

Harlan's Dissent: Citizenship, Education, and the Color-Conscious Constitution



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In his dissent in Plessy v. Ferguson, Justice John Marshall Harlan wrote, “Our constitution is color-blind, and neither knows nor tolerates classes among citizens.” Racial conservatives have argued that Harlan’s dissent should invalidate policies that partially redress the historical injuries inflicted on African Americans. This article contends that the concept of colorblindness misstates Harlan’s central claim. His dissent insisted black Americans are entitled to the full fruits of citizenship. This rearticulation reveals that race-conscious policies, particularly within public education, fulfill, rather than undermine, Harlan’s primary objective of defending black citizenship. The article shows that racial conservatives’ colorblind ideology emerged as a strategic response to their legal defeats over segregated schools and to attack affirmative action. The Supreme Court’s later use of colorblind principles is contrasted with empirical evidence of the efficacy of color-conscious pedagogies within schools. The recent Gary B. v. Whitmer case highlights the linkages between full citizenship and race-conscious pedagogies.

Keywords: colorblind Constitution, desegregation, integration, citizenship, culturally relevant pedagogy, affirmative action, John Marshall Harlan

The notion of colorblind justice is—at this historical moment—ludicrous. The murders of George Floyd, Breonna Taylor, and Ahmaud Arbery—and a long, long list of others—have sparked massive protests over police violence. These murders, the protests, and the violent reaction of police to those protests all give lie to the notion that justice is administered equally to black, brown, and white. Within the confines of the legal system, this structural racism produces gross inequities not only in the experience of police violence but also in puni-

tive fines, incarceration, solitary confinement, and capital punishment. *Colorblind* is perhaps the least accurate way to describe the justice system. A deep and rich literature documents these disparities and their causes (Alexander 2012; Butler 2018). A central aim of this issue is to map the ways that the *Plessy* decision has sustained and entrenched the systemic racial injustice and racism that structures much of social, economic, and political life in the United States. Whether the issue is redlining and its health effects (Reece 2021, this issue), the dis-

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enfranchisement of voters (Shah and Smith 2021, this issue) or the use of within-school tracking to maintain segregated classrooms (Francis and Darity 2021, this issue), the effects of *Plessy* have been anything but colorblind.

Nonetheless, since the 1970s, racial conservatives have advanced the notion that colorblindness is the best way to advance equality in the United States. For many racial conservatives, the ideal of a colorblind legal system has an appeal that stems from notions of fairness and impartiality before the law. They may concede that we are far from achieving it but contend that colorblindness should guide our development of social policy. To treat people equally as individuals, they argue, we must ignore the racial identities of citizens (and non-citizens) in our policymaking. In a historical sense, this turn to colorblindness was a strategic retreat by segregationists and architects of the post-*Brown* Massive Resistance. In the face of the accomplishments of the civil rights movement, segregationists and others turned to the language of colorblindness to argue against affirmative action, in favor of a greater reliance on market mechanisms to drive out racist practices, and against policies aimed at compensating, in some fashion, African Americans for the hundreds of years of enslavement, labor and land theft, and denied social, economic, and political opportunities.

Almost without fail, these racial conservatives invoked Associate Justice John Marshall Harlan's dissent in *Plessy v. Ferguson* (1896) as an exemplar of a "colorblind" constitutional theory.¹ Known as the Great Dissenter for his dissents in the *Civil Rights Cases* (1883) and in *Plessy*, Harlan took stances that cut through the racial hypocrisy and double standards of the post-Reconstruction Era.² It is, undoubtedly, a cruel irony that Harlan's courageous dissent in *Plessy v. Ferguson* has since the 1970s been deployed to thwart the implementation of policies that might undo some of the long-lasting effects of the majority opinion in *Plessy v. Ferguson*.

