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What a Load of Hope: The Post-Racial Mixtape

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WHAT A LOAD OF HOPE: THE POST-RACIAL MIXTAPE

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I get down for my grandfather who took my momma
Made her sit in that seat where white folks ain't want us to eat
At the tender age of six she was arrested for the sit-ins
With that in my blood I was born to be different

. . .

That's why I hear new music and I just don't be feeling it
Racism's still alive they just be concealing it.[1]

INTRODUCTION

As a hip-hop producer, Kanye West draws on a huge library of music to create beats and rhymes that underscore his message. On his first album, he samples the hook from a Blackjack song, sung by Michael Bolton, to create the lyrical critique embedded in the track *Never Let Me Down*. In the first eight bars of his verse, Kanye West summons his mother's and grandfather's involvement in the sit-ins of the civil rights movement, citing and personally engaging a history that has been diluted with post-racial rhetoric that denies the persistence of race. But the history alone isn't enough. Kanye West confronts the recording industry and social standards in two quick lines: "That's why I hear new music and I just don't be feeling it / Racism's still alive, they just be concealing it."[2] Kanye is openly

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1. KANYE WEST, *Never Let Me Down*, *on* COLLEGE DROPOUT (Roc-a-Fella Records 2004) (emphasis added).

2. *Id.*

critiquing the lack of open discourse on racism in music and culture, prefaced with his family's history in the civil rights movement, all over a sped up and re-tuned sample of Michael Bolton. But while Kanye samples for his albums and the music charts, the United States Supreme Court and Arizona State Legislature have been doing their own version of sampling through post-racial rhetoric in statutes, propositions, and legal opinions. Pulling from some of the greatest hits of the civil rights movement, the Supreme Court and Arizona Legislature have sampled the language of formal equality to mask the persistence of racism by sampling a familiar tune calling for racial equality. The hook is catchy and gets the listener nodding. Meanwhile, the lyrics providing the post-racial rhetoric declare racism is dead and to think otherwise is a new form of reverse-discrimination.

Recognition of racism in the lives of people of color has been reduced to only acknowledging individual acts of meanness; ignoring the systemic and structural discrimination that persists while asserting that programs meant to enhance the lives and careers of people of color are, in fact, racist. The hook repeats, the sample plays the sounds of the civil rights movement, the lyrics spout a post-racial fiction, masking the all too familiar beat of white supremacy. Unfortunately, in Arizona this song is not a one hit wonder. Each successive single on the post-racial mixtape, Senate Bill (S.B.) 1070, House Bill (H.B.) 2281, and Proposition 107, goes platinum and gets amplified, attempting to drown out the calls for action, coalitions, and responses from communities of color.

This Comment analyzes how Supreme Court decisions and recent legislation have used the language of post-racialism to re-center whiteness through the law. Rather than using explicit racist language, the post-racial project exploits the language of historical antiracist efforts to negate experiences with discrimination while continuing a hostile environment for racial groups and promoting white supremacy in the United States.

Beginning with Supreme Court decisions on affirmative action, in *Regents of the University of California v. Bakke*[3] and *Grutter v. Bollinger*,[4] and school desegregation in *Parents Involved in*

3. 438 U.S. 265 (1978).
4. 539 U.S. 306 (2003).

Community Schools v. Seattle School District No. 1,[5] this Comment analyzes how legal constructions of race have gradually dismantled the legal achievements of the civil rights movement and re-centered whiteness in the law through post-racial ideology. Beyond the Supreme Court, recent Arizona legislation such as H.B. 2281[6] (ending ethnic studies in high schools) and Proposition 107[7] (banning affirmative action) are symptomatic of the changing legal rhetoric of race in the United States. Rooted in rhetoric of colorblindness and individual rights, the three Supreme Court decisions and two pieces of Arizona legislation outline the dominant narrative of post-racialism in United States law. Drawing on Critical Race Theory as a theoretical framework, this Comment uses legal scholar Sumi Cho's definition of post-racialism to outline the legal narrative from the Supreme Court to Arizona legislation.[8] To consider the implications of post-racial legal narratives, Critical Race Theory underscores the role of interest convergence in United States law, forming a legal ideology that is simultaneously permissive of racist actions and insulated from legal challenges that strive for racial justice.

I. CRITICAL RACE THEORY AND POST-RACIALISM

Post-racialism and colorblindness are not new to the law, but evolved from a history of legislation designed to protect oppressed communities. As Professor Ian Haney Lopez notes, "those who purposefully seek to use the law to end discrimination or gain advantages for minority communities, may also substantially though unwittingly contribute to the legal legitimization of racial domination and subordination."[9] Statutes, legislators, judges, and common law help to create racial difference through the law by creating an idea-system that (1) legitimates race; (2) "help[s] racial categories to

5. 551 U.S. 701 (2006).

6. H.B. 2281, 49th Leg., 2d Reg. Sess. (Ariz. 2010); *see also* ARIZ. REV. STAT. ANN. §§ 15-111 to -112 (2010).

7. ARIZ. CONST. art. II, § 36; ARIZ. SEC'Y OF STATE, 2010 BALLOT PROPOSITIONS & JUDICIAL PERFORMANCE REVIEW: PROPOSITION 107 (2010), *available at* www.azsos.gov/election/2010/info/pubpamphlet/english/prop107.htm.

8. Sumi Cho, *Postracialism*, 94 IOWA L. REV. 1589, 1594-1600 (2009).

9. IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 107 (10th ed. 2006).

transcend the sociohistorical contexts in which they develop,"[10] making racial classification seem natural and inherent, rather than socially constructed; and (3) reifies racial categories to "transform them into concrete things, making the categories seem natural, rather than human creations."[11] To understand the connections between law and social norms, this Comment uses a Critical Race Theory framework to address questions of how the modern rhetoric of case law, initiatives, and statutes have obscured the ongoing role of racism and discrimination in the United States, while exploiting past civil rights rhetoric to re-center white supremacy in the law.

Central to Critical Race Theory is the notion that racism is endemic in the United States. "Racism is normal, not aberrant . . . . [I]t looks ordinary and natural to persons in the culture" and therefore formal legal remedies can only address extreme instances of injustice, ignoring "the business-as-usual forms of racism that people of color confront every day and that account for much misery, alienation, and despair."[12] Racism is a social construct that takes multiple forms. One is the more visible, often structural, manifestation of racism in overt acts of oppression, such as segregation or slavery. But behind the scenes lurks the larger collection of cultural attitudes towards race that form the dominant narrative of white supremacy[13] and "racial subordination [which] maintains and perpetuates the American social order."[14]

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10. *Id.* at 88.

11. *Id.* at 91.

