Spring 2005

Revisiting *Brown v. Board of Education*: A Cultural, Historical-Legal, and Political Perspective

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INTRODUCTION

This Article explores how *Brown v. Board of Education*[1] and subsequent Court decisions[2] have impacted the structure of society and racial cultural tradition of America. *Brown* ranks among the first instances in which a modern American institution actually tackled the cultural basis of racism and discrimination. More directly, during oral arguments to consider the separate but equal doctrine of *Plessy v. Ferguson*,[3] the Justices seemed to have understood the political and cultural importance of possibly overturning the doctrine that shaped race relations for more than fifty years.[4] The Warren Court's strategy to treat severally the constitutional pronouncement and the remedial decree suggests its awareness of how the separate but equal doctrine legitimated and gave rise to the institution of racial practices and a way of life that was clearly manifested throughout the American society. These racial practices and patterns were particularly manifested in the South.[5] The separate but equal doctrine did not create the racial culture addressed in *Brown* and subsequent decisions, but rather

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1. 347 U.S. 483 (1954).

2. Milliken v. Bradley, 418 U.S. 717 (1974); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County Sch. Bd., 391 U.S. 430 (1968); Cooper v. Aaron, 358 U.S. 1 (1958).

3. 163 U.S. 537 (1896).

4. ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN *BROWN V. BOARD OF EDUCATION OF TOPEKA*, 1952-55 (Leon Friedman ed., 1969).

5. *See generally* JOHN HOPE FRANKLIN, RACE AND HISTORY (1989); GEORGE M. FREDRICKSON, RACISM: A SHORT HISTORY (2002).

represented the constitutionalization of post-Civil War cultural traditions and policy.[6]

Since *Brown*, considerable attention has been devoted to the capacity and limitations of the Supreme Court and courts in general to bring about social change. In the literature, at least three large camps have emerged. One camp insists that the courts, especially the Supreme Court, have played a significant role in policy-making.[7] Some in this camp argue that the courts' unique structural location permits them to protect the rights of individuals and groups.[8] The second camp generally has an unfavorable perception of a signal participatory role of the Supreme Court and lower courts in policy-making. Researchers in this camp bring forth powerful arguments that question the capacity and legitimacy of the courts' involvement and institutional reform.[9] The third camp sees the courts, particularly the Supreme Court, as neither being all powerful, nor entirely impotent. Scholars in this camp assume a middle ground. They argue that under certain circumstances courts can be agents of social change, represent the politically weak, and advance the interest of the excluded and under-represented.[10] The effort of this Article is not to support any of these three camps, but rather to examine the extent to which the Supreme Court and the principles of *Brown* and subsequent decisions have served as cultural transformers in the area of race.

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6. *See* FRANKLIN, *supra* note 5, at 142; C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 54 (1966) [hereinafter WOODWARD, STRANGE CAREER].

7. *See generally* ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT (1976); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); Michael W. Combs, *The Policy-Making Role of the Courts of Appeals in Northern School Desegregation: Ambiguity and Judicial Policy-Making*, 35 W. POL. Q. 359 (1982).

8. *See* MARTIN SHAPIRO, FREEDOM OF SPEECH (1966); Jonathan D. Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50 (1976); Michael W. Combs, *The Federal Judiciary and Northern School Desegregation: Law, Politics, and Judicial Management*, 16 PUBLIUS: J. FEDERALISM 33 (1986) [hereinafter Combs, *Federal Judiciary*].

9. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (1974).

10. BRADLEY C. CANON & CHARLES A. JOHNSON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT (2d ed. 1999); Lucius J. Barker, *Black Americans and the Burger Court: Implications for the Political System*, 1973 WASH. U. L.Q. 747 [hereinafter Barker, *Black Americans*]; Lucius J. Barker, *Limits of Political Strategy: A Systemic View of the African American Experience*, 88 AM. POL. SCI. REV. 1 (1994); Lucius J. Barker, *Third Parties in Litigation: A Systemic View of the Judicial Function*, 29 J. POL. 41 (1967); Robert A. Dahl, *Decision-Making in a Democracy: The Role of the Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

Brown and subsequent decisions have had a powerful role in transforming the culture of America.[11] Culture references the enduring value system; the practices of signification, ideas, beliefs, symbols, rules, and norms that are transmitted from generation to generation. Through its decisions, the Supreme Court provided the catalyst and thrust for the recreation of the boundaries between the "we" and the "they" in America. The fundamental properties of liberal democracy or liberalism, such as equality, individualism, and freedom, did not govern the social relations between African Americans and Whites. How societal institutions and governmental entities responded to African Americans including their person, their history, and their interests, and how societal symbols and rules further perpetuated the status of African Americans as outsiders of the American society.[12] Largely, the effort here is to assess the cultural focus of *Brown* and subsequent decisions, their impact on the behavior of decision makers and institutions, and their impact on the conflict over race in America.

The motivation for this study stems from several factors. First, in more recent times, a number of scholars have called for the inclusion of cultural perspectives in research in political science on courts and other policy-making institutions.[13] Second, scholars have characterized culture as an analytical tool, including and reaching beyond the shared values and common knowledge approach to the practice-oriented approach.[14] Political science scholar Lisa Wedeen, for example,

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11. *See* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991); Mark Kessler, *Legal Mobilization for Social Reform: Power and the Politics of Agenda Setting*, 24 L. & SOC'Y REV. 121 (1990).

12. *See* FRANKLIN, *supra* note 5; GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND (1971); JAMES OAKES, SLAVERY AND FREEDOM (1990); THOMAS R. ROCHON, CULTURE MOVES 54-94 (1998).

13. *Cf.* Robert W. Jackman & Ross A. Miller, *A Renaissance of Political Culture?*, 40 AM. J. POL. SCI. 632 (1996) (stating that there is "little evidence to indicate a systematic relationship between political culture and political and economic performance"). *See generally* ROSENBERG, *supra* note 9; AUSTIN SARAT & THOMAS R. KEARNS, LAW IN THE DOMAINS OF CULTURE (1988); ROBERT C. SMITH & RICHARD SELTZER, RACE, CLASS, AND CULTURE: A STUDY IN AFRO-AMERICAN MASS OPINION (1992); Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFF. 22 (1993); Stella M. Nkomo, *The Emperor Has No Clothes: Rewriting "Race in Organizations,"* 17 ACAD. MGMT. REV. 487 (1992); Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 YALE J.L. & HUMAN. 3 (2001); Rogers M. Smith, *Political Jurisprudence, The "New Institutionalism," and the Future of Public Law*, 82 AM. POL. SCI. REV. 89 (1988).

14. SEYLA BENHABIB, THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA (2002); DONALD J. DEVINE, THE POLITICAL CULTURE OF THE UNITED STATES (1972); CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURE (1973); GEERT HOFSTEDE, CULTURE'S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES (1984); 2 TALCOTT PARSONS, *Introduction to Culture and the Social System*, *in* THEORIES OF SOCIETY: FOUNDATIONS OF MODERN SOCIOLOGICAL THEORY (Talcott Parsons et al. eds., 1961); Avner

suggests looking at observable behavior as "existing inside historical processes."[15] Culture also is argued to be "the totality of social systems and practices of signification, representation, and symbolism that has an autonomous logic of their own, a logic separated from and not reducible to the intentions of those through whose actions and doings its emerges and is reproduced."[16] Another noted scholar Rosemary Coombe offers that culture is both "the medium and consequence of social differences, inequalities, dominations, and exploitations, the form of the inscription and the means of their collective and individual imbrications."[17] Third, the embracement of multiculturalism as a means to include African American, women, and other racial and ethnic groups demands more concentration on the salience of culture. While *Brown* provided the legal and moral thrusts for inclusionary movements, there is little, if any, systematic research that has assessed the cultural impact of *Brown* and subsequent decisions or how the principles of *Brown* shaped and continue to shape the conflict over race in America and the distribution of power and opportunities along racial lines. The examinations have generally pursued two paths: (1) the role of the Supreme Court as a policy-maker; and (2) the expansion of the rights of African Americans in the context of liberal democracy.[18]

To reiterate, the purpose of this Article is to explore the cultural significance of *Brown v. Board of Education* and subsequent decisions. Even now, some scholars argue that prior to *Brown*, African Americans were outsiders, meaning that they were not "acculturated in the appropriate way"[19] or were not evaluated as "fellow members whose presence and participation is valuable itself."[20] More directly, the effort of this Article is to assess how *Brown*, subsequent decisions, and legislation of the 1960s have influenced society's modes of thought and conceptualization of the racial conflict.

Greif, *Cultural Beliefs and the Organization of Society: A Historical and Theoretical Reflection on Collectivist and Individualist Societies*, 102 J. POL. ECON. 912 (1994); Lisa Wedeen, *Conceptualizing Culture: Possibilities for Political Science*, 96 AM. POL. SCI. REV. 713 (2002).

15. Wedeen, *supra* note 14, at 714.

16. BENHABIB, *supra* note 14, at 3.

17. Rosemary J. Coombe, *Contingent Articulations: A Critical Cultural Studies of Law*, *in* LAW IN THE DOMAINS OF CULTURE 21, 33 (Austin Sarat & Thomas R. Kearns eds., 1998).

18. *See generally* JENNIFER L. HOCHSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION (1984); Barker, *Black Americans, supra* note 10; Michael W. Combs, *The Supreme Court and African Americans: Personnel and Policy Transformations*, 36 HOW. L.J. 139 (1993) [hereinafter Combs, *Supreme Court*].

19. BENHABIB, *supra* note 14, at 7.

20. MATTHEW HOLDEN, JR., THE DIVISIBLE REPUBLIC 1 (1973).

This Article revisits *Brown v. Board of Education* to assess the cultural, historical, legal, and political significance. Part I will introduce the concept of liberal democracy and racism in a historical-cultural context as it relates to the decision in *Brown v. Board of Education*. Part II will analyze the legitimization of the cultural perspectives of racism as related to the *Brown v. Board of Education* decision. Part III will discuss the ways in which *Brown v. Board of Education* served as a catalyst for cultural transformation in America. Part IV examines the opposition to *Brown v. Board of Education* fostered throughout the presidential election of 1964. Finally, this Article will analyze *Brown v. Board of Education* in an era of cultural racial diversionary standpatism. In conclusion, this Article will briefly address the conflict between the culture of racial progressive gradualism and racial standpatism, arguing that in the twenty-first century there is still a cultural war on race in America.

I. *BROWN V. BOARD OF EDUCATION*: LIBERAL DEMOCRACY AND RACISM IN HISTORICAL-CULTURAL CONTEXT

In *Brown*, the Supreme Court made a paradigmatic departure from the separate but equal doctrine and the historical processes that governed race and race relations in America for more than three hundred and fifty years.[21] The separate but equal doctrine reflected and symbolized the historical cultural tradition that severely distinguished African Americans and Whites. Liberal democracy and racism shared in the establishment of racial distinction, as well as the defense of the patterns of beliefs and values that distinguished African Americans and Whites. In that sense, both served as an ideology.[22] More directly, Whites were elevated, while African Americans were subordinated.[23] Color and phenotype became the basis for inclusion and exclusion.

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21. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976); J. HARVIE WILKINSON III, FROM *BROWN TO BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978 (1979); Robert L. Carter, *The Warren Court and Desgregation*, 67 MICH. L. REV. 237 (1968).

22. For a characterization of an ideology, see generally LUCIUS J. BARKER ET AL., AFRICAN AMERICANS AND THE AMERICAN POLITICAL SYSTEM (4th ed. 1999); DEVINE, *supra* note 14 ; CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES (1973); C. WRIGHT MILLS, THE MARXISTS (1963); MILTON ROKEACH, BELIEFS, ATTITUDES, AND VALUES (1968).

23. HOCHSCHILD, *supra* note 18; HOLDEN, *supra* note 20.

Liberal democracy remains the dominant political philosophy in America. It structures interpretations of "human nature, the origins of government, and the relationship between individuals and government and between government and society."[24] The goals of liberal democracy which are freedom, individualism, and equality, while the goal of racism, however, seems to fly in the face of liberal democracy. Racism provides the basis for the exclusion of African Americans and other racial groups from the fundamental goals of liberal democracy, freedom, individualism, and equality. Several scholars have sought to assess the relationship between liberalism and racism. Three schools of thought have surfaced. The anomaly thesis assumes that racism is an abnormal growth on an otherwise healthy American democracy. The anomaly thesis is encapsulated in Gunnar Myrdal's *An American Dilemma*.[25] The symbiosis thesis insists that liberalism and racism in America functioned so as to reinforce one another.[26] David Goldberg posits that "[a]s modernity's definitive doctrine of self and society, of morality and politics, liberalism serves to legitimate ideologically and to rationalize politico-economically prevailing sets of racialized conditions and racists exclusions."[27] Goldberg also argues that racial definitions and discourse have from "their outset followed an independent set of logics, related to and intersecting with economic, political, legal, and cultural considerations, to be sure, but with assumptions, concerns, projects, and goals that can properly be identified as their own."[28] Throughout American history, manifestations of racism and liberalism supported each other.[29] The final thesis is the multiple traditions view that argues that "American political actors have always promoted civic ideologies that blend liberal, democratic republican, and egalitarian ascriptive elements in various combinations designed to be politically popular."[30] In this work, it is assumed that the status of African Americans in the historical and cultural contexts, emerges

24. LUCIUS J. BARKER ET AL., CIVIL LIBERTIES AND THE CONSTITUTION: CASES AND COMMENTARIES (1999).

25. GUNNAR MYRDAL, AN AMERICAN DILEMMA (1944).

26. *See* DAVID THEO GOLDBERG, RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING (1993); HOCHSCHILD, *supra* note 18; Joe Feagin & Melvin P. Sikes, *Changing the Color Line: The Future of U.S. Racism*, *in* RACISM 407 (Martin Bulmer & John Solomos eds., 1999); George Fredrickson, *Social Origins of American Racism*, *in* RACISM, *supra*, at 70.