In the second half of the twentieth century, in the aftermath of the civil rights movement, racial conservatives—who were opposed to affirmative action and an activist civil rights enforcement regime, more generally—strategically adopted Harlan's use of the term *colorblind* to simultaneously oppose segregation and the steps governments were taking to reverse it. In so doing, they explicitly relied on social inequality generated by hundreds of years of repression to preserve a racial hierarchy in the United States. This conservative effort has shifted not only public rhetoric but also doctrine on the Supreme Court. Since the late 1970s, justices opposed to the use of explicit racial categories in social policy have used the concept of colorblindness to reverse affirmative action in public-sector employment and contracting and nearly prevented the use of race in admissions decisions in competitive universities and colleges. It has been used most recently to prevent school districts from voluntarily using race to increase racial integration within schools.³

This article seeks to understand the legacy of *Plessy* by exploring the reception of Harlan's dissent, first examining carefully the basis on which Harlan ruled against Louisiana's Jim Crow law and then exploring the reaction of segregationists to the advances in civil rights in the mid-twentieth century—particularly as the Supreme Court's focus shifted from ending school segregation to requiring school integration. The article argues that Harlan's dissent is best understood as a defense of the rights of citizenship rather than an application of the Equal Protection Clause. Shifting our understanding of Harlan's dissent turns the focus away from discriminating or treating individuals differently on account of race and toward fully recognizing African American citizenship.

In reality, Harlan's use of the term *colorblind* was secondary to his focus on the meaning and content of citizenship, which was the central analytical point of the opinion (Aleinikoff 1992). As Alex Aleinikoff (1992) notes, Harlan's

1. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

2. *Civil Rights Cases*, 109 U.S. 3 (1883).

3. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007).

primary objection to the Louisiana statute was its preservation and extension of a second-class citizenship for anyone who was not white. Harlan's emphasis on citizenship rather than unequal treatment shifts the frame on the use of race within public policy. Applying Aleinikoff's perspective shows that Harlan was less concerned with the use of race in public policy (that is, the practice of not being colorblind in policymaking) than with ensuring that African Americans enjoyed the full fruits of U.S. citizenship. If the popular metaphor of the colorblind Constitution is one of the legacies of Harlan's dissent in *Plessy v. Ferguson*, it stems, in fact, from a misreading of the dissent and an explicit political campaign in the 1960s and 1970s to use colorblind logics to stymie or halt material progress on civil rights for African Americans. Such use has also made suspect the use of race to promote better educational outcomes for children. By examining how pedagogical practices within schools might use race, as well as reviewing the social science on the effectiveness of these pedagogies, this article seeks to show the increasing value of color-conscious policies within education and how Harlan's dissent in *Plessy* can help evaluate their constitutionality under a theory of full citizenship.

The recent case of *Gary B. v. Whitmer* provides an opportunity to evaluate how Harlan's concern for full citizenship translates into a claim for an effective and relevant education.⁴ In *Gary B.*, a three-judge panel of the Sixth Circuit Court of Appeals found that the learning conditions in five Detroit public schools violated the U.S. Constitution, based on the theory that literacy is essential to the ability to exercise one's citizenship. Although this ruling was quickly vacated (and later dismissed) by the full Sixth Circuit, it was the first time a federal court had ruled that a federal right to education existed. Although no longer binding law, the decision in *Gary B.* highlights the linkage between effective citizenship and schooling, giving credence to policies that use race and ethnicity as

a pedagogical strategy to connect student identity to the educational task.

HARLAN'S DISSENT, FULL CITIZENSHIP, AND EQUAL PROTECTION ANALYSIS

Associate Justice Henry Billings Brown's majority ruling in *Plessy v. Ferguson* drew on a number of judicial approaches to segregation prevailing at the time, but did so in a way that elided the central claim of Homer Plessy. According to historian Charles A. Lofgren, the decision was "to put it charitably, obscure" (1987, 175). Jumbled and exhibiting faulty logic, Brown's ruling hung on the reasonableness of the racial classification used to separate whites and blacks in Louisiana railcars: "Laws permitting, and even requiring, [the] separation [of the races] in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power."⁵

This understanding of the reasonableness of state-mandated segregation relies on a formalism that neatly delineates legal treatment of African Americans and their social status. For Brown, the two are unconnected: "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."⁶

The law, in Justice Brown's view, does not generate inequality; instead, African Americans' perception of the law creates inequality. To not put too fine a point on it, Brown's hard and fast formalist separation between the legal and social spheres amounts to a kind of constitutional gaslighting in which Brown denies the effects of the law that are visible to anyone on a train in Louisiana in 1896.