12. Richard Delgado & Jean Stefancic, *Introduction* to CRITICAL RACE THEORY: THE CUTTING EDGE, at xvi (2d ed. 2000).

13. The term "white supremacy" includes more than the typical imagery of the Ku Klux Klan or burning crosses. It implicates whiteness and white privilege that may create a presumption of worth, heightened social capital, or even obscure stigma. *See generally* LOPEZ, *supra* note 9; Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993). For example, Professor Michelle Alexander describes how whiteness impacts social attitudes towards crime: "[S]tudies indicate that white ex-offenders may actually have an easier time gaining employment than African Americans *without* a criminal record. . . . Whiteness mitigates crime, whereas blackness defines the criminal." MICHELLE ALEXANDER THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 193 (2010).

14. Derrick Bell, *Who's Afraid of Critical Race Theory*, *in* THE DERRICK BELL READER 78, 80 (Richard Delgado & Jean Stefancic eds., 2005).

Existing social structures and institutions allow for change only through what Derrick Bell has termed "interest convergence."[15] Social movements alone do not lead to racial justice, but rather "white elites will tolerate or encourage racial advances for blacks only when such advances also promote white self-interest."[16] Bell explains that even after policies have been put in place to create a semblance of racial justice, "that remedy will be abrogated at the point that policymakers fear the remedial policy is threatening the superior social status of whites, particularly those in the middle and upper classes."[17] To understand and undermine interest convergence in law, Critical Race Theory emphasizes a "call to context" that requires a deeper examination of legal and social issues by paying "attention to the details of minorities' lives as a foundation for our national civil rights strategy."[18] Returning context to the legal conversation reveals the role of law as both ideology and coercion, as "ideology convinces one group that the coercive domination of another is legitimate."[19]

From the foundation of Critical Race Theory, this Comment examines legal decisions and policies which represent interest convergence, preserve white privilege, and decontextualize the social construction of race through post-racialism. Professor Sumi Cho explains that post-racial ideology "reflects a belief that due to the significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based remedies,

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15. Bell draws the principle of interest convergence from court opinions before and after *Brown v. Board of Education,* 347 U.S. 483 (1954), providing "[t]he interest of blacks in achieving racial equality will be accommodated only when it convergences with the interests of whites." Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). In other words, racial justice has been made dependent on the maintenance of white privilege. Racial equality is not an absolute goal, but only merits consideration if racial remedies "will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites." *Id.*; *see also* Lani Guinier, *From Racial Liberalism to Racial Literacy:* Brown v. Board of Education *and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92 (2004).

16. DELGADO & STEFANCIC, *supra* note 12, at xvii.

17. DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 69 (2004).

18. DELGADO & STEFANCIC, *supra* note 12, at xviii.

19. Kimberlé Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1358 (1988).

and that civil society should eschew race as a central organizing principle of social action."[20] Thus the "retreat from race" takes three forms: materially in the removal of state created racial remedies, socioculturally in redefining the meaning of racial equality and justice, and politically in delegitimizing racial political entities in pursuit of legal and social change.[21] Post-racialism has deep connections to historic legal constructions of whiteness outlined by Lopez, but also represents legal standards of whiteness.[22] Professor Cheryl Harris explains that law has created a propertied investment in whiteness as "the law's denial of the existence of racial groups is predicated not only on the rejection of the ongoing presence of the past, but is also grounded on a basic tenet of liberalism—that constitutional protections inhere in individuals, not groups."[23] By burying the language of race, post-racialism results in "the ultimate redemption of whiteness: a sociocultural process by which whiteness is restored to its full pre-civil-rights value . . . by disaggregating unjust enrichment and complicity from whiteness through the redemptive and symbolic 'big event' of racial transcendence."[24]

To outline the features of post-racialism as a racial project that forms the dominant narrative of modern legal and political rhetoric, this Comment analyzes three Supreme Court cases and two pieces of Arizona legislation using the four key features of post-racialism outlined by Professor Cho. First is "the trope of racial progress [that asserts] racial thinking and racial solutions are no longer needed because the nation has 'made great strides,' achieved a[] historic accomplishment, or transcended racial divisions of past generations."[25] Second is a "race-neutral universalism" that casts racial remedies as "partial and divisive, and benefiting primarily those with 'special interests' versus all Americans."[26] In other words, the United States is normatively defined as white, heterosexual, and male. Those who want to change this norm, through affirmative action or

20. Cho, *supra* note 8, at 1594.
21. *Id.*
22. *See generally* LOPEZ, *supra* note 9.
23. Harris, *supra* note 13, at 1761.
24. Cho, *supra* note 8, at 1596.
25. *Id.* at 1601.
26. *Id.* at 1602.

examinations of the United States as historically oppressive to disenfranchised groups, undermine the legal standing of equality the United States.[27] Third is a moral equivalence between racialism of the past and present, making racial divisions of the past, such as Jim Crow, synonymous with policies that attempt to effect racial remedies, such as affirmative action.[28] Cho explains "[p]ost-racialism views both the pre-civil-rights era (from European contact up to the mid-twentieth century) and the civil-rights era (from the mid- to late twentieth century) as racially polarizing. Instead, post-racialism idealizes a society in which race is no longer a basis for differential treatment, grievance, or remedy."[29] Fourth is a distancing move, used by post-racialists to distinguish themselves from and assert their superiority over civil rights advocates and critical race theorists.[30] The distancing move is a "hegemonic device" that features "attacks against the preceding racialisms, especially against advocates of race-conscious theories, race-based remedies, and race-based collective political action to achieve such remedies."[31]

Each feature is a distinct strategy that defines post-racial ideology: "[w]hile all four features are not required to define an instance of post-racialism, they are central and common components of post-racialist ideology and discourse."[32] In the next section, this Comment uses Cho's four points of post-racialism to analyze Supreme Court decisions in *Regents v. Bakke*,[33] *Grutter v. Bollinger*,[34] and *Parents Involved v. Seattle*.[35] These decisions form a precedent for the post-racial narrative in law, showing an ideological shift in racial fortuity of interest convergence as the Supreme Court moves further from racial remedies of the past to colorblind and post-racial understandings of equality.

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27. *Id.*
28. *Id.* at 1603.
29. *Id.*
30. *Id.* at 1604.
31. *Id.*
32. *Id.* at 1600.
33. 438 U.S. 265 (1978).
34. 539 U.S. 306 (2003).
35. 551 U.S. 701 (2007).