27. GOLDBERG, *supra* note 26, at 1.

28. *Id.* at 27.

29. ROGERS M. SMITH, CIVIC IDEALS 6 (1997); Roger Smith, *Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America*, 87 AM. POL. SCI. REV. 549 (1993).

30. For an in-depth discussion of the anomaly and symbiosis theses, see HOCHSCHILD, *supra* note 18, at 1-12.

from the re-enforcement quality of liberal values and institutions and their support of inequalities on the basis of race.

The American colonies, for example, emerged in the formative years of liberal democracy and biological racism, which has its roots in the Inquisition of Spain and Portugal. The Inquisition was instituted "to . . . make sure those of Jewish ancestry were kept apart and out of the mainstream of society, regardless of what they believed, or what church they belonged to."[31] Biological racism was a closed system, meaning that neither legal nor social processes granted those being discriminated against the means to escape.[32] Originally, the Jews were the targets, but this form of racism was expanded after the "discovery of America," influencing how Europeans dealt with Native Americans and Africans.[33] This form of racism also assumed the superiority of Whites or White supremacy. Increasingly, Whiteness became the basis of evaluation.[34]

Various theories evolved in the justification of the subordination and enslavement of non-Whites in the Americas. The list is quite lengthy, including the incapable thesis, the natural slaves thesis, the degenerative thesis, and the polygenetic thesis.[35] The common thread in all of these theories was the notion of White superiority, which significantly shaped the culture of the American colonies. The culture of the colonies also embraced the concept that "Africans became [B]lack because of Divine Action, and were thereby made permanently inferior."[36] The colonies instilled the value that being White was the best. Several liberal thinkers incorporated some elements of these theories of justification in their writing (John Locke, Montesquieu, and David Hume).[37] Locke blamed the Africans and the Native Americans for their treatment by the Europeans.[38] Both the Africans and Native Americans failed to mix their labor with the land, which, in a Lockean sense, did not create property.[39] Locke utilized the concept of a "just war," which meant that the captured Africans had forfeited their

31. Richard H. Popkin, *The Philosophical Bases of Modern Racism*, *in* PHILOSOPHY AND THE CIVILIZING ARTS 6 (Craig Walton & John P. Anton eds., 1974).
32. *Id.*
33. *Id*. at 129.
34. *Id*. at 152.
35. *Id.* at 31.
36. *Id*.
37. *Id*. at 132.
38. *See generally* GOLDBERG, *supra* note 26; Popkin, *supra* note 31.
39. GOLDBERG, *supra* note 26; Popkin, *supra* note 31.

claim to life.[40] Richard Popkin argued that Locke contended that the Africans and Native Americans "had properly lost their liberty . . . and hence could be enslaved."[41]

The institutionalization of liberal democracy and racism occurred in tandem in the colonies that would eventually become the United States of America.[42] By the time of the revolt against British rule, liberalism and racism, premised on the dichotomy of inferiority and superiority, were well established, which meant that the legal system denied certain basic rights to African Americans that were commonly granted to others. The institution of slavery not only enslaved African Americans, but also "permitted no independence of thought, no opportunity to improve their minds or their talents or to worship freely, no right to own or dispose of property, and no protection against miscarriages of justice or cruel and unreasonable punishments."[43] Slavery became the lens through which the American society saw African Americans and African Americans saw others and themselves. The word Negro became a compendium: the complete loss of freedom; the loss of humanity; cursed by God and nature; skin color a punishment by God; kinlessness and natal alienation; the social dead; the property of others; the prerogative of the master; denial of all standing in society; the universality of superiority and inferiority; the expression of power and powerlessness; the expression of morality and immorality; and the expression of kinlessness and filth.[44]

The Declaration of Independence and the Constitution were and remain the most clear and candid synergism of liberal democracy and racism in the American culture. These founding documents extolled freedom and racism, "launching the continuing battle between . . . race, on the one hand, and . . . equality and complete human fellowship, on the other."[45] At the Constitution Convention, both liberalism and racism re-enforced one another.[46] Representation and taxation were premised on protecting the institution of slavery. The Constitution contained several provisions that displayed sufficient support for values, attitudes, and practices of racism, including the capture and rendition of fugitive slaves and the close of the slave trade in 1808.

40. GOLDBERG, *supra* note 26, at 27.
41. Popkin, *supra* note 31, at 133.
42. *Id*.
43. FRANKLIN, *supra* note 5, at 132.
44. *Id*.; WINTHROP D. JORDAN, WHITE OVER BLACK (1968); OAKES, *supra* note 12.
45. FRANKLIN, *supra* note 5, at 132.
46. *See, e.g.*, HOCHSCHILD, *supra* note 18.

Moreover, in the first decade of the new nation, Whites maintained a code of separation for free African Americans.[47] The separation knew no regional boundaries, keeping African Americans out of the mainstream of American life.

The years before and after the Civil War witnessed the persistence of the value of separation of African Americans from the mainstream and the stratification of the concept of equality. Even some abolitionists thought that African Americans ought not receive the equality of Whites.[48] As the nation approached the Civil War, leaders in both major political parties viewed African Americans as different and inferior.[49] The *Dred Scott* decision was and remains the most forthright subscription to the principles of liberal democracy and racism.[50] Chief Justice Taney insisted that African Americans "had no rights which the white man was bound to respect."[51]

Immediately after the Civil War, there seemed to be a glimmer of hope that African Americans would enjoy the fruits of liberalism and escape the burdens of racism. But the political gains of African Americans were not widespread, existing

> in a very few communities only temporarily, and they never even began to achieve the status of a ruling class. They made no meaningful steps towards economic independence or even stability; and in no time at all, because of the pressures of the local community and the neglect of the federal government, they were brought under the complete economic subservience of the old ruling class.[52]

The influence of White supremacy and the desire to protect the womanhood of White women gave rise to the proliferation of terrorist organizations such as the Klu Klux Klan and White citizen councils. The three Civil War amendments to the Constitution (the 13th, 14th, and 15th amendments) and the various civil rights statutes did not sufficiently alter how Whites, institutions, and governments responded to African Americans. The practices, shared values, and the symbols of meaning continued to reflect a society that "[set] race as the first test of 'merit' under the social constitution, or sustains racial hierarchy."[53]

47. FRANKLIN, *supra* note 5.
48. *Id*. at 138.
49. *Id.*
50. Dred Scott v. Sandford, 60 U.S. 393 (1857).
51. *Id*. at 407.
52. FRANKLIN, *supra* note 5, at 139-40.
53. HOLDEN, *supra* note 20, at 6.

The Reconstruction Era soon gave way to forces that labored to severely restrict the freedom of African Americans, substituting a system of segregation in which the personal and political power of African Americans would be subordinate to White supremacy. Biological racism also blossomed.[54] First, one of their most significant accomplishments was the *Civil Rights Cases* of 1883 in which the Supreme Court decided that the provisions of the Civil Rights Act of 1875 regarding public accommodation did violence to the Fourteenth Amendment.[55] Second, there was a return to the pre-Civil War forms of segregation and discrimination perpetrated against free African Americans, for example, segregated schools, segregated units in the military, segregated churches, segregated services in institutions; excluded from the body politics.[56] Third, social Darwinists employed Darwin's theory of evolution to reject the principle of equality for African Americans. Fourth, the media portrayed African Americans as "lazy, idle, improvident, immoral, and criminal."[57] Fifth, many Americans were convinced that "state ways cannot change folkways," meaning that any legislation enacted to foster and recognize the equality of African Americans was destined to fail.[58] While many Americans accepted the futility of law to bring about social change in the status of African Americans, they supported legislation that eroded the advances gained by African Americans during Reconstruction (such as literacy and understanding tests, grandfather clauses, poll taxes, and white primaries) to the application of liberal democracy.[59]

Perhaps, the most devastating blow to the rights of African Americans since slavery was the *Plessy v. Ferguson*[60] decision. In *Plessy*, the Supreme Court gave constitutional footing and legitimacy to the groundswell efforts to deny individualism and equality to African Americans. The Supreme Court announced the separate but equal doctrine. *Plessy* reflected the enormous impact that culture has on the interpretation of the Constitution and impact the Constitution has on culture. *Plessy* is noted for its separate but equal doctrine and

54. C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH (1951) [hereinafter WOODWARD, ORIGINS]; WOODWARD, STRANGE CAREER, *supra* note 6.

55. The Civil Rights Cases, 109 U.S. 3 (1883).

56. WOODWARD, STRANGE CAREER, *supra* note 6.

57. FRANKLIN, *supra* note 5, at 141.

58. *Id.*; Michael W. Combs, *Courts, Minorities, and the Dominant Coalition: Racial Policies in Modern America* (unpublished Ph.D. dissertation, Washington University) (on file with author) [hereinafter Combs, *Courts*]; *see also* Plessy v. Ferguson, 163 U.S. 537 (1896).

59. FRANKLIN, *supra* note 5.

60. 163 U.S. 537 (1896).

the phrase, "color-blind constitution."[61] *Plessy* disallowed the capacity of law to change cultural traditions and values. Writing for the majority, Justice Brown argued, "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation."[62]

In *Plessy*, the majority opinion of Justice Brown and the dissenting opinion of Justice Harlan are open windows into the breadth and height of the White supremacy value in America. Justices Brown and Harlan gave explicit support to and even legitimated white supremacy. Justice Brown took a cavalier approach to the foreseeable or probable consequences to the legal and constitutional separation of the races: "If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."[63] In his dissent, Justice Harlan distinguished the social and constitutional construction of race relations:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its heritage, and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eyes of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens.[64]

Justice Harlan evaluated the most probable consequences of the decision and the laws of segregation. According to Justice Harlan, the outcome of the decision stemmed from the capacity of law to initiate and to bring about social change. Justice Harlan seemed cognizant of the power of law to impact perception and beliefs over time.

Over the next fifty-seven years, the separate but equal doctrine became the cultural symbol through which individual citizens, governments, and society's institutions viewed race.[65] The separate but equal doctrine also structured governmental and social institutions' response to African Americans. No aspect of the lives of African Americans

61. *Id*. at 559.
62. *Id*. at 551.
63. *Id*. at 552.
64. *Id*. at 559 (Harlan, J., dissenting).
65. *See generally* WOODWARD, STRANGE CAREER, *supra* note 6; U.S. PRESIDENTIAL COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS (1947) [hereinafter TO SECURE THESE RIGHTS].

and Whites escaped the influence of the separate but equal doctrine. The separate but equal doctrine reached beyond the belief that Whites were superior to the premise that the superior group should also rule and dominate every aspect of culture.[66]

The separate but equal doctrine infused the opposition to the equality of African Americans. Segregation became the cultural force—the practice that reinforced the belief that African Americans were naturally inferior to Whites. When African Americans and Whites looked upon the disparity, legitimated and fostered by the separate but equal doctrine on every hand, they saw evidence of racial hierarchy.[67] Whites enjoyed the advantage, and African Americans suffered the disadvantage. The Federal Housing Administration (FHA) underwriting manual, for example, termed African Americans and other ethnic minorities "adverse influence," regarding African Americans in white neighborhoods.[68] The manual stated, "[A] change in social or racial occupancy generally contributes to instability and a decline in values."[69] FHA's policies worked to create African American slums and ghettos.

On every crucial measurement of the perceived good in America, African Americans were a very distant second. The Truman Administration's, *To Secure These Rights*, documented the extent of the disparities between African Americans and Whites.[70] Matthew Holden describes this reality as "[t]he probability that any given African American person will receive more undesirable results and fewer desirable results is higher than that any similarly circumstanced white person will receive such results in the same combination."[71]

This overview supports the symbiosis thesis. Over the past four hundred years, liberal democracy and racism have re-enforced one another. At every key point in the history of this nation, the two have been joined. This would include the settling of the colonies, the establishing of the institution of slavery, the drafting of the Declaration of Independence and the Constitution, the abolishing of slavery, the establishing of the Reconstruction period, and the legitimizing of the separate but equal era. Persistently and consistently, the goals of lib-

66. JOHN L. HODGE ET AL., CULTURAL BASES OF RACISM AND GROUP OPPRESSION (1975).
67. The separate but equal doctrine defined the worldview of both Blacks and Whites, supporting the thesis that Whites were superior.
68. *See* FED. HOUS. ADMIN., UNDERWRITING MANUAL, §§ 934 & 937 (1934).
69. *Id*.
70. *See* TO SECURE THESE RIGHTS, *supra* note 65.
71. HOLDEN, *supra* note 20, at 6-7.

eralism and racism merged to the detriment of African Americans in America.