When we turn to Harlan's dissent, his sense of frustration is palpable, but even as he is chal-

4. *Gary B. v. Whitmer*, 957 F. 3d 616 (2020).

5. *Plessy*, 163 U.S. at 544.

6. *Plessy*, 163 U.S. at 551.

lenging the effects of the law, he also maintains a formal division between law and social relations. In Harlan's view, we cannot allow the social inequality to construct a legal inequality. Thus his dissent echoes Brown's formalism: "In view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."⁷ Harlan's dissent rests in part on a legal formalism that forces public actors to hold reality at bay, to ignore the lived realities of inequality within the American experience, and to grasp onto a strict separation between public, legal categories and private, social standing.

The analytical problem of viewing Harlan's position as merely advocating colorblindness is that colorblindness as a principle is unable, by itself, to overcome the distinctions between legal and social inequality. In this sense, formally equal treatment that meets the colorblind test entrenches and maintains the social inequality that African Americans' prior legal status as slaves created. In short, colorblindness enables equality to be used to defeat equity.

One possible way out of this box is what Reva Siegel (2004) calls the antisubordination tradition of Fourteenth Amendment jurisprudence. In her discussion of the politics surrounding the remedial phase of the *Brown v. Board of Education* decision, Siegel defines the antisubordination principle as "the conviction that it is wrong for the state to engage in practices that enforce the social status of historically oppressed groups" (2004, 1472–473). Subordination, in this view, rather than the act of classification itself constitutes the violation of the Equal Protection Clause.

A third way to approach Harlan's dissent is through the lens of citizenship. Alex Aleinikoff (1992) makes a compelling argument that Harlan's dissent is best understood less as an argument against the use of race to discriminate against African Americans and more as a claim

that state laws cannot deny African Americans the full rights of U.S. citizenship. In fact, Aleinikoff argues, "Harlan never argued that the Equal Protection Clause ought to be understood as establishing a norm of color blindness." He adds that "The dissent is not about the Equal Protection Clause, but rather about the meaning of freedom embodied in the Thirteenth Amendment and the nature and scope of rights inhering in national citizenship as embodied in the Fourteenth Amendment" (1992, 963–64).

From Aleinikoff's perspective, Harlan was focused primarily on the effects of the post-Civil War amendments and the ways that they reshaped the relationship between the states and the federal government. An essential element of that reconfiguration was a robust limitation on the ability of states to take away from African Americans what the first sentence of the Fourteenth Amendment provided to slaves recently emancipated by the Thirteenth Amendment—U.S. citizenship. Thus "the new amendments provided, for the first time, a constitutional definition of citizenship and sought to guarantee that no citizen would be denied those fundamental rights generally recognized as inhering in citizenship" (Aleinikoff 1992, 964). A citizenship perspective on the central claim of Harlan's dissent is important because it changes the way we read the most commonly quoted portions of the dissent. It also opens our eyes to other portions of the dissent that are not as frequently quoted in constitutional law textbooks. In particular, we see that Harlan was less concerned with the differences of treatment and more concerned with the state's efforts to deny rights of citizenship to Homer Plessy. Thus Harlan writes that the Louisiana statute sought "under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. . . . The fundamental objection, therefore, to the statute is that it interferes with the personal freedom of citizens."⁸ The citizens referred to here are African American citizens.

Turning now to the most famous quote from

7. *Plessy*, 163 U.S. at 559 (Harlan, dissenting).

8. *Plessy*, 163 U.S. at 557.