II. POST-RACIAL PRECEDENT

Though post-racialism is a recent development, its ideological roots are present in three major Supreme Court cases that have dictated the state's interest in affirmative action and school desegregation. While these are not the only cases to dictate the role of race in legal decisions, they represent a distinct trend in creating a dominant post-racial ideology, specifically related to race and education. Cases such as *McCleskey v. Kemp*[36] and *Adarand Constructors, Inc. v. Pena*[37] show the operations of a post-racial framework in capital sentencing and employment. *McCleskey*[38] narrows understandings of racism to individual and intentional acts of discrimination, rather than systemic inequalities, while *Adarand*[39] solidifies the moral equivalence between Jim Crow and affirmative action. This Comment focuses on majority opinions from *Bakke*, *Grutter,* and *Parents Involved*, as they are three of the most significant guideposts in generating a post-racial legal narrative in race and education. Justice John Powell's opinion in *Bakke* establishes the language of strict scrutiny in evaluating affirmative action within the law,[40] while Justice Sandra Day O'Connor's decision in *Grutter* upholds affirmative action as a "compelling interest" in achieving diversity in higher education.[41] Post-racialism emerges in *Parents Involved* as the Court determines that racial diversity in schools can be otherwise achieved through non-racial means.[42]

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36. 481 U.S. 279 (1987).

37. 515 U.S. 200 (1995).

38. *See generally* Randall Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988) (exploring the race-of-the-victims disparities argued before the Court and the devaluation of black lives by giving more lenient sentences to those who murder black people); Veronica Patton, *Rethinking Equal Protection Doctrine in the Wake of* McCleskey v. Kemp, 11 NAT'L BLACK L. REV. 348 (1990) (analyzing the effects of *McCleskey* on equal protection litigation and the requirement of "discriminatory effect").

39. *See* Cho, *supra* note 8, at 1615 (discussing the implications of *Adarand* in future Supreme Court decisions: "[t]he Court declared all racial classifications suspect 'irrespective of the race of the burdened or benefited group'").

40. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

41. Cho, *supra* note 8, at 1617.

42. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 734-35 (2007).

A. Regents of University of California v. Bakke

In the first major Supreme Court decision on affirmative action, the Court held that affirmative action was a constitutional means to further educational institutions' interests in attaining diversity,[43] but the Court's reasoning was incredibly fractured. Alan Bakke sought injunctive relief against the Regents of the University of California at Davis after being denied admission to the school's medical program for two consecutive years.[44] Bakke alleged that the existence of sixteen spots set aside for racial minority applicants restricted his admission and thus, he was unjustly denied acceptance into the program under the Equal Protection clause of the United States Constitution.[45] The California Supreme Court ruled that because the program involved "racial classification," and even though the goal of racially diversifying the medical school was a compelling state interest, "the special admissions program was not the least intrusive means of achieving these goals."[46]

Once the United States Supreme Court heard the case, it issued a "confusing, multifaceted decision."[47] In the Court's opinion, Justice Powell held that the set-aside of sixteen applicant spots was unconstitutional, but the state had a compelling interest in pursuing diversity in a university setting.[48] Though not enough justices joined in all parts of the opinion to form a majority opinion, Justice Powell's opinion contains kernels of post-racial rhetoric that have been exploited in later political discourse. A central component of Justice Powell's argument is his understanding that

> [t]he special admissions program is undeniably a classification based on race and ethnic background. . . . Whether this limitation is described as a quota or goal, it is a line drawn on the basis of race and ethnic status. . . . The guarantee of equal protection cannot mean one thing when applied to one individual and something else

43. *Bakke*, 438 U.S. at 319-20.
44. *Id.* at 276-77.
45. *Id.* at 278-79.
46. *Id.* at 279.
47. BELL, *supra* note 17, at 142.
48. *Bakke*, 438 U.S. at 314.

> when applied to a person of another color. If both are not accorded the same protection, then it is not equal.[49]

Justice Powell does not engage in the systemic discrimination that occurs before the admissions process or the prevalence of racism in United States society, underscored by Justice Marshall in his dissent, because "racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact."[50] Instead, Justice Powell's decision codifies the narratives of racial progress and moral equivocation through race-neutral universalism. Justice Powell asserts "it cannot be said the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm."[51] Justice Powell invokes *Brown v. Board of Education*[52] to define racially discriminatory harms, creating a moral equivalence between the harm of removing sixteen admissions spots from availability for white students with the harms of school segregation and national disparate impact in educating black students. Justice Powell indicts the role of "societal discrimination" as vague, giving too much scope to "reach into the past,"[53] creating an illusion of racial progress by narrowly defining racism to include any specific acts of discrimination that have been overcome in the present.

The early post-racial arguments in Justice Powell's opinion present the evolution of interest convergence in the eyes of the Supreme Court. Though the state has a compelling interest and degree of responsibility in achieving diversity within schools, it cannot be made through distinctions based on race. Buried in the neutral tone of Justice Powell's argument is what Thomas Ross terms "the rhetoric of innocence" that states two effects to affirmative action plans:

> They hurt innocent white people, and they advantage undeserving black people. . . . Affirmative action does not merely do bad things to good ('innocent') people nor merely do good things for bad

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49. *Id.* at 289-90.
50. *Id.* at 400 (Marshall, J., dissenting).
51. *Id.* at 308-09.
52. 347 U.S. 483 (1954).
53. *Id.* at 307.

> ('undeserving') people; affirmative action does both at once and in coordination.[54]

Bakke's rhetoric therefore sets a precedent for post-racialism in creating a moral equivalence between the harms of affirmative action and segregation through "white innocence" while upholding affirmative action as a compelling state interest for diversifying state universities.

B. Grutter v. Bollinger

Nearly twenty-five years after *Bakke* set out the precedent for affirmative action discourse, another white student was rejected from a professional degree program and sought an injunction. In 2003, the Supreme Court heard the case of *Grutter v. Bollinger*, considering the rejection of a white woman, petitioner Barbara Grutter, from the University of Michigan Law School.[55] Similar to *Bakke,* Grutter was denied admission and argued that the affirmative action program in place was a violation of Equal Protection. Unlike *Bakke,* the University of Michigan had no selective system in place and instead relied on a broad "commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against."[56] The District Court drew on the precedent set by *Bakke* to rule the program unconstitutional because "'the attainment of a racially diverse class . . . was not recognized as such by *Bakke* and it is not a remedy for past discrimination.'"[57] The Supreme Court upheld the use of affirmative action in Michigan in a 5-4 decision, but used *Bakke* to outline an argument for compelling state interest.

Writing for the majority, Justice Sandra Day O'Connor drew heavily on Justice Powell's decision in *Bakke* to reject any justification for affirmative action rooted in historical disadvantage or remedying present discrimination. In both cases, race in university admissions is legal only in "the attainment of a diverse student

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54. Thomas Ross, *Innocence and Affirmative Action,* 43 VAND. L. REV. 297, 301 (1990).

55. Grutter v. Bollinger, 539 U.S. 306, 316-17 (2003).

56. *Id.* at 319.