II. *BROWN V. BOARD OF EDUCATION*: THE LEGITIMIZATION OF THE CULTURAL PERSPECTIVE OF RACISM

In *Brown v. Board of Education* (*Brown I* and *Brown II*), the Supreme Court legitimated the cultural perspective of racism. The Supreme Court granted official status to the perspective that racism reaches beyond the acts and behavior of individuals and individual decision-makers to institutions, to values and attitudes commonly shared, and to practices transmitted in society. The *Brown* Court was not the first to postulate such a perspective. In *Plessy v. Ferguson*, Justice Harlan's dissent reflected elements of the cultural perspective, leading him to conclude that the white race was "the dominant race in this country."[72] Warning that the separate but equal doctrine would inevitably have widespread consequences for the relationship between African Americans and Whites, and ultimately upon the status of African Americans in America, Justice Harlan argued:

> Slavery, as an institution tolerated by law would, it is true, have disappeared from our country, but there would remain a power in the States, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom; to regulate civil rights, common to all citizens, upon the basis of race, and to place in a condition of legal inferiority a large body of American citizens . . . .[73]

In the 1940s, the focus on the cultural perspective as the means of eliminating racism gained momentum. Perhaps, the most bold and candid embracement of such a perspective might be found in the government report entitled, *To Secure These Rights*.[74] The publication was issued by the Civil Rights Commission appointed by President Harry S. Truman. The report evaluated the impact of the separate but equal doctrine and the status of African Americans in the context of the American heritage, which promised freedom and equality to all citizens of America.[75] The report examined the conditions of rights in America in terms of (1) the right to safety and security of the person; (2) the right to citizenship and its privileges; (3) the right to freedom

72. Plessy, 163 U.S. at 559.
73. *Id.* at 563.
74. *See generally* To Secure These Rights, *supra* note 65.
75. *Id.*

of conscience and expression; and (4) the right to equality of opportunity. The data supported the conclusion that the American heritage did not describe the experiences of African Americans.[76] The report recognized the cultural basis of racism.

> The adoption of specific legislation, the implementation of laws or the development of new administrative policies and procedures cannot alone bring us all the way to full civil rights. The strong arm of government can cope with individual acts of discrimination, injustice and violence. But in one sense, the actual infringements of civil rights by public or private persons are only symptoms. They reflect the imperfections of our social order, and the ignorance and moral weaknesses of some of our people.[77]

The report connected the full enjoyment of civil rights by African Americans to shared values in society. "We must make constructive efforts to create an appropriate national outlook a climate of public opinion which will outlaw individual abridgements of personal freedom, a climate of opinion as free from prejudice as we can make it."[78] Finally, the report called on the government to be engaged in eliminating the values of racism from society. "All of our governments, federal, state, and local, must be uncompromising enemies of discrimination, which is prejudice come to life."[79] Additionally, governmental efforts "must be reinforced by education—education through carefully planned experience, to break down the fears of groups; education through information to dispel ignorance about our heritage and our civil rights."[80]

The cultural perspective came into sharp focus as the attack on the separate but equal doctrine shifted from professional and graduate education[81] to elementary and secondary education. In the lower courts, several social scientists noted how the values transmitted in separate but equal education negatively impacted both African Americans and Whites. The African American children were the hardest hit. Social psychologist Dr. Kenneth B. Clark reported findings from his doll test with African American children. Dr. Clark concluded that African American children "like other human beings who are

76. *Id*. at 17-79.
77. *Id*. at 133.
78. *Id*.
79. *Id*. at 135.
80. *Id.*
81. McLaurin v. Okla. State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Bd. of Regents, 332 U.S. 631 (1948); Missouri *ex rel*. Gaines v. Canada, 305 U.S. 337 (1938).

subjected to an obviously inferior status in the society in which they live, have been definitely 'harmed' in the development of their personalities; that the signs of instability in their personalities are clear . . . ."[82]

Dr. David Krech emphasized the harmful effect of legal segregation on the community. Dr. Krech testified:

> [L]egal segregation, because it is legal, because it is obvious to everyone, gives what we call in our lingo environmental support for the belief that [African Americans] are in some way different from and inferior to white people, and that in turn, of course, supports and strengthens beliefs of racial differences, of racial inferiority. . . . Legal segregation of the educational system starts this process of differentiating the [African American] from the white at a most crucial age. Children, when they are beginning to form their perceptions of people, at the very crucial age they are immediately put into the situation which demands of them, legally, practically, that they see [African Americans] as somehow of a different group, different being, than Whites.[83]

He also referenced the interconnection between legal segregation and other beliefs and attitudes that support racial discrimination in the community and contended that, "a child who has for ten or twelve years lived in a community where legal segregation is practiced, furthermore, in a community where other beliefs and attitudes support racial discrimination . . . will probably never recover from whatever harmful effect racial prejudice and discrimination can wreak."[84]

Such arguments did not move lower courts to abandon the separate but equal doctrine.[85] The Delaware Court of Chancery, however, concluded that there was "an existing and continuing violation of the separate but equal doctrine," which meant the plaintiff was entitled to admission to the "[s]tate facilities which have been shown superior."[86] The district court in *Brown* acknowledged that legal segregation is "usually interpreted as denoting the inferiority of the [Black] group," affecting the child's motivation to learn.[87] In *Briggs v. Elliott*, Judge J. Waites Waring rendered a dissenting opinion in which he contended

82. LUCIUS J. BARKER & TWILEY W. BARKER, JR., FREEDOMS, COURTS, POLITICS: STUDIES IN CIVIL LIBERTIES 140 (1965).
83. *Id.*
84. *Id.*
85. Brown v. Bd. of Educ., 98 F. Supp. 797 (D. Kan. 1951); Briggs v. Elliott, 98 F. Supp. 529 (E.D.N.C. 1951); Belton v. Gebhart, 87 A.2d 862 (Del. Ch. 1952).
86. *Belton*, 87 A.2d 862.
87. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (citation omitted).

that "the mere fact of segregation, itself, had a deleterious and warping effect upon the minds of children."[88] Judge Waring also noted that "the evils of segregation and color prejudice come from early training."[89] Waring believed that the system of segregation in South Carolina "must go and must go now."[90] Judge Waring was certainly out of step with his community in South Carolina and more generally with the South. Eventually, Judge Waring resigned from the district court. He had been severely criticized for earlier decisions.[91] In *Elmore v. Rice*,[92] for example, Judge Waring disallowed South Carolina's efforts to circumvent *Smith v. Allwight*.[93] Judge Waring concluded that "[i]t is time for South Carolina to rejoin the union . . . to adopt the American way of conducting elections."[94]

In *Brown v. Board of Education*, the Supreme Court gave the cultural perspective of racism constitutional footing and force. Chief Justice Earl Warren refused to engage in a comparison of tangible factors under the separate but equal doctrine. "We must look instead to the effect of segregation itself on public education."[95] Chief Justice Warren pointed to the role of education in the inculcating of "cultural values, the preparing of students for professional training and in helping him to adjust normally to his environment."[96] Chief Justice Warren then turned to the effect of separate education on the child's perception of herself and his place in society. "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[97] The *Brown* Court held that segregation is a denial of the equal protection of the law.[98]

Chief Justice Warren employed a strategy that reserved the issuing of remedial decrees for a later day. Unlike Judge Waring, Chief Justice Warren did not say, "[T]he system of segregation must go and

88. *Briggs*, 98 F. Supp. at 547.
89. *Id*.
90. *Id*. at 548.
91. BARKER & BARKER, *supra* note 82.
92. 72 F. Supp. 516 (E.D.S.C. 1947).
93. 321 U.S. 649 (1944).
94. *Elmore*, 72 F. Supp. at 528.
95. Brown v. Bd. of Educ., 347 U.S. 483, 492 (1954).
96. *Id*. at 493.
97. *Id*. at 494.
98. *Id.* at 495.

must go now."[99] Seemingly, the path-breaking character of the decision, the political climate that awaited the decision, and the complexity of the task that was before the Court and America influenced Chief Justice Warren. Chief Justice Warren permitted widespread involvement in the formulation of the remedial decree. The Warren Court has been taken to task for the delay in the pronouncement of the remedy.[100]

The decision's probable impact on the cultural basis of the separate but equal doctrine might be gauged from the reaction of many to the *Brown* decision. Viewing *Brown* unfavorably, southern officials and newspapers anticipated a tremendous change in the practices and the way of life in the South. Many southerners sensed that their way of life no longer enjoyed constitutional support and that perhaps state power alone was not sufficient to sustain the cultural values and attitudes that gave vitality to the system of segregation. Moreover, they might have anticipated the heightened mobilization of African Americans and their supporters. Some northern newspapers termed the *Brown* decision as a victory for democratic ideas and principles, suggesting that the goals of liberal democracy might now point in the direction of African Americans.[101]

Cultural change is an involved process, requiring the managing of the process and the monitoring of results. In *Brown II*, the Supreme Court announced the how and when of the elimination of unconstitutional segregation in public schools. Speaking for a unanimous Court, Chief Justice Warren noted that "[f]ull implementation of these constitutional principles may require solution to varied local problems."[102] Anticipating opposition, Warren said, "[I]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."[103] As noted above, Chief Justice Warren seemed to be sensitive, some argued too sensitive, to the political climate that was integrally tied to values, attitudes, and practices in the South, and eventually the evolution of time revealed in the North as well.[104] Lower courts were given

99. Briggs v. Elliott, 98 F. Supp. 529, 548 (E.D.S.C. 1951).

100. Combs, *Courts, supra* note 58.

101. BARKER & BARKER, *supra* note 82; Arthur A. North, *Desegregation: It's Implication in the Constitutional, Political, Legal, Economic and Sociological Spheres of Southern Life*, 25 FORDHAM L. REV. 91 (1956).

102. Brown v. Bd. of Educ., 349 U.S. 294, 299 (1955) (Brown II).

103. *Id*. at 300.

104. *See* GARY ORFIELD, MUST WE BUS? (1978); *see also* Combs, *Courts*, *supra* note 58.

broad discretion in altering the segregation character of school districts. Lower courts were also assigned the dual role of managing and monitoring the change. The managing role included the consideration of "problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis . . . ."[105] All of these elements were heaped in practices that reflected and symbolized the status of African Americans and Whites. To facilitate change, lower courts were also empowered to bring about "revision of local laws and regulations . . . ."[106] The monitoring function of lower courts was fairly clearly defined. "During this period of transition, the courts will retain jurisdiction of these cases."[107]

The "with all deliberate speed" doctrine has been a two-edged sword.[108] On the one hand, the doctrine has provided recalcitrants time to resist steps to eliminate discriminatory practices. The unwilling employed the time to strategize to maintain the status quo or to make minor changes in the hopes of maintaining the prevailing culture that embraced elements of racism and discrimination. On the other hand, the "with all deliberate speed" doctrine gave lower courts time to assess the best plans to disestablish the segregation attitudes, values, and practices that were, and are so imbedded in society.[109] In time, however, the Supreme Court and America discovered that time was not the issue but willingness; the resistance of a culture that significantly opposed the recognition of the equality and personhood of African Americans and opposed the involvement of the Supreme Court, the federal government, and northerners in a problem of the South.[110]

III. *BROWN V. BOARD OF EDUCATION*: THE CATALYST FOR CULTURAL TRANSFORMATION

While the *Brown* decisions did not initiate the drive toward equality and anti-discrimination,[111] *Brown I* and *II* have become the

105. *Brown*, 349 U.S. at 300.
106. *Id*. at 301.
107. *Id.*
108. JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 86-117 (2001).
109. *Id*. at 96; JACK W. PELTASON, FIFTY-EIGHT LONELY MEN 132 (1971).
110. *See* PELTASON, *supra* note 109; Combs, *Supreme Court*, *supra* note 18.
111. ALDON MORRIS, THE ORIGIN OF THE CIVIL RIGHTS MOVEMENT (1984).

catalyst for the transformation of the values, attitudes, and practices of American culture, including mobilization of political action, legal mobilization, and alteration in perceptions and approaches.[112] *Brown I* and *II* have also changed, to some extent, the meaning and perception of what it is to be Black and White, as well as the means whereby the racial inequalities are contested. That is, *Brown I* and *II* have put into place the constitutional principles of equality and anti-discrimination that have under girded and guided the general thrust of policy that seeks to change the racist and discriminatory practices that are so imbedded in American culture.[113] For most of the history of this nation, such constitutional principles had been virtually ignored by national, state, and local decision-makers; reflecting the overall character of the system's values.[114]

The import of these decisions has extended well beyond education to include voting, employment, recreation, public accommodation, and corporate America.[115] This seemingly universal extension has restricted some of the influence of racism and discriminatory practices, values, and attitudes. More directly, *Brown* and subsequent decisions have given rise to what we term the culture of racial progressive gradualism which would include the following components: (1) the salience of societal, historical, and present-day racism in defining and structuring the social interactions between African Americans and Whites, as well as influencing the opportunities available to both African Americans and Whites; (2) the necessity of an active role of government, especially the federal government, in the disestablishment of the values, traditions, symbols, and significations rooted in white supremacy and segregation[116]—the civil rights legislation of the 1960s legitimated the posture of the Supreme Court as re-

112. Canon & Johnson, *supra* note 10; Kessler, *supra* note 11; Aldon Morris, *supra* note 111; *see also* Rosenberg, *supra* note 9.

