concept*, 2 COLUM. J. RACE & L. 1, 4 (2012).

200. Barnes, *supra* note 198, at 1004 (citation omitted).

To effectively address the damage done to the law and by the law—especially in America's education system—jurists and lawmakers must recognize race, not as a biological fact, but as a social and legal construct that continues to negatively impact racial and ethnic minorities in the United States. By utilizing this interpretive frame, the Court can assist national and local leaders to remedy the effects of race-based discrimination. Improvement might include benchmarks set by non-partisan organizations that rely one reliable statistical data, to determine which measurements are vital in determining whether "improving life circumstances–matches our aspirations" in rectifying the disparate impact of race-based policies.[201]

Until the time that we as a society achieve "true" diversity and integration,[202] our leaders, as well as the American electorate, should talk of racial progress as an aspiration, and not as a past goal that we long ago achieved. In the words of Justice Blackmun: "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. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy."[203]

Hayden Smith[*]

201. *Id.*

202. *See* Christine Chambers Goodman, *A Modest Proposal in Deference to Diversity*, 23 NAT'L BLACK L.J. 1, 69 (2010); MARGUERITE L. SPENCER, ET AL, THE BENEFITS OF RACIAL AND ECONOMIC INTEGRATION IN OUR EDUCATION SYSTEM: WHY THIS MATTERS FOR OUR DEMOCRACY 3 (Kirwan Inst. for the Study of Race and Ethnicity: Ohio State Univ. 2009).

203. Regents of Univ. of California v. Bakke, 438 U.S. 265, 407 (1978).

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