57. *Id.* at 321.

body."[58] From Justice Powell's moral equivalence in *Bakke*, Justice O'Connor seems assured of future racial progress because "race-conscious admission policies must be limited in time. . . . [A]ll governmental uses of race must have a logical end point."[59]

The open use of interest convergence makes *Grutter* distinct. Justice O'Connor holds that the state interest in pursuing diversity in higher education comes from the benefits that may be gained for the larger student population due to the

> unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. The Law School has determined, based on its experience and expertise, that a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.[60]

Derrick Bell notes that Justice O'Connor's sudden advocacy for affirmative action is a textbook example of interest convergence in the law. Justice O'Connor "evidently viewed [affirmative action] as a benefit and not a burden to nonminorities. In addition, it was a boost to a wide range of corporate and institutional entities with which she identifies."[61] Justice O'Connor's interest convergence logic relies on race-neutral universalism to legitimize affirmative action, because a more diverse student body is beneficial to the predominantly white campus, and therefore outweighs the perceived harm of fewer white students being admitted.

Justice O'Connor makes a pointed distinction between the use of racial "quotas" and the use of "race as a 'plus' factor" in the admissions process: "[A] university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."[62] Viewing race as a "plus" returns to a propertied investment in whiteness, described by

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58. *Id.* at 324.
59. *Id.* at 342.
60. *Id.* at 333.
61. BELL, *supra* note 17, at 151.
62. *Grutter*, 539 U.S. at 337.

Cheryl Harris,[63] by inhering constitutional protections in individuals rather than groups. Doing so denies the background of racism that has worked to systematically discriminate against groups based on race, while again establishing a race-neutral universalism by touting the individual as the core unit of legal analysis.

A rhetorical move that Justice O'Connor does not challenge, or even acknowledge outside of summation, is the petitioner's claim that the University of Michigan is "giving applicants who belong to certain minority groups 'a significantly greater chance of admission than students with similar credentials from disfavored racial groups.'"[64] Much like the "white innocent" described by Ross,[65] the white petitioner describing herself as a "disfavored racial group" embodies a moral equivalence between the decline of white privilege and racism. With whites defined as a "disfavored racial group," it rearticulates the racial climate of the law to assume racial progress has been made to the point that whites are now disadvantaged. Whites' "disfavored" status represents white entitlement and a distancing move by comparing attempts at dismantling whiteness to the disenfranchisement of people of color; of course, for Grutter, the present status of whites is worse.

C. Parents Involved v. Seattle

Just four years after the Supreme Court ruled on the role of race in law school admissions, the issue of school desegregation was brought before the court in the 2007 case *Parents Involved v. Seattle.*[66] Combining cases based in Seattle, Washington, and Louisville, Kentucky, the Supreme Court ruled on the ability of school districts to utilize race as a factor to create racially integrated school districts in areas that were historically racially segregated. In Seattle, this integration took the form of a secondary tie breaker based on the student's racial identification as white or non-white and the racial makeup of the school.[67] However this tie breaker took place only once

63. *See generally* Harris, *supra* note 13.
64. *Id.* at 317.
65. Ross, *supra* note 54, at 301.
66. 551 U.S. 701 (2007).
67. *Id.* at 711-12.

the more popular options were already taken and after students were assigned based on the presence of a sibling in a desired school.[68] In Louisville, the issue arose over the use of race in Jefferson County school district, which would occasionally reassign students from regional areas in order to assure a diverse school makeup.[69] While Louisville was legally required to desegregate based on a federal court decision in 1973,[70] Seattle had no court-mandated school desegregation.[71]

The majority opinion by Chief Justice John Roberts contains all four points in Sumi Cho's post-racial framework. Justice Roberts begins by asserting the two standards used to determine compelling state interest in using racial classifications: "remedying the effects of past intentional discrimination" and the "interest of diversity in higher education."[72] From these narrow guidelines, Justice Roberts outlines the trope of racial progress and race-neutral universalism by first asserting that there is no compelling state interest in "racial balance," which Justice Roberts argues the Court has repeatedly found unconstitutional.[73] Instead, the state has a vested interest in diversity in schools, which should not be racially defined, and in fact, "[w]hen the actual racial breakdown is considered, enrolling students without regard to their race yields a substantially diverse student body under any definition of diversity."[74] Justice Roberts' opinion reflects a view that racial progress has been achieved, because diversity seems to occur naturally under "any definition," even though Justice Roberts notes that Seattle suffers from "racially identifiable housing patterns on school assignments."[75]

The language of racial progress and universalism in the *Parents Involved* decision stems from earlier rulings in *Grutter* and *Bakke*. In *Parents Involved*, however, Justice Roberts' opinion goes further than past decisions by attacking previous uses of race in the law. Roberts'

68. *Id.*
69. *Id.* at 710-11.
70. *Id.* at 715.
71. *Id.* at 712.
72. *Id.* at 720, 722.
73. *See id.* at 726.
74. *Id.* at 728.
75. *Id.* at 712.

opinion includes all four aspects of Professor Cho's post-racial framework, including moral equivalence and distancing moves, which were not evident in past decisions. Justice Roberts holds that

> Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society . . . . Allowing racial balancing as a compelling end in itself would effectively assur[e] that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race will never be achieved.[76]

According to Justice Roberts, not only has racial progress been achieved, but the "racial balancing" that Seattle and Louisville attempt to achieve by integrating schools distracts from the ultimate goal of eliminating race from government. The precedent Justice Roberts cites, and his own opinion itself, creates a distancing move in trying to separate the present and future of racial rhetoric from the racialism of the past by aspiring for the removal of race from society.

But despite the inherent injustice that Justice Roberts seems to believe will occur if the two school districts attempt to use racial balance to achieve diversity within schools, Justice Roberts argues that the impacts are minor. "While we do not suggest that *greater* use of race would be preferable, the minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using racial classifications."[77] Justice Roberts' argument revives the role of white innocence and interest convergence: it would be unconstitutional to create racial balance within schools by using race, yet the impact of racial classifications is so minimal it is unnecessary to achieve racial balance in schools.[78] Thus, there is no compelling state interest because no general benefit can be linked to the benefit to larger society or schools—in other words, white interests are no longer served by racial integration. Moreover, racial integration now disadvantages whites by taking places in schools desired by whites and reserving them for others. Thus racial integration in schools has been constructed as a violation of white innocence. By the conclusion

76. *Id.* at 730 (internal quotation marks omitted).

77. *Id.* at 734.