113. For a discussion of the embeddedness of racial inequities, see Feagin & Sikes, *supra* note 26.

114. Franklin, *supra* note 5; Barker et al., *supra* note 22; Combs, *Courts*, *supra* note 58.

115. *See* Exec. Order No. 11, 246, 3 C.F.R. 339 § 101 (1965); Michael Rosenfeld, Affirmative Action: A Philosophical and Constitutional Inquiry 160 (1991); *see also* Arthur Gutman, EEO Law and Personnel Practices (2d ed. 2000).

116. White supremacy is premised on values, traditions, and symbols that maintained a hierarchical system that shaped the life chances of Blacks and Whites. Under the leadership of the Supreme Court, the federal government pursued policies and programs that focused on the cultural basis of White supremacy. *See* Eduardo Bonilla-Silva, White Supremacy and Racism in the Post-Civil Rights Era (2001). For a discussion of White racism and dominance in organizations, see Robert T. Carter, Addressing Cultural Issues in Organizations: Beyond the Corporate Context (2000).

flected in *Brown* and other decisions, requiring a pro-active federal role; (3) the support of race conscious measures and policies to overcome and to address the disadvantages perpetuated by the traditions, structures, and understandings of Jim Crow and present-day discrimination; and (4) the stress of the harmful and persistent consequences of racism and its expression on the lives of African Americans. In addition, the harm thesis has been at the center of the culture of racial progressive gradualism, providing an understanding of racial discrimination and the need to eliminate racism and racial discrimination. Gradualism tends to govern the intensity and speed of the efforts and policies. The *Brown* decisions provide the moral and constitutional foundation for the changes that have occurred over the past fifty years, and the Supreme Court has been in the forefront of this mammoth undertaking.[117]

In *Brown I*, the Supreme Court gave constitutional significance to the "harm" thesis that was originally articulated in social science research.[118] Fundamentally, the harm thesis posits that discriminatory practices not only have a detrimental impact on the minds and hearts of African Americans and Whites, but ultimately disadvantage African Americans in their personal development, their access to opportunities and the benefits and rewards of American society, and tip the power equation in the favor of Whites. To some extent the "harm" thesis connects present day racism and discrimination to the effects of slavery and the system of segregation.[119] One writer argued, "[T]he racist presumably wants to disadvantage his victims . . . ."[120]

Among lower federal courts, the "harm" thesis received enormous authentication. As school desegregation unfolded, several courts employed remedial measures that targeted the harm racist and

117. The notion of the culture of racial progressive gradualism is deduced from a number of works. *See, e.g.*, BARKER ET AL., *supra* note 24; BONILLA-SILVA, *supra* note 116; MICHAEL DAWSON, BLACK VISIONS: THE ROOTS OF CONTEMPORARY AFRICAN AMERICAN POLITICAL IDEOLOGIES (2001); ROCHON, *supra* note 12; Barker, *supra* note 10; Casper, *supra* note 8; Combs, *Courts*, *supra* note 58; Combs, *Federal Judiciary*, *supra* note 8; *see also* LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER AND TRANSFORMING DEMOCRACY (2002).

118. *See* KENNETH B. CLARK, EFFECTS OF PREJUDICIAL AND DISCRIMINATION ON PERSONALITY (MID-CENTURY WHITE HOUSE CONFERENCE ON CHILDREN AND YOUTH 1950); E. FRANKLIN FRAZIER, THE NEGRO IN THE UNITED STATES (1949); MYRDAL, *supra* note 25; Max Deutscher & Isidor Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. PSYCHOL. 259 (1949).

119. Oliver v. Kalamazoo Bd. of Educ., 368 F. Supp. 143, 154 (W.D. Mich. 1973); *see also* DERRICK A. BELL JR., FACES AT THE BOTTOM OF THE WELL (1992).

120. ROSENFELD, *supra* note 115, at 43.

discriminatory practices had reeked on African Americans and more generally on the African American community.[121] In *Oliver v. Kalamazoo*, Judge Fox argued that the "harm" perpetuated by segregative conditions continues to be felt.[122] He said, "[T]he context of modern America, segregated education is detrimental to Black and White students, creating, especially for Black students, psychological and social difficulties which have a substantial adverse impact on overall individual development. Segregated education plainly denies equal educational opportunity."[123]

The harm thesis has ramifications well beyond the area of school desegregation. It has become, for example, a major argument in the affirmative action debate. Consider, for example, President Johnson's affirmative action policy that was significantly influenced by the harm thesis.[124] The centerpiece of Johnson's affirmative action policy was Executive Order 11,246, which was result-oriented.[125] The Order prohibited discrimination by contractors and subcontractors: (1) requiring them to take affirmative action to make sure African Americans were employed and treated without racial discrimination; and (2) requiring contractors and subcontractors not to discriminate in the recruitment, employment, promotion, demotion, and transfer of African American employees.

In affirmative action cases before the Supreme Court, the harm thesis gained support.[126] Perhaps, the most forceful statement of the harm thesis is found in Justice Marshall's concurring and dissenting in part opinion in *Regents of University of California v. Bakke*.[127] Justice Marshall urged:

> It is unnecessary in 20th century America to have individual [African Americans] demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of [African Americans] in America has

121. Liddell v. Missouri, 731 F.2d 1294, 1313 (8th Cir. 1984); Oliver v. Mich. State Bd., 508 F.2d 178, 183 (6th Cir. 1974); Bradley v. Milliken, 402 F. Supp. 1096, 1101 (E.D. Mich. 1975).

122. *Oliver*, 368 F. Supp. at 143.

123. *Id*. at 156; *see also* Bradley v. Milliken, 433 U.S. 267 (1977) (Milliken II).

124. *See* Combs, *Courts*, *supra* note 58.

125. Exec. Order 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965).

126. *See*, *e.g.*, United States v. Paradise, 480 U.S. 149 (1987); Firefighters v. City of Cleveland, 478 U.S. 501 (1986); Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986); United States Steelworkers v. Weber, 443 U.S. 193 (1979); *cf.* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Firefighters v. Stotts, 467 U.S. 561 (1984).

127. 438 U.S. 265, 387 (1987) (Marshall, J., concurring in part and dissenting in part.).

> been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by law. And that mark has endured. The dream of America as the great melting pot has not been realized for the [Black]; because of his skin color he never even made it into the pot.[128]

The harm thesis has become widely accepted throughout the American society.[129] The harm thesis demands more than the repeal or removal of state-supported barriers. But rather, it demands decisive action that would eliminate racism and discriminatory practices that perpetuate inequalities.

In *Brown I* and *II*, additionally, the Supreme Court subscribed to the eradication of racism.[130] The principal agency of eradication was the power and authority of government, especially the Federal government. As noted above, the Truman Administration's report, *To Secure These Rights*, proposed the eradication of racism, but the report carried neither the authority of law nor the force of the Constitution. The report looked to voluntary action and the bully pulpit of the President.[131] In *Brown I* and *II*, the Supreme Court assumed that voluntary efforts alone would not alter the system of segregation that espoused values and practices that severely hindered the lives of African American children. In *Brown I*, Chief Justice Warren's citation of the Kansas and Delaware cases clearly demonstrates that "the mere increase in funding for African American students would not meet the newly announced constitutional standard for equal educational opportunities.[132] *Brown II* speaks of the "elimination of a variety of obstacles in making the transition to school operated in accordance with the constitutional principles set forth in [*Brown I*]."[133] *Brown II* also speaks of the "systematic and effective" removal of obstacles. While school boards put forth voluntary plans and lower courts accepted them, after fourteen years of voluntary plans, the Supreme Court demanded plans that placed an affirmative duty on school officials. The

128. *Id*. at 400-01.

129. The harm of racism and discrimination is discussed in the areas of school desegregation, affirmative action, and the debate of mutliculturalism.

130. Brown v. Bd. of Educ., 347 U.S. 483 (1954) (Brown I); Brown v. Bd. of Educ., 349 U.S. 294 (1955) (Brown II).

131. To Secure These Rights, *supra* note 65.

132. *Brown*, 347 U.S. at 492. Chief Justice Warren rejected the equalization of buildings, curricula, qualifications, and salaries of teachers. Warren argued, "[W]e must look instead to the effect of segregation itself on public education." *Id*.

133. *Brown*, 349 U.S. at 300.

desegregation of Central High School of Little Rock, Arkansas witnessed a change in the view of President Eisenhower who abandoned his moderate approach to school desegregation and civil rights, dispatching federal troops to stop the violence and the threat of violence at the school.[134] In *Cooper v. Aaron*, the Supreme Court refused to relent, declaring that that the Court would not permit the postponement of court decrees in the face of threatened or actual violence.[135] In *Green v. County School Board of New Kent County, Virginia*, Justice Brennan pointed out that the goal was the "transition to a unitary, nonracial system of public education . . . ."[136] Justice Brennan adjudged that school officials were "charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[137] The eradication of racism is a concept that is now diffused throughout the American society. However, as we shall see below, the Supreme Court and other decision makers and participants in politics have dealt a powerful blow to the concept, retreating from the notion of eliminating racism.[138]

IV. *BROWN V. BOARD OF EDUCATION* AND THE 1964 PRESIDENTIAL ELECTION: THE MAKING OF THE COUNTER-CULTURE OF RACIAL DIVERSIONARY STANDPATISM

In July of 1964, the passage of the Civil Rights Act of 1964 represented the triumph of *Brown v. Board of Education*.[139] Now the President and Congress had squarely joined the Supreme Court in the imposition of government power, especially the federal government, to transform the nation from the culture of Jim Crow to the culture of racial progressivism. Under Jim Crow, the values of White supremacy and segregation effectively denied political, economic, and personal power to African Americans. Segregation and the powerless scope of interactions between African Americans and Whites reinforced the values, beliefs, and significations of White supremacy.[140] The culture

134. Combs, *Courts*, *supra* note 58, at 293-95, 297-310.
135. Cooper v. Aaron, 358 U.S. 1, 16 (1958).
136. 391 U.S. 430, 436 (1968).
137. *Id*. at 437-38.
138. Combs, *Courts*, *supra* note 58.
139. LINO A. GRAGLIA, DISASTER BY DECREE: SUPREME COURT ON RACE AND THE SCHOOLS (1976); Combs, *Courts*, *supra* note 58.
140. *See infra* notes 150-51.

of racial progressive gradualism emphasized: (1) the salience of societal, historical, and present-day racism and discrimination in shaping the interactions between African Americans and Whites at all levels; (2) the necessity of an active role of the government, especially the federal government, in the disestablishment of the values of racism premised on white supremacy and segregation; (3) the employment of race conscious measures and terminology to describe and address the removal of the values and significations, and traditions that disadvantaged blacks; and (4) the emphasis on the harmful and persistent consequences of racism and its expressions on the lives of African Americans.

However, the triumph of *Brown* was met with a counter-culture movement fueled by the presidential campaign of Senator Barry Goldwater.[141] Even prior to the passage of the Civil Rights Act of 1964, cultural opposition existed, seeking to blunt or to overturn the *Brown* decision. The manifestation of the opposition was expressed variously (such as the Southern Manifesto, the brutality of local police forces, the threat of violence, terrorism, and the enactment of segregation laws).[142] These were all efforts to maintain the value system of White supremacy and segregation, or to keep African Americans politically, economically, legally, and symbolically powerless. Geertz, among others, suggests that cultural changes are met with efforts to maintain present or existent values, practices, and signification.[143] The same holds true for *Brown v. Board of Education*.

Increasingly, however, the exponents of the counter-culture found it difficult to make overt appeals to segregationist sentiments and still remain credible participants in the body politics.[144] *Brown* transformed the dialogue on race and spurned definitive shifts in the political and cultural movement that opponents risked being perceived as anti-Black and pro-White supremacy.[145]

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141. DONALD R. KINDER & LYNN M. SANDER, DIVIDED BY COLOR (1996); RICHARD H. ROVERE, THE GOLDWATER CAPER (1965).

142. PATTERSON, *supra* note 108, at 86-117.

143. GEERTZ, *supra* note 14; HUNTER, *supra* note 11.

144. Jerry Himelstein, *Rhetorical Continutities in the Politics of Race: The Closed Society Revisited*, 48 S. SPEECH COMM. J. 153 (1983). For a discussion of cultural reinforcement of beliefs, see ROCHON, *supra* note 12; Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 AM. SOC. REV. 273 (1986).

145. EARL BLACK & MERLE BLACK, POLITICS AND SOCIETY IN THE SOUTH (1987) [hereinafter BLACK & BLACK, POLITICS]; EARL BLACK & MERLE BLACK, THE VITAL SOUTH: HOW PRESIDENTS ARE ELECTED (1992) [hereinafter BLACK & BLACK, VITAL SOUTH]; BONILLA-SILVA, *supra* note 116; KINDER & SANDER, *supra* note 141.