Harlan’s dissent, we can now understand better the significance of the phrase *class of citizens*: “In view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.”⁹

The emphasis in this quote is on the word *citizens*—stated three times in four sentences. For Harlan, the state of Louisiana is attacking a unitary notion of citizenship and endowing some citizens with more rights than other citizens and granting them a greater capacity to realize those rights. When Harlan turns a few lines later to the harms of the Louisiana statute, the cost—to whites and African Americans—of that second-class citizenship is made clear: “What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens. That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.”¹⁰

For Harlan, citizenship is premised on equality, and to enjoy the rights of citizenship is to be equal. The language of colorblindness is not a principle by which we evaluate the kinds of policies that states can adopt. The term was an afterthought, a throwaway line lifted, most likely, from the plaintiff’s brief. The central core of Harlan’s dissent is anchored in the notion that states cannot impair the rights of U.S. citizenship. The wrong lesson to draw

from his dissent is that states must ignore the racial identities of those citizens as it enacts policies.

BROWN AND THE STRATEGIC DEPLOYMENT OF COLORBLINDNESS

In the aftermath of the Plessy decision, the dimensions of “separate but equal” within the realm of education emerged quickly. In 1899, only three years after *Plessy*, the Supreme Court upheld the closure of a black high school in Georgia to pay for two elementary schools for black students. At the same time, the school district kept open the whites-only high school.¹¹ In 1908, the Court further entrenched “separate but equal” when it upheld a 1904 Kentucky statute that barred any school—public or private—from educating black and white students together. The aim of the statute in question was clear enough from its title—“An Act to Prohibit White and Colored Persons from Attending the Same School”—but Justice David Josiah Brewer contended that state police powers to regulate corporations enabled Kentucky to “withhold powers which may be exercised by and cannot be denied to an individual. It is under no obligation to treat both alike. In granting corporate powers, the legislature may deem that the best interests of the state would be subserved by some restriction.”¹² In other words, the power to regulate Berea College, as a corporation, enabled the state to eliminate any integrated schooling within Kentucky.

The story of the fight for African American students and an end to racial segregation in education has been told well (see, among others, Kluger 1976; Patterson 2001; Tushnet 1987; Walker 2018). *Brown v. Board of Education*, a key milestone in that effort, was however both the

9. *Plessy*, 163 U.S. at 559.

10. *Plessy*, 163 U.S. at 560.

11. *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899). This case merits further discussion than space allows here, primarily because Harlan was the author of a unanimous opinion upholding the closure of the black high school. Complicating matters for the Great Dissenter was, most likely, that both white and black high schools were publicly supported tuition schools and that three other private tuition high schools were available to black students. Moreover, the plaintiffs did not seek the maintenance of the black high school, but the closure of the white one, an outcome that would have eliminated public high schools in the county (for a detailed examination of the case, see Connally 2000).

12. *Berea College v. Kentucky*, 211 U.S. 45 (1908) at 54.

product of intense judicial negotiation and compromise and unclear on whether it fully reversed the *Plessy* decision. *Brown* stands, now, as both a hallowed and increasingly hollow landmark in constitutional history, its original moral voice and potentially transformative effects diminished by the Supreme Court's failure to vigorously articulate its scope and meaning in the early years after the decision and a conservative effort in the 1970s and 1980s to reduce *Brown*'s capacity to achieve racial justice in the United States.

A central element of the effort to limit *Brown*'s impact has been a decades-long campaign by racial conservatives to develop and deploy a colorblind constitutional theory, which they claim is inspired by Harlan's dissent in *Plessy v. Ferguson*. Through a strategic retreat on the maintenance of segregation and the advocacy of a colorblind agenda, racial conservatives have limited the ability of *Brown* and race-conscious policies more generally to achieve social and educational equality.