78. *Id.*

of the decision, Justice Roberts makes a final few points of moral equivalence by directly citing *Brown* to affirm, not the desegregation, but the de-*integration* of public schools:

> It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954.... Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons.[79]

Justice Roberts' final statements punctuate a moral equivalence that directly compares the present efforts in Seattle and Jefferson County districts with the Jim Crow segregation that inspired *Brown*. Key to Justice Roberts' argument is Justice Roberts' use of neutrally worded language to refer to *Brown*. Stating that "schoolchildren" and "children" were discriminated against based on the color of their skin ignores the white supremacy that dictated school segregation, but also permits Justice Roberts' post-racial interpretation of race in the law: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[80]

Justice Roberts' majority opinion in *Parents Involved* marks the first case in the new post-racial era of the courts, as it includes all four aspects of post-racialism. Sumi Cho summarizes:

> The post-racial era no longer needs to rely upon the racialized language that was more evident prior to the Civil War. Instead, courts rely on race-neutral legal mechanisms, especially increased burdens of proof, and suggest a failure of proof on the part of race-discrimination plaintiffs. In the post-racial courts, the complex machinations of the courts' evidentiary burden sleight-of-hand achieves the racial hegemony sought on matters of racial jurisprudence with far greater effectiveness.[81]

Though the Court's decisions in *Bakke* and *Grutter* outline some key points of post-racialism, they still affirm the role of race and

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79. *Id.* at 746-47.

80. *Id.* at 748.

81. Cho, *supra* note 8, at 1620.

affirmative action as necessary for achieving diversity, even if only through interest convergence and white innocence. In *Parents Involved*, Justice Roberts strikes out into new, but not unfounded, territory that uses one of the most recognizable tunes in the catalogue, *Brown*, to underscore his post-racial lyricism. Post-racialism becomes law by burying the language of racism under narrow definitions of state interest that remove mentions of race from legal discourse. With the legal precedent for post-racialism in place, in the next section, this Comment follows the themes of affirmative action and education to analyze post-racial legislation in Arizona represented by H.B. 2281 and Proposition 107.

III. THE SOUTHWESTERN STRATEGY: POST-RACIALISM IN ARIZONA

After the Arizona Senate passed the infamous Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070,[82] Arizona became the seat for the "Southwestern Strategy" of post-racialism. The Act created legal regulations on immigration targeted at the Latina/o community through racial profiling and limiting access to public services.[83] In the same way conservatives and neoconservatives created a "Southern Strategy" that exploited white racial fears of blacks to create voting strength in the south and win Republican elections in the twentieth century, this Comment argues that the Southwestern Strategy is a twenty-first century political move that exploits white racial fears over Latina/o immigration to push post-racial legislation in Arizona. Though S.B. 1070's full implementation was denied through a federal injunction,[84] Proposition 107[85] and H.B. 2281[86] marked two major sections of an evolving post-racial narrative in Arizona that has found public approval passing in 2010 elections. Again using Sumi Cho's four points of post-racialism, this Comment analyzes how Proposition 107 and H.B. 2281 perpetuate post-racial rhetoric set by Supreme Court precedent while feeding on anti-Latina/o tensions in Arizona.

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82. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

83. *Id.*

84. United States v. Arizona, 641 F.3d 339 (9th Cir. 2011).

85. ARIZ. CONST. art. II, § 36; ARIZ. SEC'Y OF STATE, *supra* note 7.

86. H.B. 2281, 49th Leg., 2d Reg. Sess. (Ariz. 2010); *see also* ARIZ. REV. STAT. ANN. §§ 15-111 to -112 (2010).

A. Proposition 107

While the Supreme Court voiced its opinion on the status and use of affirmative action in schools through *Grutter*, ballot measures arose in different states to ban affirmative action. Advocates of California's Proposition 209,[87] Washington's Initiative 200,[88] Michigan's Proposal 2,[89] Nebraska's Initiative 424,[90] and most recently Arizona's Proposition 107, argue that "[a]ffirmative action is the moral equivalent to Jim Crow segregation," and these "ballot initiatives to ban affirmative action are presented and passed as 'civil rights initiatives' in states with an overwhelming white majority of registered voters."[91] In California and Arizona, these "civil rights initiatives" came on the heels of ballot initiatives and legislation designed to exploit anti-immigrant narratives that play on white fears of rising Latina/o populations.[92] While the Latino Threat Narrative increases racial tensions by operating on a hegemonic understanding of Latina/os as negative agents of change,[93] post-racialism attempts to

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87. CAL. SEC'Y OF STATE, 1996 GENERAL ELECTION BALLOT PAMPHLET: PROPOSITION 209 (1996), *available at* http://vote96.sos.ca.gov/bp/209.htm.

88. WASH. SEC'Y OF STATE, 1998 ELECTION: STATE BALLOT MEASURES – COMPLETE TEXT OF INITIATIVE 200 (1998), *available at* http://www.sos.wa.gov/elections/1998/i200_text.aspx.

89. MICH. SEC'Y OF STATE, NOTICE: STATE PROPOSALS, NOV. 7, 2006, GENERAL ELECTION 5 (2006), *available at* http://www.michigan.gov/documents/sos/ED-138_State_Prop_11-06_174276_7.pdf.

90. NEB. SEC'Y OF STATE, INFORMATIONAL PAMPHLET: INITIATIVE MEASURE #424 APPEARING ON THE 2008 GENERAL ELECTION BALLOT (2008), *available at* http://www.sos.ne.gov/elec/2008/pdf/pamphlet%20424.pdf.

91. Cho, *supra* note 8, at 1615.

92. Key to the Latino Threat Narrative is the idea that Latina/os as a group represent an "invading force . . . bent on reconquering the land that was formerly theirs (the U.S. Southwest) and destroying the American way of life." LEO CHAVEZ, THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION 2 (2008). Therefore the Latino Threat Narrative capitalizes on the growing Latina/o. *See generally id.* (outlining of the history and present implications of the Latino threat narrative, its role as a discourse of power, and common sense roots); Mary Romero, *Racial Profiling and Immigration Law Enforcement: Rounding Up of Usual Suspects in the Latino Community*, 32 CRITICAL SOC. 447, 459 (2006) (discussing the Latino Threat Narrative as applied to Arizona law enforcement, specifically the fear of mass Latin).

93. CHAVEZ, *supra* note 92, at 41.

bury the role of racism in society, obscuring the racist roots of legislation.