The opponents of the egalitarian principle and the approach of *Brown* and its triumph in the Civil Rights Act of 1964 confronted the need to alter their strategies and agency of articulation.[146] From 1960-1964, both the Democrat and Republican parties were committed to a civil rights agenda that would ultimately reconfigure the power ratio between African Americans and Whites at several levels, including the electoral process, the distribution of jobs and opportunities, the impact of racist values and institutions on the lives of African Americans, and altering America's public view of African Americans and race.[147] With the passage of the Civil Rights Act of 1964, however, the Democratic Party effectively became the Pro-Civil Rights Party. Additionally, the Republican Party, under the dominance of northeasterners, joined with the Democratic Party to secure passage of the Civil Rights Act of 1964. African Americans flocked to the Democratic Party in unprecedented numbers, while many White southerners believed the Democrats had left them and actively attacked their values, attitudes, symbols, significations, and way of life.[148]

The presidential election of 1964 brought into sharp focus the relationship between culture and electoral politics.[149] What a number of White southerners lost with the pro-civil rights posture of the Democratic Party, they gained in the ideological candidacy of Senator Barry Goldwater, the Republican Party's standard-bearer. Goldwater and conservatives dislodged northerners from dominance in the Republican Party.[150] The centerpiece of Goldwater's conservativism was states' rights and a strict constructionist understanding of the Constitution.[151] For Goldwater, "the whole contemporary concept of 'civil rights' [was] constitutionally invalid," and there is only "an imagined conflict" between states' rights and civil rights.[152] The value of states'

146. *See* BARKER ET AL., *supra* note 22; PARSONS, *supra* note 14; C. WRIGHT MILLS, *supra* note 22. For the discussion of the relationship between culture and politics, see HUNTER, *supra* note 11.

147. BLACK & BLACK, POLITICS, *supra* note 145; BLACK & BLACK, VITAL SOUTH, *supra* note 145; KINDER & SANDER, *supra* note 141; ROVERE, *supra* note 141; Philip E. Converse et al., *Electoral Myth and Reality: The 1964 Election*, 59 AM. POL SCI. REV. 321 (1965).

148. Converse et al., *supra* note 147.

149. For a discussion of the relationship between culture and politics, see HUNTER, *supra* note 11.

150. BLACK & BLACK, POLITICS, *supra* note 145; BLACK & BLACK, VITAL SOUTH, *supra* note 145; ROVERE, *supra* note 141; Converse et. al., *supra* note 147.

151. EDWARD G. CARMINES & JAMES A. STIMSON, ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS (1989); ROVERE, *supra* note 141.

152. ROVERE, *supra* note 141, at 49.

rights has been a rally cry in the South since the 1830s as a justification for the institution of slavery and the disallowance of federal intervention in protecting the rights of African Americans. States' rights is deeply embedded in the culture of the political and social culture of America. The *Brown* decision and its embrace by Congress and the President, in the Civil Rights Act of 1964 were, in the mind of many in the South, a clear violation of the doctrine of states' rights.

The Goldwater candidacy also appealed to some who desired the rigid separation of African Americans and Whites and the social, political, and legal values that empowered Whites and disempowered African Americans, returning the South and the nation to their pre-*Brown* patterns of racial interactions.[153] Goldwater employed a strategy that made the South a fulcrum for victory, which called for the reorganization of American politics. The campaign reasoned that the "South had no reason to be a Democratic bastion; by all of its affinities and traditions, it should long since have become Republican."[154]

The strategy tapped into the mounting "White backlash" that emerged in response to the civil rights thrust of the Kennedy and Johnson administrations, and "the increased signs of [Black] unrest."[155] Additionally, Goldwater proved his colors with a vote against the civil rights legislation of 1964, representing "no condoning of segregation per se, but rather a blow for states' rights against the encroachment of the federal government."[156] The central thrust of the strategy was the provision of a clear party differentiation on civil rights at the national level. The Republican Party became the party of individualism, and the Democratic Party became the party of equality. The Republican Party became the party of racial conservativism, and the Democratic became the party of racial liberalism. The Republican Party became the party that appealed to supporters of White supremacy and segregation, becoming the "White man" party. The Democratic Party became the party that appealed to supporters of desegregation, becoming the pro-civil rights party.[157]

Using code words, Goldwater pitched his message on the campaign trail. A code word "is a word or phrase which communicates a well understood but implicit meaning to part of a public audience

153. Converse et al., *supra* note 147.
154. *Id*. at 327.
155. *Id*.
156. *Id*. at 328.
157. Black & Black, Politics, *supra* note 145; Black & Black, Vital South, *supra* note 145; Carmines & Stimson, *supra* note 151.

while preserving for the speaker deniability of that meaning by reference to its denotative explicit meaning."[158] Senator Barry Goldwater's speeches were tailored to tap, among other things, White resentment and dislike for an active role of the federal government in the pursuit of equality for African Americans. "[C]ertainly, no level of government can or should attempt by its actions to enforce equality in those essentially personal areas of great human differences. It is such differences that give life to diversity and man his wondrous variety."[159] He supported segregation and opposition to *Brown* by appealing to God and nature:

> [W]here government presumes to control equality, forgetting that in its essential areas it lies within God's province and laws of nature, there can be only conformity. Government must consider and trust all men as equal in the areas of law and civic order. Otherwise, and in no other area, can it make men equal.[160]

Words are very important in the political culture of America, gaining advantage and manipulating public opinion.[161] Senator Goldwater initiated the shift from the horrors and iniquities of segregation and racism to the proper role of the federal government in the struggle to break the traditions of discrimination against African Americans.

Although Goldwater never mentioned "race," "African Americans," "Whites," or "segregation," one commentator, Richard H. Rovere contended, "[Goldwater] talked about them all the time in an underground, or Aesopian, language—a kind of code that few in his audience had any trouble deciphering."[162] Rovere further insisted, "[In the code], 'bullies and marauders' means ['African Americans']. 'Criminal defendants' means ['African Americans']. 'States' rights' means 'opposition to civil rights'. . . . 'Federal judiciary' means 'integrationist judges.'"[163] Goldwater appealed to the distorted images of African Americans that are embedded in the culture dominated by the beliefs of White supremacy and segregation. The Goldwater movement in the South "appeared to be a racist movement and very

158. KINDER & SANDERS, *supra* note 141; DANIEL T. RODGERS, CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE (1987); Himelstein, *supra* note 144, at 156.

159. Senator Barry Goldwater, Speech at the Conrad Hilton Hotel, Chicago, Ill. (Oct. 16, 1964).

160. *Id.*; ROVERE, *supra* note 141, at 143.

161. RODGERS, *supra* note 158.

162. ROVERE, *supra* note 141, at 143.

163. *Id.*

little else. Goldwater seemed fully aware of this and not visibly distressed by it."[164]

On balance, the 1964 Goldwater presidential candidacy legitimated and augmented the cultural-political opposition to the *Brown* culture that empowered African Americans to some extent and in some ways. *Brown* stood for the prohibition of segregation, the prohibition of the continuation of White supremacy as a cultural value that shaped the lives of African Americans at assorted levels, and the imposition of government power, especially federal power, to break down the consequences of *Plessy* and Jim Crow. Goldwater, however, could "not bring himself to support the objective of a desegregated society."[165] In his speeches, Goldwater made it clear that segregation and integration ought to be given equal weight before the Constitution: "To me," Goldwater argued, "it is wrong to take some children out of schools they would normally attend and bus them to others just to get a mixture of ethnic and racial groups that somebody thinks is desirable. This forced integration is just as wrong as forced segregation."[166]

Goldwater elevated opposition to *Brown* from the level of anti-Black to that of legitimate opposition to an overly intrusive federal government that compromises the cultural traditions of the nation and the region of the South. Carmines and Stimson advance a persuasive argument that assesses the salience of the 1964 presidential election:

> The 1964 presidential election thus marked the decisive turning point in the political evolution of racial issues. With the nomination of Goldwater the Republican Party – the party of Lincoln and emancipation – turned its back on one hundred years of racial progressivism and instead undertook a strategy designed to attract the support of racially disaffected Democrats.[167]

The elements of the Goldwater strategy continue to guide or at least inform the strategy of the Republican Party. On racial issues, every Republican candidate for the presidency has been significantly more conservative than their Democratic counterparts.[168] In 1968, for

164. *Id*.; CARMINES & STIMSON, *supra* note 151, at 47.

165. BARKER ET AL., *supra* note 22; BLACK & BLACK, POLITICS, *supra* note 145; BLACK & BLACK, VITAL SOUTH, *supra* note 145, at 152.

166. Goldwater, *supra* note 159, at 143.

167. CARMINES & STIMSON, *supra* note 151, at 47. For a general discussion of the agency of ideas and ideology, see MILLS, *supra* note 22.

168. MILLS, *supra* note 22; *see also* BARKER ET AL., *supra* note 22; BLACK & BLACK, POLITICS, *supra* note 145; BLACK & BLACK, VITAL SOUTH, *supra* note 145.

example, Nixon "pursued a course of action on racial issues that had great appeal to white southerners."[169] In fast order, the victorious Nixon nominated four conservatives to the Supreme Court: Chief Justice Warren E. Burger (1969); Harry A. Blackmun (1970); Lewis Franklin Powell (1972); and William H. Rehnquist (1972). Each possessed conservative credentials. Finally, the 1964 presidential candidacy of Goldwater established the Republican Party as the agency that embraced White supremacy, segregation, and racial conservativism.[170]

We have categorized the counter culture to *Brown* the culture of racial diversionary standpatism which possesses the following elements: (1) a minimalist approach to Federal power to eliminate racism and racial discrimination (There is an enormous faith and commitment to the invisible hand or market approach to racism and discrimination. Race is largely perceived as a local issue rather than a national one, and is more amiable to local solutions); (2) a conciliatory disposition to the racial views and status of southerners and Whites on the whole (A greater sympathy exists for southerners and Whites' racial situation than for the racial discrimination that defines the cultural and political status of African Americans.[171] There is an enormous emphasis on the cost of eliminating racial discrimination in policies, procedures, and structures of the system); (3) the move from the biological inferiority of African Americans to the biologization of culture[172] (The assumption is that the culture of African Americans is inferior to that of Whites. Prior to *Brown*, the central thrust of racism pivoted on the biological inferiority of African Americans, meaning white people were naturally perceived to be superior and whiteness was the basis of evaluation. White superiority became the justification for the power and advantages of Whites. The biologization of culture is a post-*Brown* rationalization that "allows Whites to express resentment and hostility safely since, in their view, African Americans are where they are as a group because they do not want to get ahead")[173]; and (4) the avoidance of any direct reference to race or the abandonment of racial terminology in the discussion of racism and racial discrimination.[174] Racial issues are discussed in terms of the intervention

169. Carmine & Stimson, *supra* note 151, at 53.
170. For a discussion of the agency of ideas and ideology, see Mills, *supra* note 22.
171. Bonilla-Silva, *supra* note 116, at 248.
172. *Id*.; *see* Mydral, *supra* note 25.
173. Bonilla-Silva, *supra* note 116, at 248; *see* Combs, *Courts*, *supra* note 58.
174. Combs, *Courts*, *supra* note 58.

of the federal government, individualism, personal responsibility and a historical context. Under the culture of racial diversionary standpatism, the built-in tension between the values of individualism and equality is resolved on the side of individualism. Additionally, the harm of racism and racial discrimination against African Americans is severely ignored or discounted.

Unlike the culture of racial progressive gradualism supported in *Brown*, the culture of racial diversionary standpatism is not far removed from the period of unbridled segregation and White supremacy.[175] This perspective enforces the claims and the racial arrangements that existed prior to *Brown*, supporting the status quo on race. On balance, the consequences of the Goldwater campaign stand in contrast to the principles and approach propagated in *Brown*. Goldwater legitimated cultural opposition to *Brown* and provided the agency to advance that opposition.

V. *BROWN V. BOARD OF EDUCATION* IN THE ERA OF THE CULTURE OF RACIAL DIVERSIONARY STANDPATISM

Since May 17, 1954, *Brown v. Board of Education* has been at center stage in the cultural war over race. In *Brown*, the Supreme Court ushered in the culture of racial progressive gradualism, altering how the values of individualism and equality would inform the interactions of African Americans and Whites. *Brown* summoned a decisive role on the part of the government in structuring ideas, beliefs, and values as to how African Americans would be seen and treated. Contrary to conventional wisdom, government was at the center of the culture of Jim Crow (such as state statutes that required the separation of races; the litany of Supreme Court decisions that legitimated the separation of the races; the federal government's enormous role in the creation and preservation of the system of separation in housing, employment and voting and countless local government laws).[176]

Brown's culture of racial progressive gradualism encountered an empowered culture of racial diversionary standpatism that emerged in the 1960s.[177] The 1968 victory of Richard Nixon meant that the bal-

175. *Id*.; *see* MYDRAL, *supra* note 25.

176. Combs, *Courts*, *supra* note 58.

177. The culture of racial diversionary standpatism describes the culture system that emerged in opposition to *Brown v. Board of Education* and its culture of racial progressive gradualism. The culture of racial diversionary standpatism de-emphasizes the salience and impact of racism and discrimination on the political, legal, economic, social, and educational status of African Americans. The effort is also to greatly limit the role of the federal government as an

ance of power had shifted. During his first term, President Nixon appointed four justices to the Supreme Court who possessed conservative credentials. Subsequently, the Supreme Court gradually abandoned the racial progressive gradualism championed in *Brown* and the civil rights legislation of the 1960s. The racial policy that emanated from the Supreme Court bears several of the characteristics of the culture of racial diversionary standpatism: (1) a minimalization of government power, especially the Federal government, in the arena of race; (2) a conciliatory disposition to the racial views and situation of Whites on race and a stress on the cost of the effort of the elimination of racial inequalities to the system; (3) an avoidance of direct reference to race or the usage of racial terminology and approaches in the formulation of public policy that govern or impact the interactions between African Americans and Whites and that shape the opportunities of African Americans; and (4) a focus on the harmful and persist consequences of racism and its manifestation on and in the lives of African Americans.