The linkage between *Brown v. Board of Education* and Harlan's dissenting colorblind language began shortly after the opinion was handed down in May 1954. In a lead editorial titled "Justice Harlan Concurring" the *New York Times* proclaimed, "the words [Harlan] used in his lonely dissent . . . have become in effect by last Monday's unanimous decision of the Supreme Court a part of the law of the land." The paper then quoted the colorblind passage and added, "There was not one word in Chief Justice [Earl] Warren's opinion that was inconsistent with the earlier views of Justice Harlan. This is an instance in which the voice crying in the wilderness finally becomes an expression of the people's will and in which justice overtakes and thrusts aside a timorous expediency" (Editorial Board 1954).

Despite the *New York Times*' enthusiastic endorsement of *Brown*, the Supreme Court toed a cautious path as the desegregation cases proceeded in lower courts. Indeed, beyond the *Brown II* decision in 1955 and an emergency or-

der upholding President Eisenhower's use of federal troops to integrate Central High School in Little Rock, Arkansas, the Supreme Court did not issue another school desegregation opinion until the 1968 *Green v. New Kent County* decision.¹³ The momentum for racial justice in the intervening fourteen years came instead from the streets and from Congress, with the 1964 Civil Rights Act and the 1965 Voting Rights Act transforming the national agenda on race. Perhaps emboldened by shifts in public sentiment and support from the executive and legislative branches, the Supreme Court with its *Green* decision finally undertook an energetic and vigorous effort to actively undo the effects of formal segregation.

The High-Water Mark of Color-Conscious School Integration

With *Green* in 1968 and *Swann v. Charlotte-Mecklenburg* in 1971, the Supreme Court focused on reversing the harms of mandatory racial segregation.¹⁴ *Green*, in particular, shifted the burden of proof onto Jim Crow school districts that had not meaningfully integrated to do so immediately. The *Green* decision came out of rural New Kent County, Virginia, which, prior to *Brown*, had operated only two public schools: one for whites and one for blacks. When *Brown* compelled New Kent County to desegregate the two schools, the school system simply allowed students, under a "freedom of choice" plan, to attend either school. Few students elected to exercise this "choice." Writing for a unanimous Court, Justice William Brennan stated that any segregated district at the time of *Brown* was "clearly 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."¹⁵ In short, "school officials have the continuing duty to take whatever action may be necessary to create a 'unitary, nonracial system.'" This was no longer the words of a colorblind logic; policies that were neutral to race—such as school choice systems—had failed to integrate

13. *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430 (1968).

14. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

15. *Green*, 391 U.S. at 437–38.

schools and failed to end the constitutional harm identified in *Brown*. As a result, the only option left available to school officials was to develop a plan that "promises realistically to work, and promises realistically to work now."¹⁶ In the view of Stephen Caldas and Carl Bankston, the *Green* decision marked the beginning of a decade that saw the "greatest extension of judicial power over school districts ordered to desegregate." (Caldas and Bankston 2007, 232).

One element of that power was court-ordered busing for integration. In *Swann*, the Supreme Court approved court-ordered busing to achieve the objective laid out in *Green*: an integration plan that works immediately. *Swann* was perhaps the most far-reaching integration decision because it required the immediate implementation of an effective integration plan that reached throughout metropolitan Mecklenburg County, not just within the City of Charlotte. Further committing the Supreme Court to race-conscious strategies to reverse the constitutional harm it defined in *Brown*, Chief Justice Warren Burger, a Nixon appointee, wrote that "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation."¹⁷ Because Jim Crow school districts had not met the constitutional obligation to their students, "a district court has broad power to fashion a remedy that will assure a unitary school system."¹⁸ In so ruling, Burger gave a green light to federal judges to impose busing plans on any recalcitrant school district.

Significantly, the *Swann* ruling discarded the language of colorblind policymaking in the wake of an ongoing civil rights violation. As Burger noted in a companion case, the Mobile, Alabama, school board "argued that the Constitution requires that teachers be assigned on a 'color blind' basis. It also argues that the Constitution prohibits district courts from using their equity power to order assignment of

teachers to achieve a particular degree of faculty desegregation. We reject that contention."¹⁹ By turning away from the colorblind logic, the *Green* and *Swann* rulings defined a much more energetic role for federal judges in school desegregation cases. As a result, the racial patterns of southern school districts changed dramatically in a short time frame. In 1967, prior to the *Green* decision, roughly 17 percent of black schoolchildren in the South attended school with whites. By the 1972–1973 academic year, that figure was over 91 percent (Rosenberg 1991, 50, table 2.1). In roughly six years, the Supreme Court's color-conscious approach had brought the South substantially into compliance with the *Brown* ruling.