Arizona's Proposition 107 is the latest in the trend of ballot initiatives. Proposition 107 used the language of moral equivalence by amending the Arizona State Constitution to read: "This state shall not grant preferential treatment to or discriminate against any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[94] Though not as explicit as the Supreme Court decisions, these thirty-seven words effectively ban affirmative action in Arizona and assume racial progress by ignoring the persistence of racism in the United States while equating affirmative action measures and racial discrimination. The proposed amendment passed with sixty-eight percent approval, earning majority approval in every county in Arizona except Apache County,[95] which occupies the northeastern corner of the state and is predominantly American Indian.[96]

Post-racial rhetoric emerges in full force through the statements of proponents for Proposition 107 in the *Arizona Ballot Proposition Guide* distributed by the Arizona Secretary of State.[97] Seventeen of the proponents' statements offered a version of the phrase "regardless of race or skin color," seven argued Proposition 107 promotes "equal opportunity," four used a "hard work" bootstrap narrative of overcoming obstacles, and three directly quoted Dr. Martin Luther King Jr. in arguing against affirmative action.[98]

One proponent of Proposition 107, State Representative Steve Montenegro, combined the Latino Threat Narrative and a post-racial narrative in citing his family history of "legal" immigration to the United States from El Salvador, and applying the rhetoric of legality

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94. ARIZ. CONST. art. II, § 36.

95. ARIZ. SEC'Y OF STATE, STATE OF ARIZONA OFFICIAL CANVASS: 2010 GENERAL ELECTION 14 (2010), *available at* http://www.azsos.gov/election/2010/General/Canvass2010GE.pdf.

96. In Apache County, 72.9% identify as American Indian or Alaska Native. *State & County Quick Facts: Apache County, Arizona*, U.S. CENSUS BUREAU (Jan. 31, 2012), http://quickfacts.census.gov/qfd/states/04/04001.html.

97. ARIZ. SEC'Y OF STATE, BALLOT PROPOSITIONS & JUDICIAL PERFORMANCE REVIEW: PUBLICITY PAMPHLET 33, 34-47 (2010), *available at* http://www.azsos.gov/election/2010/info/pubpamphlet/english/e-book.pdf.

98. *Id.* at 34-37.

to affirmative action: "Can you imagine if someone wanted to LEGALIZE racial or sexual discrimination?"[99] Another proponent of Proposition 107, Ward Connerly, the president of the American Civil Rights Coalition, went so far as to argue that "America was founded on the principle of equality," and even though there was historical discrimination "we have struggled mightily over the years to extend the blessings of freedom and equality to all men and women in our nation."[100]

Beginning with a narrative of race-neutral universalism, Connerly asserted racial progress by contending that affirmative action and "preferences for some" must come to an end.[101] Each of Connerly's statements morally equates affirmative action programs with discrimination, frequently co-opting the language of civil rights. In his statement promoting Proposition 107, Tom Horne, the present Attorney General for the State of Arizona, quoted the "quality of . . . character" from Dr. King's 1963 speech in Washington, asserting that non-racial, non-gendered individuality is a "fundamental value" of the United States.[102] The moral equivalence evident in these statements is dependent on race-neutral universalism that incites the distancing move proposed by Connerly, Horne, and other advocates for Proposition 107. Many of the statements hypothesize what opponents may say about affirmative action or its benefits, with Montenegro drawing the direct parallel between advocates of affirmative action and segregationists.[103] According to Montenegro, not only are advocates of affirmative action wrong, but they are also creating racial preferences that "convince entire generations that they were not good enough or smart enough to compete."[104]

The proponents of Proposition 107 used political rhetoric to attempt to seize the moral high ground from racial justice advocates by asserting a post-racial framework that is not ignorant of history, but rather strategically selective about which aspect of history it acknowledges. No mention of affirmative action by advocates of

99. *See id.* at 34.
100. *Id.* at 35.
101. *Id.*
102. *Id.* at 34.
103. *Id.*
104. *Id.*

Proposition 107 goes without moral equivocation between segregation, Jim Crow, or affirmative action.[105] Moreover, the proponents' statements exploit the language of the civil rights movement to re-center whiteness by invoking "reverse discrimination" and creating the presumption of white innocence.[106] Under this logic, not only are whites being victimized by affirmative action or "racial preference programs," but these post-racialists also portray themselves as the vanguard of a new civil rights movement, distancing themselves by invoking the words of past civil rights leaders and constitutional rhetoric.[107] The language of racism and race is buried with post-racialism, intentionally masking ongoing racial tension in Arizona and perpetuating anti-immigration rhetoric despite their supposed commitment to justice.

B. H.B. 2281: Tom Horne's "Downer"

In a discussion on CNN with Anderson Cooper and Professor Michael Eric Dyson, then-Arizona State Superintendent Tom Horne invoked the legacy of Dr. Martin Luther King Jr. to defend his proposed policy to ban ethnic studies programs in Arizona. Horne claimed that ethnic studies programs "divide[] students up by race" and teach students of color the "downer that they're oppressed."[108] Horne's statements reflect the post-racial agenda that denies the presence of racism in the United States because it is the "land of opportunity." The legislature passed the Arizona ethnic studies ban in the fall legislative session as H.B. 2281, amending the Arizona Revised Statutes to read:

> The legislature finds and declares that public school pupils should be taught to treat and value each other as individuals and not be taught to resent or hate other races or classes of people. . . . A school district or charter school in this state shall not include in its program of instruction any courses or classes that include any of the

105. *Id.*

106. *See* Ross, *supra* note 54, at 301.

107. ARIZ. SEC'Y OF STATE, *supra* note 97, at 34-37.

108. *Anderson Cooper 360 Degrees: Arizona's New Controversy* (CNN television broadcast Dec. 21, 2011) [hereinafter *Cooper*] (transcript available at http://transcripts.cnn.com/TRANS CRIPTS/1005/12/acd.02.html).

> following: 1. Promote the overthrow of the United States government. 2. Promote resentment toward a race or class of people. 3. Are designed primarily for pupils of a particular ethnic group. 4. Advocate ethnic solidarity instead of the treatment of pupils as individuals.[109]

H.B. 2281 is a clear example of post-racial advocacy. H.B. 2281 declares the discussion of race in public schools taboo and discriminatory, and the learning of the United States' history of oppression treacherous and seditious. Central to H.B. 2281, and Tom Horne's statements, is an emphasis on treating students as individuals, continuing the individualist rhetoric of Supreme Court decisions on affirmative action, and reaffirming the propertied investment of whiteness in the law. The statute's neutral wording prohibits teaching children to "resent other races or classes of people" while treating them as individuals. This wording is a distancing move; an effort to shatter group solidarity in the pursuit of racial justice. At its core, H.B. 2281 is a trope of racial progress that assumes the histories of oppression taught in ethnic studies programs are not connected to modern experiences of people of color. Furthermore, H.B. 2281 assumes the histories are not truthful or accurate portrayals of the United States, and are dangerous to the mindset of students.