A. The Minimalization of Government Power

Since the late 1960s, the tenor of racial policy reflects the minimalization of government power to alter the social, political, economic, and legal status of African Americans. The minimalization of government power often works to promote entrenched interests and retard the movement to address entrenched inequalities that results from racial discrimination and the various forms of racism. The Supreme Court has been at the forefront in this movement. While the Court participation has not been linear, nevertheless, the Supreme Court has established standards and doctrines that restrict the implementation and force of the principles of *Brown* and legislation enacted to sustain those principles.

B. From Discriminatory Effect to Discriminatory Purpose

A key element of the minimalization of the usage of government power has been the shift from the effect test to the purpose test in the establishment of violations of the Constitution and certain provisions

agent in the eradication of racism and discrimination against African Americans. Finally, the culture of diversionary standpatism has, seemingly, supplanted the value of White supremacy and subscribes to the legitimacy of White privilege.

of the civil rights legislation of the 1960s.[178] Initially, the Supreme Court demonstrated a reluctance to impose discriminatory purpose or intent. In *Griggs v. Duke Power Co.*, the Supreme Court issued the requirements mandated under Title VII of the Civil Rights Act of 1964.[179] Speaking for a unanimous Court, Chief Justice Burger argued that Congress required "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." Employing an effect standard, Burger held that "the touchstone is business necessity,"[180] and argued that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in head winds' for minority groups and are unrelated to measuring job capability."[181] However, in *Palmer v. Thompson*, the Supreme Court disallowed the permissibility of the purpose test in deciding whether the City of Jackson, Mississippi unconstitutionally closed the city's swimming pool for financial reasons after being ordered to integrate by a federal court.[182] Speaking for the Court, Justice Black claimed, "No case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."[183] In his dissent, Justice Douglas argued that the closing of the city swimming was "at least in part racially motivated."[184] He refused to argue for a purely discriminatory purpose as grounds for the case. Justice Douglas noted that the "question for the federal judiciary is not what the motive was, but what the consequences [effects] are."[185] Justice Douglas concluded neither the state nor its subdivisions may eliminate services "for the purpose of perpetuating or install apartheid or because it finds life in a multi-racial community difficult or unpleasant."[186]

As the support for the culture of racial diversionary standpatism increased on the Supreme Court, the Court gradually, but persistently,

178. John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Note, *Legislative Purpose and Federal Constitutional Adjudication*, 83 HARV. L. REV. 1887 (1970).
179. 42 U.S.C. § 2000e (2002).
180. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
181. *Id*. at 432.
182. Palmer v. Thompson, 401 U.S. 217 (1971).
183. *Id.* at 224.
184. *Id*. at 235.
185. *Id*. at 236.
186. *Id.* at 238.

endorsed the permissibility of the purpose or intent standard. Discriminatory purpose became the distinguishing characteristic of *de jure* and *de facto* segregation in the context of northern school desegregation. In *Keyes v. School District No. 1*, Justice Brennan wrote:

> [W]here plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system.[187]

However, concurring in part and dissenting in part, Justice Powell, an apologist for the South, disagreed, intimating that segregation in the North does not differ from that of the South which requires a national constitutional standard. Justice Powell termed tortuous the "effort of identifying 'segregative acts' and deducing 'segregative intent.'"[188]

The establishment of proof of purposeful discrimination is decidedly more difficult than that of discriminatory effect or impact, separating instances in which the equity power of federal courts can be invoked. The equity power of federal courts can only be invoked to remedy a constitutional violation.[189] Without the proof of purpose there is no constitutional violation, meaning that the presence of discriminatory effect does not substantiate a violation. This is illustrated in *Milliken v. Bradley*.[190] Both the District Court and the Court of Appeals for the Sixth Circuit advanced a multi-district remedy to desegregate the schools of Detroit. Writing for a divided Court, Chief Justice Warren E. Burger disallowed the imposition of a metropolitan desegregation plan. Chiding the lower courts, Chief Justice Burger questioned the capacity of a district court judge to administer fifty-four school districts, and championed the "people control of schools throughout their elected representatives."[191] Chief Justice Burger argued,

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district.

187. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 201 (1973).
188. *Id*. at 224 (Powell, J., dissenting in part and concurring in part).
189. Swan v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).
190. 418 U.S. 744-45 (1974).
191. *Id*. at 744.

> Specifically, it must be shown that racial discriminatory acts of the state or local school districts, or of a single school district has been a substantial cause of interdistrict segregation.[192]

The dissenters took the majority to task. Justice Douglas placed the disallowance of the metropolitan plan in the context of the willingness of the society to grapple with the problem of race. "When we rule against the metropolitan area remedy we take a step that will likely put the problems of the [African Americans] and our society back to the period that antedated the 'separate but equal' regime of *Plessy v. Ferguson*."[193]

The dissent of Justice Marshall argued that the majority was surrendering to political difficulties, suggesting that the Detroit-only remedy constituted a missed opportunity to overcome the barriers of equal opportunity and an open society. "We deal here with the right of all of our children," contended Justice Marshall, "whatever their race, to an equal start in life and to an equal opportunity to reach their full potential as citizens. Those children who have been denied that right in the past deserve better than to see fences thrown up to deny them that right in the future."[194] Justice Marshall continued, "Our Nation, I fear, will be ill served by the Court's refusal to remedy separate and unequal education, for unless our children begin to learn together, there is little hope that our people will ever learn to live together."[195]

The purpose standard was also applied in other areas with the direct consequence of minimalizing the exercise and the reach of government power to remove barriers, processes, and structures that promoted the exclusion of African Americans.[196] In *Washington v. Davis*, for example, two Black applicants to become police officers in the District of Columbia alleged that the police department's recruiting procedures, including written personnel tests were racially discriminatory and violated the Due Process Clause of the Fifth Amendment.[197] Speaking for the majority, Justice White distinguished the standard of Title VII from that of the equal protection component of the Due Process Clause of the Fifth Amendment and the Equal Protection

192. *Id.* at 744-45.
193. *Id.* at 759 (Douglas, J., dissenting).
194. *Id.* at 783.
195. *Id*.
196. Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989); City of Mobile v. Bolden, 446 U.S. 55 (1980); Arlington Heights v. Metro. Hous. Corp., 429 U.S. 252 (1977).
197. Washington v. Davis, 426 U.S. 229 (1976).

Clause of the Fourteenth Amendment.[198] Title VII demands an effect standard, and the Constitution requires proof of discriminatory purpose. The *Davis* Court explicitly placed the purpose test on constitutional footing. Justice White argued, "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule . . . ."[199] Also, in *City of Mobile v. Bolden*, the Supreme Court continued to rely on the exacting standard, which required proof of discriminatory purpose to establish a violation of the Fourteenth and Fifteenth Amendments and the Voting Rights Act of 1965.[200] The City of Mobile had a Black population of forty percent, but no Black had ever been elected to the city's three-member city commission. The district court held that the at-large election system discriminated against African Americans. Speaking for the majority, Justice Powell reversed, noting that the at-large election system was established in the early years of the twentieth century by the Progressives. The purpose was not to discriminate against African Americans. In 1982, however, Congress established the effect standard when it extended the Voting Rights Act of 1982.[201] The effect standard was sustained in *Thornburg v. Gingles*.[202] The at-large system minimized the opportunities of African Americans to win electoral positions.

C. The Good Faith Standard

For nearly forty years, the Supreme Court and lower courts have grappled with school desegregation decrees. Education has been one of the chief means to alter the culture of racism in America. Through the orders of federal courts, the government has played a decisive role. In the early 1990s, the Supreme Court backed away from the affirmative duty of *Brown* and *Green*.[203] In *Green v. County School Board of New Kent County*, the Supreme Court gave constitutional support to the principle that school officials possessed an affirmative

198. *Id*. at 238-39.
199. *Id.* at 242.
200. Voting Rights Amendment of 1982, 42 U.S.C. § 1971 (1982).
201. City of Mobile v. Bolden, 446 U.S. 55 (1980).
202. 478 U.S. 30 (1986).
203. *See* Erica Frankenberg et al., A Mutliracial Society with Segregated Schools: Are We Losing the Dream? (2003), *available at* http//:www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream; *see also* Freeman v. Pitts, 503 U.S. 467 (1992); Bd. of Educ. v. Dowell, 498 U.S. 237 (1991); Missouri v. Jenkins, 495 U.S. 33 (1990).

duty to transform dual school systems into a unitary school system.[204] Writing for a unanimous Court, Justice Brennan adjudged, "School boards . . . operating state-compelled dual systems were . . . charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[205] The affirmative duty standard came under attack. In the 1990s, the good faith standard became the controlling doctrine as to whether or not district courts relinquished their supervision of school districts found in violation of the principles of *Brown*.

At issue in *Board of Education of Oklahoma v. Dowell* was whether the Board of Education of Oklahoma City was entitled to dissolution of a desegregation decree entered by the district court. Ignoring the thirty years of intransigence by the board of education, Chief Justice Rehnquist and the majority held that the board was entitled to relief. The Court of Appeals for the Tenth Circuit concluded the board had the "affirmative duty . . . not to take any action that would impede the process of disestablishing the dual system and its effects."[206] Chief Justice Rehnquist insisted, "[I]t is a mistake to treat words such as 'dual' and 'unitary' as if they were actually found in the Constitution,"[207] abandoning the *Green* standard. Rehnquist offered a more relaxed or less demanding standard. He directed the district court to "address itself [as] to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable."[208] The effects of the good faith standard have been immediate and widespread. During the latter part of the 1990s, Black re-segregation in schools occurred in all but two states, Michigan and New Jersey. These two states were already highly segregated. In many of the states, school districts under long running desegregation decrees were relieved of the supervision of Federal courts.[209]

The purpose and good faith standards constitute the minimalization of government power, especially the federal government. The distribution of power favored those alleged to have violated or excluded African Americans from certain benefits. In Detroit, for ex-

204. Green v. County Sch. Bd., 391 U.S. 430 (1968).
205. *Id*. at 437-38.
206. Bd. of Educ. v. Dowell, 498 U.S. 237, 234 (1991).
207. *Id*. at 245.
208. *Id*. at 249-50.
209. FRANKENBERG ET AL., *supra* note 202.

ample, Black children and parents were denied access to equality of education, and the state of Michigan was spared the responsibility and the burden of creating a desegregated school system.[210] Government power is essential for the cultural transformation of the American Society.

D. A Conciliatory Disposition to the Views of Whites on Race/ Cost to the System

The culture of racial diversionary standpatism is also defined by a conciliatory disposition to the views of Whites and emphasis on the cost of the elimination of racism and racial discrimination to the structure of government and established processes and arrangements. That is, decision-makers approach the elimination of racially imposed inequities and disadvantages with undue concern for the inconveniences visited upon Whites and the cost to the system. The decisions of the Supreme Court are fertile grounds, for examples. As the conflict over school desegregation moved north of the Mason-Dixon line, the Supreme Court, as well as Congress and the President, became more antagonistic toward the policy.

In *Milliken v. Bradley*, for example, Justice Marshall chided the Court for being overly sensitive to the political winds.[211] Nationally, many suburbanites had fled cities to escape living next door and having their children sitting next to African Americans in school. Chief Justice Burger voided the inter-district remedy, asserting, "[N]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and the support for public schools and to quality of the educational process."[212] Justice Marshall countered with greater emphasis on the viewpoint of the African American students, stressing the goals of equality rather than administrative convenience or the tradition of local control of education. "[African American] students will continue to perceive their schools as segregated educational facilities and this perception will only be increased," retorted Marshall, "when Whites react to a Detroit-only decree by fleeing to the suburbs to avoid integration."[213] Marshall stressed, "It will be of scant significance to [African Ameri-

210. *Id.* at 48.
211. Milliken v. Bradley, 418 U.S. 717, 814 (1974) (Marshall, J., dissenting).
212. *Id.* at 741-42.
213. *Id.* at 805.

can] children who have for years been confined by *de jure* acts of segregation to a growing core of all [African American] schools surrounded by a ring of all-white schools that the new dividing line between the races is the school district boundary."[214] Chief Justice Burger never referenced how local control of schools and the educational processes supported segregation and re-enforced negative images of African Americans.

The conciliatory element of the culture of standpatism is quite evident in *McCleskey v. Kemp* and *Bush v. Gore*.[215] In *McCleskey*, a Black man sentenced to death employed the Baldus study to allege that the administration of the Georgia capital punishment system violated the Equal Protection of the Fourteenth Amendment.[216] Since *Furman v. Georgia*, the existence of racism in the imposition of the death penalty has been a fundamental and persistent argument against the permissibility of capital punishment under the Constitution.[217] The Baldus study reported that the race of the victim was one of the factors that was decisive in the system's imposition of the death penalty. Speaking for a sharply divided Court, Justice Powell based the majority's rejection of McCleskey's petition on four factors: (1) the desire to encourage sentencing discretion; (2) the presence of statutory safeguards in the George death penalty system; (3) the fear of encouraging widespread challenges to other areas of sentencing; and (4) the proper role of the judiciary. Factor three supports the conciliatory element of the culture of racial diversionary standpatism. More directly, the elimination of racism and discrimination is weighed against the cost or disruption of the system. Justice Powell intimated as much when he said, "McCleskey statistical proffer must be viewed in the context of his challenge. McCleskey challenges decisions at the heart of the State's criminal justice system."[218] In his conclusion, Powell reiterated the majority's concern for the cost that McCleskey's claim of racism and discrimination posed for the system. "Thus, if we accept McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty."[219] "Moreover, the claim that his sentence rests on the irrelevant factor of race," Justice Powell claimed,

214. *Id*.
215. McClesky v. Kemp, 481 U.S. 279 (1987); Bush v. Gore, 531 U.S. 98 (2000).
216. *McClesky*, 481 U.S. at 283.
217. Furman v. Georgia, 408 U.S. 238 (1972).
218. *McClesky*, 481 U.S. at 297.
219. *Id*. at 315.

"easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender."[220]

A more recent example from the Supreme Court will conclude our discussion of the conciliatory disposition to Whites or to the cost to the system. In *Bush v. Gore*, the Supreme Court effectively decided the Presidential Election of 2000. The presidential vote in Florida was laden with controversy, including racial discrimination at polling places, intimidation of Black voters by police officers, and the removal of Black voters from the state voter rolls.[221] It has also been reported that one-third of the disqualified votes (22,807) were concentrated in predominantly Black areas in South Florida.[222] Moreover, the under votes tended to be disproportionately in counties that were poor with large Black populations. The Supreme Court of the United States reversed the ruling of the Florida Supreme Court.[223] In a *per curiam* decision, a divided Court held that the Florida Court's definition of a legal vote violates the Equal Protection Clause of the Fourteenth Amendment.[224] The decision provided four explanations: (1) the definition provides for variations of standards within counties; (2) the order provides no assurance that the recounts included in a final certification must be complete; (3) the order provides no specificity as to who would recount the ballots; and, (4) the recount process is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single judicial order.[225]

In the *per curiam* decision, the majority insisted that the Florida Supreme Court's order did not include "a recount procedure. . . that comports with minimal constitutional standards."[226] Instead of remanding the case to the Florida Supreme Court to devise a remedy in conformity with the decision, the majority concluded that the safe har-

220. *Id*. at 315-16.

221. *See* U.S. Comm'n on Civil Rights, Voting Irregularities in Florida During the 2000 Presidential Election (2001).

222. *See* Alan M. Dershowitz, Supreme Injustice: How the High Court Hijacked Election (2000); Bob Drogin, *Two Florida Counties Show Election Day's Inequities Vote*, L.A. Times, Mar. 12, 2001, at A1; *Many Disqualified Votes in Minority Areas*, Chi. Trib., Dec. 1, 2000, at 19.

223. Bush v. Gore, 531 U.S. 98 (2000).

224. *Id*.

225. *See Bush*, 531 U.S. at 129-35 (Souter, J., dissenting); Dershowitz, *supra* note 222; David A. Straus, Bush v. Gore: *What Were They Thinking?,* 68 U. Chi. L. Rev. 737 (2001); Cass R. Sunstein*, Order Without Law*, 68 U. Chi. L. Rev. 757 (2001).

226. *Bush*, 531 U.S. at 136-43.

bor of December 12 would be missed. In his dissent, Justice Souter argued that the loss of the "safe harbor" was not fatal. Justice Ginsburg criticized the majority for departing from the Court's normal view of the state courts construction of state law.[227] "And not uncommonly," Justice Ginsburg observed, "we let stand state-court interpretations of federal law with which we might disagree."[228] Justice Ginsburg insisted, "Rarely has this Court rejected outright an interpretation of state law by a state high court."[229] She blamed the shortness of time for the recount on the "Court's entry of a stay on December 9."[230]

Since *Bush v. Gore*, the Supreme Court has been much analyzed.[231] The majority seemed to give minimum consideration to the fact that voters were denied the right to participate in the election of the President. But rather, the greater emphasis is focused on the issue of a "safe harbor." The participation of voters suffered before "conjured" niceties of the system, the principles of equality, seemingly, succumbed to the interest of partisanship on the Supreme Court and the elimination of a potential presidential succession crisis, ultimately deciding the outcome of the Presidential Election of 2000.

E. The Avoidance of Racial Terminology

The avoidance of racial terminology is the final element of the culture of racial diversionary standpatism. The manifestation of this element has been a gradual and unfolding process. In *Regents of University of California v. Bakke*, the Supreme Court permitted the University of California Davis Medical School to use race as a plus in admission decisions.[232] The *Bakke* decision, however, stands for much more. First, a plurality would include Whites as a suspect class, requiring the imposition of the strict scrutiny standard to race conscious measures that impact Whites. The plurality made no distinction between policies and programs designed to overcome culturally and historically ingrained inequalities and race conscious policies that subjugated African Americans. Second, greater weight would be granted to individualism than to group basis of rights. And third, the

227. *Id.* at 135.
228. *Id*. at 136.
229. *Id.* at 139.
230. *Id*. at 143.
231. *See, e.g.*, DERSHOWITZ, *supra* note 222; RICHARD A. POSNER, LAW, PRAGMATISM AND DEMOCRACY (2003); Straus, *supra* note 225; Sunstein, *supra* note 225.
232. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

decision stands for the principle of stigmatizing benefactors of affirmative action as unable to achieve success without special protection based on a factor unrelated to individual worth.[233] The stigma argument has been rejected as being ahistorical. That is, Whites stigmatized African Americans long before affirmative action. In fact, the stigmatization of African Americans is linked to presumption of the inferiority of African Americans and a carryover from slavery.[234]

The strict scrutiny standard has been coupled with racial stigma as a powerful factor in the Supreme Court's attack on race conscious programs and policies that sought to eliminate racism and racial barriers against African Americans.[235] The Court seemed to grow weary of race conscious measures by the late 1980s and early 1990s. Justices Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer replaced Justices Burger, Powell, Brennan, Marshall, Blackmun, and White. For the most part, the personnel of the Supreme Court tended to be right of center.[236] Justices, however, do not always vote the preferences of the appointing President (for example Justices, Warren, Brennan, Blackmun, Powell, and Souter).

The imposition of the strict scrutiny standard de-railed a set-aside program put in place by the city council of the city of Richmond, Virginia. The motivation of the race conscious measure was to overcome widespread racism and racial discrimination in the construction industry of Richmond, which was once the capital of the Confederate. Speaking for the majority in *City of Richmond v. J.A. Croson Co.*, Justice O'Connor distinguished the authority of Congress and states and their political subdivisions under the Fourteenth Amendment.[237] Justice O'Connor felt that the city of Richmond misinterpreted the majority in *Fullilove* in which the Supreme Court sustained the constitutionality of a congressional set-aside program relating to the con-

233. *Id*. at 284-321.

234. Bonilla-Silva, *supra* note at 117; Pierre-Andre Tagueff, The Force of Prejudice: On Racism and its Doubles (Hassan Melehy trans. & ed., University of Minnesota Press 2001).

235. *Compare* Grutter v. Bollinger, 123 S. Ct. 2325, 2350-65 (2003) (Thomas, J., concurring in part and dissenting in part); Shaw v. Reno, 509 U.S. 630 (1993); *and Bakke*, 438 U.S. 265 (1978), *with* Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986); Firefighters v. Cleveland, 478 U.S. 501 (1986); United States v. Paradise, 480 U.S. 421 (1986); Fullilove v. Klutzmik, 448 U.S. 448 (1980); *and* United Steelworkers v. Weber, 443 U.S. 193 (1979). All of these are cases in which race conscious measures were sustained.

236. *See* David O'Brien, Storm Center: The Supreme Court in American Politics (2003); Twiley W. Barker & Michael W. Combs, *Civil Rights and Liberties in the First Term of the Rehnquist Court: The Quest for Doctrine and Votes*, 1 Nat'l Pol. Sci. Rev. 31 (1989).

237. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

struction industry.[238] Unlike the city of Richmond, Justice O'Connor insisted that Congress "has a constitutional mandate to enforce the dictates of the Fourteenth Amendment," which means that Congress "may identify and redress the effects of society-wide discrimination."[239] Justice O'Connor gave little weight to the claim of past discrimination and evidence of discrimination proffered by Richmond. Employing strict scrutiny, Justice O'Connor noted dismissively, "While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for [B]lack entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in awarding public contracts in Richmond, Virginia."[240]

Four years after *Croson*, the Supreme Court again voiced its objection to race conscious measures as it voided a re-districting plan from North Carolina. The effort by North Carolina was to comply with the Voting Rights Act of 1965. In *Shaw v. Reno*, the appellants alleged that the two majority Black districts concentrated Black voters arbitrarily without considering compactness, contiguousness, geographical boundaries, or political subdivisions so as to create congressional districts along racial lines and to assure the election of two Black representatives.[241] Justice O'Connor spoke for a divided court. Justice O'Connor utilized the strict scrutiny standard, arguing, "Classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.' "[242] She believed that the reapportionment plan

> reinforces the perception that members of the same racial group - regardless of their age, education, economic status, or the community in which they live–think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.[243]

For Justice O'Connor, such an approach "may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract."[244] Ignoring the long history of racial discrimination in the creation of the politics of North Carolina and

238. *Id*. at 477-506.
239. *Id*. at 490.
240. *Id.* at 499.
241. Shaw v. Reno, 509 U.S. 630 (1993).
242. *Id.* at 643 (quoting Hirabayashi v. United States, 320 U.S. 81 (1943)).
243. *Id*. at 647.
244. *Id.* at 648.

opportunities in the state, Justice O'Connor wrote as if racism and racial discrimination and their effects had been eliminated or never existed. Justice O'Connor strives for a color-blind society without uprooting and eradicating the values, beliefs, and significations of inequalities.[245]

As Justice O'Connor heightened the argument against race conscious measures, other members of the Court also enlivened their arguments in support of such policies and programs, especially in reapportionment.[246] Justice Souter, for example, contended that legislators have to take race into account "as long as members of racial groups have the commonality of interest implicit in our ability to talk about concepts like minority voting strength, and so long as racial bloc voting takes place . . . ." and, unlike other governmental decisions, districting "denies no one a right or benefit provided to others. All citizens may register, vote and be represented."[247] Souter noted that the Court

> cases recognize the reality that members of the same race often have shared interests. 'Dilution' thus refers to the effects of districting decisions not on an individual's political power viewed in isolation, but on the political power of a group. This is the reason that the placement of voters in a given district, even on the basis of race, does not, without more, diminish the effectiveness of the individual as a voter.[248]

Souter posited, "[U]nder the Voting Rights Act when communities are racially mixed, the legitimate consideration of race in districting decision is usually inevitable."[249]

Adarand Constructors, Inc. v. Pena symbolizes the triumph of strict scrutiny in all instances in which the constitutionality of race conscious measures is raised.[250] In *Adarand*, the Supreme Court extended the application of the strict scrutiny in cases arising under the equal protection component of the Fifth Amendment Due Process Clause, abandoning the lenient standard, resembling the intermediate scrutiny of *Fullilove v. Klutznik* and *Metro Broadcasting, Inc. v. Fed-*

245. *Id*. at 641-47.
246. *Id.* at 658, 676, 679.
247. *Id*. at 682 (Souter, J., dissenting).
248. *Id.*
249. *Id*. at 683.
250. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

eral Communication Commission.[251] By the year 2003, the controversy over race conscious measures was significantly joined. Universities and the private and public sectors continued to employ race conscious policies to enhance the representation of African Americans, women, and historically disadvantaged groups. Such policies are proffered as a means to overcome generations of exclusion and to achieve diversity. The University of Michigan found itself at storm center because its College of Literature, Science, and Arts and College of Law's admission procedures included race conscious provisions. Eventually, the litigation reached the United States Supreme Court in the cases of *Gratz v. Bollinger*[252] and *Grutter v. Bollinger*[253] revealing the centrality of race specific policy to the American culture war. The culture of racial progressive gradualism insists that race conscious measures are indispensable in the struggle to eradicate the values, beliefs, and built-in institutional and systemic elements that by purpose and effect disadvantage African Americans, Hispanic Americans, and Native Americans. The culture of racial diversionary standpatism takes the position that the values, beliefs, and institutional and systemic elements of disadvantage are virtually non-existent. Additionally, the perspective subscribes to the position that race conscious measures do more harm to the benefactors of such policies and the state of race relations than benefit.

In *Gratz v. Bollinger*, Chief Justice Rehnquist spoke for a sharply divided Court.[254] Chief Justice Rehnquist termed the automatic twenty points assigned to African Americans, Hispanic, and Native American applicants by the College of Literature, Science and Arts a quota which was outlawed in such circumstances in *Regents of the University of California v. Bakke*.[255] Relying on the strict scrutiny test, Chief Justice Rehnquist held that the university's use of race in its current freshman admission policy is not narrowly tailored to achieve the university's asserted compelling interest of diversity.[256] For Rehnquist, the policy did not provide for individual consideration of each

251. Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990); Fullilove v. Klutznick, 448 U.S. 448 (1980). In these two cases, the Supreme Court employed the intermediate scrutiny test where race conscious measures are evaluated on the following basis: Do the measures serve important governmental objectives within the power of Congress? Are the measures substantially related to achievement of those objectives?

252. 123 S. Ct. 2411 (2003).

253. 123 S. Ct. 2325 (2003).

254. *Gratz*, 123 S. Ct. 2411.

255. 438 U.S. 265 (1978).