Another area in which the impulses of the Warren era continued to thrive was language rights for linguistic minorities. In 1974, the Supreme Court broadened the scope of the Civil Rights Act by ruling that the City of San Francisco had violated the civil rights of some 1,800 students who spoke only Chinese by failing to provide them with instruction (whether English language courses or bilingual instruction) that they could understand. As Justice William O. Douglas wrote, "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."²⁰ The Court explicitly declined to decide that San Francisco's practices violated the Fourteenth Amendment's Equal Protection Clause, but instead declared the school district to be in violation of the 1964 Civil Rights Act for engaging in discrimination based "on the ground of race, color, or national origin."

Congress codified this judicial expansion eight months later when it enacted the Equal Educational Opportunity Act. For English learners, the key element of this wide-ranging law was its mandate that "No State shall deny equal educational opportunity to an individual

16. *Green*, 391 U.S. at 439.

17. *Swann*, 402 U.S. at 15.

18. *Swann*, 402 U.S. at 16.

19. *Swann*, 402 U.S. at 19.

20. *Lau v. Nichols*, 414 U.S. 563 (1974) at 566.

on account of his or her race, color, sex, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.”²¹ This statutory language has provided the basis for most if not all of the litigation aimed to advance the rights of English learners in U.S. schools since the mid-1970s. The challenge for litigators is that the definition of what constitutes appropriate action has been variously interpreted by courts and has, in general, been exceedingly deferential to state and local authorities as they design educational programs for English learners.²²

The Colorblind Conversion of a Segregationist

Much of the Supreme Court's success at ensuring compliance with *Brown* by the early 1970s was due to the abandonment of school segregation as a rallying cry for southern politicians. In the immediate wake of *Brown*, state legislatures undertook a campaign of Massive Resistance, beginning in Virginia and quickly spreading throughout the South (Lewis 2006). James Kilpatrick, an indefatigable editor at the *Richmond News Leader*, stood at the center of Massive Resistance, inveighing readers and politicians alike to pursue more obstructionist measures. Kilpatrick began his campaign against *Brown* with a revival of the states rights theory of “interposition” advanced by James Madison, Thomas Jefferson, and John Calhoun. That theory contended the states held a veto over unconstitutional actions by the federal government, thereby protecting the liberty of the people. In Kilpatrick's hands, *Brown* was a resumption of the war of northern aggression against a southern way of life. An unreconstructed segregationist, he claimed Earl Warren's decision was “a revolutionary act by a judicial junta which simply seized power, and thus far has managed to get away with its act of usurpation” (Hustwit 2011, 647). In a seemingly endless series of editorials, Kilpatrick railed

against school desegregation, and, in the view of one historian, his editorial campaign in Richmond “helped ignite resistance to civil rights and the Court in Virginia and the South” (Hustwit 2011, 647).

His media savvy and stinging pen brought Kilpatrick to the attention of other, northern conservatives who used his states rights perspective in their broader effort to limit the role of government, particularly on civil rights. William F. Buckley sought out Kilpatrick to write for the *National Review* on civil rights and the Constitution; the intellectual veneer of “interposition” made the fire-breathing segregationist palatable to Buckley and other conservatives who offered him platforms in their own publications.