H.B. 2281 and Horne present an interest convergence view of history, turning the law to an ideology of post-racialism that attempts to censor ethnic studies classes that would "[p]romote resentment toward a race or class of people."[110] Here the white innocent returns, but not in the removal of privilege through affirmative action described by Ross.[111] Instead, it appears in the acknowledgment of white supremacy as a defining feature of United States history. Without naming race in the main text of the resolution, H.B. 2281 protects white supremacy as a form of power by shielding the historical mechanisms by which it has taken power. In other words, the language of the bill gives the Superintendent of Public Instruction the power to target and eliminate any teachings about United States history that could be interpreted as resentment towards wealthy white men who have dominated the course of United States history.

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109. ARIZ. REV. STAT. ANN. §§ 15-111 to -112 (2010).

110. *Id.*

111. Ross, *supra* note 54, at 301.

Removing ethnic studies programs from schools is post-racialists' attempt to disconnect students from historical knowledge that can generate critical consciousness. As Lani Guinier and Gerald Torres note, such knowledge has transformative power:

> [C]onsciousness of race has, for many people of color, functioned as a form of political literacy, both affirmatively connecting individuals to a group and critically assessing the conditions of the group in light of larger structures within the society. It may encourage them not only to see but also to act.[112]

Post-racialism is antithetical to movements for racial justice because it recognizes the power of race-based collective struggle, categorically labels the struggle as negative, and asserts a race-neutral ideology that buries the past under strategic ignorance. During Horne's CNN interview, Horne borrows statements from students in Arizona ethnic studies classes, such as "[n]ow that I took the course, I realized that I'm oppressed," and uses these statements to argue that the students learn the "downer" that they are oppressed through these classes.[113] According to Horne, not only has racial progress been achieved by eliminating Arizona's ethnic studies programs, but to assert anything otherwise is damaging to the health and wellbeing of students in the educational system. Horne uses Paulo Freire's *Pedagogy of the Oppressed* as an example of literature that would undermine the legitimacy of ethnic studies programs. In doing so, Horne seeks to claim moral high ground for the work of post-racial advocates, while distancing the work of racial justice scholars such as Freire, Guinier, or Torres and disclaiming their work as racist and antithetical to equality.[114]

However broad and sweeping H.B. 2281 is, buried in the legal code is a final disclaimer that helps to insulate post-racial rhetoric from claims of discrimination, especially when dealing with the

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112. LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 104 (2002).

113. *Cooper*, *supra* note 108.

114. *Id.* Instead of engaging scholars like Freire, Guinier, or Torres, or other academic work discussing the issues and problems of people of color, Horne turns their scholarship into the problem itself, discounting their work without any discussion or identification of the underlying issues that these scholars are trying to speak to or combat. *Id.*

content of education. Subsection E asserts that restrictions do not apply to Federal Indian Law, tracking that may produce "disparate impact by ethnicity," teaching "controversial aspects of history," or histories of "any ethnic group" are key functions of post-racial legal framing.[115] The demonization of ethnic studies classes, which "promote resentment" while not restricting or prohibiting "the instruction of the holocaust, any other instance of genocide or the historical oppression of a particular group of people" is a rhetorical move to limit the way classes are taught.[116] While teaching the history of oppression is not restricted, the "resentment" returns to the white innocent that may be damaged by learning histories of oppression in a certain tone or through certain scholars. The individualizing of students and the selective teaching of history advocated by H.B. 2281 is a surgical historical erasure, attempting to sever historical connections between white supremacy, capitalism, and the oppression of people of color.

IV. WHAT A LOAD OF HOPE[117]: POST-RACIAL TRAUMA AND THE SEARCH FOR JUSTICE

Post-racialism has integrated itself into legal ideology as a legitimate reading of race, discrimination, and education in the United States. It has evolved into a modern political rhetoric that combats antiracist efforts through what Ian Haney Lopez describes as a "new, well-honed jujitsu of reactionary colorblindness in action: Exploit race (use coded terms to stir up racial animosity); parry (brush aside charges of racism by demanding proof that you used an old-fashioned

115. ARIZ. REV. STAT. ANN. § 15-112(E) (2010).

116. *Id.* § 15-112(A), (F).

117. The phrase "load of hope" was originally used in a laundry detergent marketing campaign to symbolize the hope of clean clothes for victims of Hurricane Katrina. Tide, *Tide Loads of Hope*, YOUTUBE (Mar. 9, 2009), http://youtu.be/1K-yjsRFW9Y. In Dr. Romero's Racial Justice course at Arizona State University, it became an ironic phrase representing a sort of naïve idealism, untruth, or misrepresentation that, in this case, is negative and destructive to efforts for racial justice. Hope is uplifting, important and crucial to any aspect of life. When post-racial rhetoric is used to negate the histories and lived experiences of people of color under the assumption equality has been achieved and oppression no longer exists in any form, it is not just a load of untruth, hogwash, or manure, it is a "load of hope."

slur); punch (accuse your critics of constantly playing the race card)."[118]

The four features of post-racialism that Sumi Cho outlines[119] become instructive in identifying the rhetorical and legal strategies used to insulate white supremacy from challenges through a post-racial narrative. Post-racialism, however, makes a distinct departure from reactionary colorblindness in its moral equivalence and distancing move. If reactionary colorblindness is the hand-to-hand jujitsu of conversational white supremacy, then post-racialism, through legislation and common law, is the heavy artillery. Post-racialism attacks communities from a distance while those in power sit comfortably, insulated, due to the elimination of programs, opportunities, and histories of people of color.

Post-racialism, in the law and in political rhetoric, feeds people of color a "load of hope" that racism is dead. Post-racialists foist this load of hope on people of color by acknowledging the history of oppression, and morally equating any programs, organizations, or people that strive for racial justice with discrimination. This creates "post-racial trauma"; a dissonance between the experiences of racism that people of color face daily and the legal and political language that asserts the United States has transcended race. Indigenous Scholar of Education Bryan Brayboy argues that historical trauma, or the cumulative emotional and psychological damage that occurs across generations from massive group trauma, is deeply connected to "genesis amnesia," or forgetting the beginning.[120] In contrast, post-racial trauma comes from laws and political rhetoric that acknowledge the history of oppression in the United States, but deny that said history has meaning, value, or impact on the present experiences of people of color. When Tom Horne states that ethnic studies programs that utilize the pedagogy of the oppressed are a "downer," or the Supreme Court rules that affirmative action programs that tread on white privilege in school admissions is the same as segregation, a twisted history of the United States becomes institutionalized. This

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118. Ian Haney Lopez, *Blind Spot: How Reactionary Colorblindness Has Infected Our Courts – and Our Politics*, AM. PROSPECT (Mar. 9, 2011), http://prospect.org/article/blind-spot-0.

119. Cho, *supra* note 8, at 1601-04.

120. Bryan Brayboy, *Unpacking Remembrances*, AM. EDUC. RES. J., (forthcoming 2012).

twisted history recognizes that oppression *existed* (maybe, once upon a time), but claims it is no longer relevant.