256. *Gratz*, 123 S. Ct. at 2440.

applicant. The *Gratz* decision challenges universities, particularly universities with tens of thousands of applicants, to design procedure to constitutionally satisfy the asserted compelling interest in diversity.[257]

Several dissenting opinions were also filed. Justice Souter, for example, argued that the University of Michigan freshman admission was closer to what *Grutter* approved than to what *Bakke* condemns. Unlike in *Bakke*, Justice Souter contended the policy

> lets all applicants compete for all places and values an applicant's offering for any place not only on grounds of race, but on grades, test scores, strength of high school, quality of course of study, residence, alumni relationships, leadership, personal character, socioeconomic disadvantage, athletic ability and quality of a personal essay.[258]

Justice Souter believed that the assignment of specific points does not set race apart from all other weighted considerations. Justice Souter declared,

> The very nature of a college's permissible practice of awarding value to racial diversity mean . . . that race must be considered in a way that increases some applicants' chances for admission. Since college admission is not left entirely to inarticulate intuition, it is hard to say what is inappropriate in assigning some stated value to a relevant characteristic, whether it be reasoning ability, writing style, running speed, or minority. Justice Powell's plus factors necessarily are assigned some values.[259]

Justice Souter turned his attention to the admission systems used at public universities in California, Florida, and Texas. He directly focused on the United States' claim that Michigan could get diversity that meets its compelling interest by "guaranteeing admission to a fixed percentage of the top students from each high school in Michigan."[260] Agreeing that the practices in those states were constitutional, Justice Souter felt that the practice suffers from a serious disadvantage. "It is the disadvantage of obfuscation," continued Souter, "The percentage plans are just as race conscious as the point scheme (and fairly so), but they get their racially diverse results without saying directly what they are doing or why they are doing it. . . .

257. *See* Lani Guiner, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 114, 172-98 (2003).

258. *Gratz*, 123 S. Ct. at 2441 (Souter, J., dissenting).

259. *Id*. at 2441.

260. *Id*. at 2442.

Equal Protection cannot become an exercise in which the winners are the ones who hide the ball."[261]

Justice Ginsburg placed her dissent in the context of the continued existence and harmful effects that flow from "centuries of law-sanctioned inequities [which] remain painfully evident in our communities and schools."[262] Justice Ginsburg argued that the disparities of the recently ended race caste system endure:

> unemployment, poverty, and access to health care vary disproportionately by race. Neighborhoods and schools remain racially divided. African American and Hispanic children are too often educated in poverty-stricken and underperforming institutions. Adult African Americans and Hispanics generally earn less than Whites with equivalent levels of education. Equally credentialed job applicants receive different receptions depending on their race. Irrational prejudice is still encountered in real estate markets and consumer transactions. Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this county's law and practice.[263]

Justice Ginsburg contended that the implementation of the constitutional requirement of equality demand that "government decision makers may properly distinguish between policies of exclusion and inclusion. Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its after effects have been extirpated."[264]

Justice Ginsburg addressed the issue of the color-blind Constitution. Proponents of the culture of racial diversionary standpatism argue that race conscious policies offend the Constitution's colorblind requirement. She believed that the constitution is "both color blind and color conscious."[265] Quoting Judge Wisdom's opinion in *United States v. Jefferson County Board of Education*, Ginsburg argued,

> [T]o avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is colorblind. But the

261. *Id.*
262. *Id.* at 2443.
263. *Id.*
264. *Id.* at 2444.
265. *Id.*

> Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination.[266]

For Justice Ginsburg, *Brown v. Board of Education* permits color conscious policies that are designed to "correct inequalities."[267] In her view, the College of Literature, Science and Arts color conscious procedure is designed to accord special consideration to racial and ethnic groups that "have been relegated to inferior status by law and social practice; their members continue to experience class based discrimination to this day."[268]

In *Grutter v. Bollinger*, a divided Court approved the University of Michigan College of Law's admission plan. Unlike the College of Literature, Science and Arts, the College of Law did not assign points to historically disadvantaged racial and ethnic groups. Applicants were evaluated in terms of a personal statement, letters of recommendation, an essay describing how the applicant will contribute to law school life and diversity, the applicant's undergraduate grade point average, and the Law School Admissions Test Score. School officials also assessed recommender's enthusiasm, the quality of the undergraduate institution, the applicant's essay, and the area and difficulty of undergraduate course selection. Various circuits of the Courts of Appeals disagreed on whether or not diversity constituted a compelling interest. The Court of Appeals for the Fifth Circuit found that diversity did not reach the threshold of a compelling state interest, while the Sixth and Ninth Circuits concluded that diversity was a compelling state interest.[269]

Speaking for a sharply fractured Court, Justice O'Connor turned to Justice Powell's opinion in *Bakke* for guidance. O'Connor indicated Justice Powell rejected the following: (1) racial balance for historically disfavored racial and ethnic minorities as a compelling interest; (2) the remediation of societal discrimination as a compelling interest; and (3) increasing the number of physicians who would practice in communities currently underserved as a compelling interest.[270] Justice O'Connor noted that Justice Powell approved the use of race to further diversity. Employing the strict scrutiny standard, Justice

266. *Id*.
267. *Id*. at 2445.
268. *Id*.
269. *See* Grutter v. Bollinger, 123 S. Ct. 2325, 2336 (2003); Bollinger v. Grutter, 288 F.3d 732 (6th Cir. 2002); Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188 (9th Cir. 2000); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).
270. *Grutter*, 123 S. Ct. at 2336.

O'Connor endorsed Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions and rejected the assumption that the only governmental use of race that can survive strict scrutiny is remedying past discrimination. "Today, we hold that the Law School," intimated Justice O'Connor, "has a compelling interest in . . . attaining a diverse student body."[271]

The *Grutter* Court deferred to the law school's educational judgment. Justice O'Connor argued that universities occupy a special niche in America's constitutional tradition, noting that "[T]he important purpose of public education and the expansive freedoms of speech and thought associated with the university environment."[272] More directly Justice O'Connor insisted: (1) that the attainment of a diverse student body is at the heart of the law school's proper institutional mission; (2) that the Court must presume "good faith" on the part of a university absent a showing to the contrary; (3) that the desire for a critical mass of students is defined by reference to the educational benefits that diversity is designed to produce; (4) that the law school's claims of a compelling interest is supported by amici who pointed to the educational benefits that flow from student body diversity, such as promoting learning outcomes, better preparing students for an increasingly diverse workforce, and better preparing students as professionals; (5) that education is the foundation for good citizenship; (6) that universities and law schools represent the training ground for a large number of America's leaders; and (7) that the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity.[273]

Justice O'Connor contended that educational benefits are not theoretical, but real. She referenced the briefs submitted by major American businesses, high-ranking retired officers and civilian leaders of the United States military. According to Justice O'Connor, the competitiveness of American businesses in today's increasingly global marketplace "can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[274] In terms of the military, Justice O'Connor observed, "[T]he primary sources for the Nation's officer corps are the service academies and the Reserve Of-

271. *Id*. at 2339.
272. *Id*.
273. *Id*. at 2339-41.
274. *Id*. at 2340.

ficers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities."[275] Quoting from Amici Curiae Brief 27, O'Connor noted, "[T]he military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admission policies."[276] She added that "it requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective."[277] Finally, Justice O'Connor held that the University of Michigan Law School admission program met the requirement of being narrowly tailored because it provides for individualized consideration of each and every applicant, arguing that race conscious admissions policies must be limited in time.[278] The durational requirement "can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity."[279] Justice O'Connor claimed race conscious measures "are potentially . . . dangerous."[280] In the end, Justice O'Connor concluded the Equal Protection Clause does not prohibit the University of Michigan Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.

In his dissent, Justice Thomas argued that the law school's admissions policy stigmatized African Americans as being inferior and lacking the capacity to achieve. "I believe African Americans can achieve," contended Justice Thomas, "in every avenue of American life without the meddling of university administrators."[281] Justice Thomas argued, "[W]hen African Americans take the highest places of government, industry and academia, it is an open question whether their skin color played a part in their advancement. The question itself is the stigma."[282] Justice Thomas indicated that the race conscious policy failed to meet the compelling interest of strict scrutiny: (1) national security; and (2) remediating past racial discrimination. In his

275. *Id*.
276. *Id*.
277. *Id.*
278. *Id*. at 2346.
279. *Id*.
280. *Id*.
281. *Id.* at 2350 (Thomas, J., concurring in part and dissenting in part).
282. *Id*. at 2362.

view, there was no real distinction between the educational benefits of racial diversity and racial balancing. Justice Thomas seemed enormously bothered by the elitism of the University of Michigan Law School. Justice Thomas, also, pointed to research that supported the view that educational diversity hinders learning among African Americans which suggests that African Americans attending historically Black public colleges and universities reported higher academic achievement than those attending predominantly white colleges.[283] Justice Thomas questioned the system of selective admission, discussing how the system was utilized to restrict the number of Jews. Justice Thomas dismissed the factor that the opportunities of African Americans were so depressed that there was no need to employ a selective admission procedure to restrict the admission of African Americans. He also objected to the present day LSAT on which African Americans tend to perform poorly. Justice Thomas insisted, "[T]he Law School's continued adherence to measures it knows produces racially skewed results is not entitled to deference by this Court."[284] Quoting Justice Harlan's dissent in *Plessy v. Ferguson*, Justice Thomas advanced the color-blind argument, "[O]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens."[285]

CONCLUSION: THE CLASH OF CULTURES

In this Article, the clash of cultures has been conceptualized in terms of two broad categories: (1) the culture of racial progressive gradualism; and (2) the culture of racial diversionary standpatism. *Brown v. Board of Education* constitutes one of the first instances in which an American institution actually tackled the cultural basis of racism and racial discrimination. During oral arguments, it was clear that the justices and counsel for and against the constitutionality of segregation understood the probable impact of the *Brown* decision on racial symbols, values, attitudes, and traditions of the south and more generally of America. But, then, few persons were prophetic enough to grasp fully the depth and ways in which the *Brown* decisions would clash with the culture of the white supremacy embedded and reflected in the system of Jim Crow.

283. *Id*. at 2358.
284. *Id.* at 2350.
285. *Id*. at 2365.

In *Brown v. Board of Education*, the Supreme Court instituted a paradigmatic departure from the separate but equal doctrine constitutionalized in *Plessy v. Ferguson* and the historical processes that governed race and race relations in America. The separate but equal doctrine and historical processes were premised on inferiority and superiority of African Americans and Whites. Both the inferiority of African Americans and superiority of Whites were anchored in the ideologies of racism and liberalism that were allies in the denial of freedom, individualism, equality, and self-worth to African Americans. Early in the cultural-history of America, the institution of slavery, and other forms of racial discrimination against African Americans were justified in biological explanations and divine creation. Even today, elements of these explanations resonate in the values, beliefs and attitudes of some Americans.[286]

In *Brown*, the Supreme Court gave constitutional footing to the culture of racial progressive gradualism which has the following attributes: (1) the salience of societal, historical, and present-day racism and discrimination in shaping the interactions between African Americans and Whites; (2) the necessity of an active role of government, especially the Federal government, in the disestablishment of the values of racism and the inequalities premised on white supremacy and segregation; (3) the employment of race conscious measures and terminology to describe and address the values, significations and traditions that advantage Whites and disadvantaged African Americans; and (4) an emphasis on the harmful and persistent consequences of racism and its expressions on the lives of African Americans. Congress and the President gave support to the culture of racial progressive gradualism in the 1960s through the efforts of the Kennedy and Johnson administrations. The Civil Rights Act of 1964 reflected the triumph of *Brown* and its perspective.

However, just as *Brown* clashed with the culture of Jim Crow and its White supremacy values and racial inequalities, a counter-culture movement emerged in the 1960s that opposed *Brown*'s culture of racial progressive gradualism. This counter-culture, which is referred to as the culture of racial diversionary standpatism, demonstrates the interconnection of culture, party and electoral politics, policy and the structure of government. The counter-culture movement tapped the "White backlash" that resulted from the Civil Rights Movement, and

286. Bonilla-Silva, *supra* note 117; Susan Welch et al., Race and Place (2001).

the passage of the Civil Rights Act of 1964, as well as the desire of supporters of white supremacy and segregation to maintain those traditions. The strategy of Goldwater in 1964 provided the basis and thrust for the culture of racial diversionary standpatism.

The elements of the culture of racial diversionary standpatism include: (1) a minimalist approach to federal and governmental power; (2) a conciliatory disposition to the interests and conveniences of Whites and to the cost of change to the system; (3) the move from biological inferiority of African Americans to the biologization of culture; and (4) the avoidance of any direct reference to race or racial terminology in the discussion of racism and racial discrimination.

Over the past forty years, there has been a persistent cultural clash between the culture of racial progressive gradualism and the culture of racial diversionary standpatism. The Supreme Court has been an active participant in the clash of these two cultures. The decisions of the Supreme Court, since the 1970s, have tended to promote the interests that support the culture of racial diversionary standpatism. This does not, however, mean that there have not been decisions that advance interests that favor the culture of racial progressive gradualism. Even so, the tenor of appointments to the Supreme Court, and the doctrines and tests that emanate from the Court, tend to undermine the culture supported by *Brown* and subsequent decisions of the 1950s and 1960s.

In conclusion, this research effort has given us insight into the connection between racism and liberalism and the pattern of interaction between African Americans and Whites, the effects of the Supreme Court and other governing institutions on the racial culture of America, and the persistence and survivability of cultural values, attitudes, traditions, symbols, inequalities, and significations over the history of this nation.