Kilpatrick's role as a popularizer for southern intransigence brought him considerable fame and career success as he continued to write on race and equality into the 1960s. But as the historian William Hustwit notes, Kilpatrick demonstrated a remarkable ability to adapt rhetorical positions while remaining committed to the objective of preserving a racial hierarchy. Having lost the battles of interposition and Massive Resistance, Kilpatrick sought out the language of colorblind policymaking as a means to achieving the same objective. As he grappled with the intellectual and logical puzzle of how to ensure that African Americans received the short end of the stick while abandoning the explicit language of white supremacy, Kilpatrick wrote the following to a friend and collaborator:

I think your idea of emphasizing the “difference” instead of the “inferiority” of the Negro race is absolutely sound. . . . Like yourself, I believe the Negro race is inferior, and I don't see how any person who weighs the evidence objectively could come to any other conclusion. Be that as it may, the word “inferior” is semantically bad. It goes with “white supremacy,” which is another phrase difficult to manage in a public opinion struggle. By

21. Pub. L. 93-380, title II, § 204, Aug. 21, 1974, 88 Stat. 515.

22. The Fifth Circuit Court of Appeals articulated a set of criteria by which to evaluate the appropriateness of state policies for English learners in 1981 in *Castañeda v. Pickard* 648 F.2d 989 (5th Cir. 1981), but subsequent court decisions have eroded those standards (Haas and Gort 2009).

dwelling upon the "difference" between the races, we can establish the case for inferiority without involving ourselves in a value judgment. (Hustwit 2011, 652)

In his 1962 book, *The Case for School Segregation*, Kilpatrick contended that the differences between African Americans and whites were numerous and deep, ranging from the nature of black family to lousy test scores. The differences established, Kilpatrick could then make the argument that race-conscious governmental policies that aided African Americans were simply an effort to cover up for those irredeemable differences. As Hustwit writes, "Kilpatrick put the task of creating equality and progress on blacks and nudged them to fulfill the American Dream without government aid. . . . The freedom to rise to unequal levels would determine whether blacks could compete in an open society" (2011, 653).

This shift marked a change in Kilpatrick's public rhetoric, away from the fire-breathing segregationist and toward the colorblind policy wonk. More important, his shift shaped the language of twentieth-century conservatism more broadly. "Kilpatrick contributed to mainstream political dialogue with the conservative argument that many of the most venerated civil rights laws and accomplishments were, in fact, corrupt, dangerous, unlawful, and un-American because they impinged on American individualism and freedom" (Hustwit 2011, 645). By the late 1970s, the public tenor of Kilpatrick's commitment to colorblind rhetoric sounded almost charitable and big-hearted: "I spent years as a Southern editor, filled with old-fashioned Southern racial prejudices, fighting to preserve segregation in our schools. Then came the light. Today I am just as incensed as my Yankee critics were incensed 30 years ago at what seems to me the virulent evils of a pervasive racism throughout our society. That men and women must be hired, promoted, educated, transported, assigned or not assigned solely because of the color of their skin strikes me as indefensible" (666).

In private, however, a more revealing posi-

tion emerged in his letters. Hustwit summed up Kilpatrick's colorblind "transformation": "During the 1970s, he hid his distaste for integration in the respectable language of color blindness to defy racial egalitarianism and diversity, but the change was a façade."

THE SUPREME COURT MOVES TOWARD COLORBLIND CONSTITUTIONALISM

Kirkpatrick was not the only public figure undergoing a transformation on race in the early 1970s. After the high-water mark of judicial commitment to integration in *Swann*, the Supreme Court began to back off aggressive judicial strategies to address continuing segregation. After a 1973 case upholding a finding of segregation in Denver, the Court began to tame the ambitions of its education rulings.²³ In particular, the 1974 Supreme Court's Detroit case, *Milliken v. Bradley*, saw the Court begin to unwind its commitment to a more racially equal school system.²⁴ The plan at issue in *Milliken* reached beyond the confines of the city limits of Detroit. Because of white flight, too few white students remained within Detroit public schools to effectively integrate the schools. As a result, the federal district court drew up a metropolitan-wide busing plan that encompassed fifty-three suburban school districts, in addition to Detroit. Although the plan promised to effectively integrate the metropolitan area, it also engendered wide opposition.