Post-racialism creates post-racial trauma by connecting the institutional racism codified in the law to the everyday experiences of people of color by denying that these experiences are painful, have meaning, or are related to any form of systemic discrimination. The prohibition of ethnic studies programs, and other post-racial projects, attempts to bury the potential for empowerment in race consciousness[121] by removing the explicit language of racism from the law and reviving oppression through race-neutral universalism and assertions of racial progress. Post-racial laws define racism through overt individual acts of meanness, acts that do not connect to the institutions of the status quo. These laws also deny the presence of racial microagressions,[122] and equate racism with affirmative action or ethnic studies education. Post-racialism as a legal ideology makes the law hostile to racial reform and thus makes post-racialism appear eternal.

Yet youth, the supposed victims of Tom Horne's "downer," generally don't believe the hype of post-racialism. The Applied Research Center found that the "millennial" generation believes that systemic racism and race continue to matter in United States society, based on focus group interviews conducted with people ages eighteen to twenty-five of White, Asian American/Pacific Islander, Black, and Latina/o descent.[123] Across the five identified racial groups, a majority of respondents believe racism remains a significant problem in the criminal justice system and in employment, and a majority of respondents believe racism is still a significant problem in education, except for a majority of white respondents.[124] Most of the interviewees expressed concern with problems of inequitable access to education or the ongoing segregation in schools. Yet while the youth

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121. *See* GUINIER & TORRES, *supra* note 112.

122. *See generally* Daniel Solorzano et al., *Critical Race Theory, Racial Microagressions and Campus Racial Climate: The Experiences of African American College Students*, 69 J. NEGRO EDUC. 60 (2000) (exploring the role of racial microagressions in educational settings).

123. Dominique Apollon, *Don't Call Them "Post-Racial": Millenials' Attitudes on Race, Racism, and Key Systems in Our Society*, APPLIED RESEARCH CTR. 4 (June 2011), http://arc.org/millennials/report/.

124. *Id.* at 12.

talk about getting an education through college degrees, diplomas, and careers, there was little focus on how *education* itself can be a tool, process, or way of knowing, used to combat racism. Researchers found respondents are hesitant to describe how systemic racism works, exists, or functions, but can more easily describe interpersonal acts of meanness and systemic issues of class.[125] This paucity of dialogue can be seen as one of the main symptoms of post-racial trauma, reducing racism to individualized acts, while the systemic post-racial rhetoric obscures, obfuscates, and otherwise obviates the need for formalized changes. While youth recognize that such problems may exist, they experience difficulty in communicating ideas or feelings about structural problems. These difficulties could be mended through the very kind of programs that Horne, H.B. 2281, and Proposition 107 are attempting to erase.

The kind of education that H.B. 2281 targets, such as the ethnic studies program in the Tucson Unified School District, provides the type of language to talk openly about race, structural oppression, and systemic racism. In a report funded by the Arizona State Superintendent's office,[126] an independent auditor found that the Mexican American Studies Department (MASD) in Tucson provided higher student-teacher interaction, improved student achievement through the curriculum, and even complied with the vague language of H.B. 2281.[127] Although MASD courses included readings on Latina/o history and LatCrit, the report's primary concern[128] was that

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125. *Id.* at 26.

126. Formerly run by Tom Horne, the Superintendent's office was the very office that sought to dismantle ethnic studies, specifically Mexican American Studies in Tucson based on the focus of an audit and Horne's repeated emphasis on Mexican American Studies in public comments to dismantle ethnic studies as an example of the negative effects of ethnic studies programs. *See Cooper*, *supra* note 108.

127. CAMBIUM LEARNING, CURRICULUM AUDIT OF THE MEXICAN AMERICAN STUDIES DEPARTMENT TUCSON UNIFIED SCHOOL DISTRICT 47 (2011) (on file with author).

128. *Id.* at 36. The report also looked at books that had been marked as "questionable texts," reading the books based on quotes provided to the auditors. In reviewing the text, the report includes quotes marked as "controversial," both of which would imply violence against whites when taken out of context. However, the report includes both quotes in context, the first is a historical account of violence undertaken by Texas authorities in 1915, while the second quotes a 1969 rally when

such readings were not "age appropriate" based on the complexity of the content.[129] However, high rates of achievement reported in the audit show that coursework provided open discourse on race, history, and oppression in the classroom and students were not only engaged in the coursework, but engaged in education at higher rates, which indicated that students turn racial and political literacy into action.

Post-racialism seeks to individualize students, eliminate group affiliations, and rearticulate the rhetoric of civil rights to make claims to universal personhood incompatible with the goals of racial equity. Cooptation into interest convergence becomes simple and ingrained into race-related legislation since whiteness is taken as the normative position of power *and* victimization. Harms are typically localized to disparate impact on privileged whites rather than oppressed and disenfranchised people of color. Sumi Cho reiterates that the power to overcome post-racialism as an ideology lies in collective action, citing the work of Immanuel Wallerstein and Andre Gunder Frank in advocating for the formation of a large-scale social movement to combat post-racial attitudes and oppressions. "Only by empowering the various understrata may the existing undemocratic structures be weakened."[130]

Coalitions between racial groups empower people of color, and everyone involved, by giving them greater political voice, and can help combat post-racial trauma by reaffirming experiences of oppression as valid. Importantly, coalitions provide a space for discussion that does not distance or disregard experiences with racism as being "too sensitive" or "over analyzing" encounters. This sort of empowerment not only begins in schools, through ethnic studies programs that have been banned by a post-racial agenda, but also by refining academic discourse through "political impact statements . . . , [which] ascertain how well one's projects and ideas align with . . . larger project[s] and goals in the medium run and . . . anticipate hazards along the way."[131]

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a promise to stampede "gringo" was used as a call to action against white supremacy. *Id.*

129. *Id.*

130. Cho, *supra* note 8, at 1648.

131. *Id.* at 1649.

By generating coalitions against post-racial ideology, people of color can generate a critical mass to respond to historic and present oppression. Rather than the "critical mass" used to justify token representation of people of color in the interest of diversity, critical mass coalition building strives to generate a larger social network that can blossom into a social movement, creating a new beat, tune, and song that challenges the post-racial mixtape; reminding everyone, like Kanye West has, that "racism's still alive, they just be concealing it." Post-racialism has gathered acclaim by sampling the ideals and rhetoric of the civil rights movement, but like an old cassette, the tune has become warped, twisting and morphing the words into hollow support of people of color while reinforcing a white supremacist beat. Coalition building is less destructive, and more creative, sampling the old tune to reinforce the old message, adding current relevance by connecting the old beats and the modern style into an effort that can expose the post-racial mixtape for what it is: a load of hope.