The plaintiffs contended that because the state of Michigan created school district boundaries, it, ultimately, was responsible for the segregation of students, but the Supreme Court rejected this logic, contending that the fifty-three surrounding school districts were not subject to the court-imposed remedy because they committed no acts of discrimination themselves. The earlier efforts by Detroit public schools to hold onto its dwindling white student population were the only judicially cognizable acts of discrimination the lower court could address.

The 5–4 *Milliken* decision effectively prevented courts from addressing metropolitan-wide area segregation. Arguing that an interdis-

23. *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973).

24. *Milliken v. Bradley*, 418 U.S. 717 (1974).

trict remedy for an intradistrict violation too roughly abrogated the traditions of local control in U.S. schooling, Chief Justice Warren Burger handed down the first post-*Brown* decision that found black plaintiffs on the losing end of the decision.

A key factor in the Supreme Court's retrenchment on school integration was the growing influence of Nixon appointees on the high court. In particular, Associate Justice William Rehnquist, appointed in 1971, began to argue more forcefully for colorblind interpretations of policy in order to limit the scope of school integration remedies. In fact, shortly after his confirmation, Rehnquist was the lone dissenter in the *Keyes* case out of Denver, arguing that the unofficial racial gerrymandering undertaken by Denver school officials did not meet the same level of state action as the dual systems invalidated in *Brown*. In that dissent, he also sought to restrict the scope of the *Green* ruling, particularly its language on an "affirmative duty to integrate."²⁵

Later, during the Reagan and Bush presidencies, Justices Antonin Scalia and Clarence Thomas joined Rehnquist on the Court, and advanced firm originalist views that race-conscious policies violated the Constitution. These conservative justices all sought to limit the ability of Congress and the judiciary to employ race-conscious strategies in the effort to protect civil rights. According to Brad Snyder, this power to reconstruct the civil rights framework in the United States came about as conservatives made a strategic retreat on the moral and legal validity of *Brown v. Board of Education*. After the political mobilization of the civil rights movement and the legal and statutory civil rights victories, many conservative judicial nominees came to the same conclusion as Kilpatrick: fighting *Brown* was a lost cause. In his examination of the Supreme Court confirmation process, Snyder contends that the failed Nixon appointments of Clement Haynsworth and G. Harrold Carswell signaled to conservatives that accepting the fundamental legitimacy of *Brown* was required to secure confirmation. By accepting *Brown* as canonical, in Senate tes-

timony, and simultaneously employing a colorblind framework to implement it, legal conservatives could both gain influence and limit the scope of the new civil rights regime. As Snyder writes, "Rehnquist was the first conservative to recognize that the rules of the game had changed—agreeing with the validity of *Brown* was the only way to participate in the constitutional debate and to get confirmed to the Supreme Court. In so doing, he began the widespread endorsement of *Brown* by conservatives" (Snyder 2000, 449).

The bargain had limited payoffs at first for racial conservatives because Nixon appointees did not always have the votes to overcome the remaining Warren-era justices. Still, with public opposition growing against court-ordered integration in the North and West, the Supreme Court declared in 1973 that education is not a fundamental right as it ruled that extreme funding inequalities in Texas's system of financing public education did not violate the Equal Protection Clause.²⁶ As the 1970s wound down, the Supreme Court became increasingly reluctant to expand its role in adjudicating race-based discrimination in schools. Over the course of the 1980s, as Reagan-era appointees joined the Court, Justices Clarence Thomas and Antonin Scalia explicitly employed colorblind language to express their opposition to an assertive civil rights enforcement regime. Prior to his appointment to the Court, Clarence Thomas penned an originalist argument for incorporating the Declaration of Independence into constitutional interpretation. Noting that the phrase *colorblind Constitution* does not appear in Supreme Court rulings after *Plessy* until the 1961 sit-in case of *Garner v. Louisiana*, Thomas wrote, "Justice Harlan's reasoning, as we understand him, provides the best basis for the Court opinions in the Civil Rights cases from *Brown* on" (Thomas 1987, 922). As Snyder summarizes it, "In enforcing *Brown*, the conservatives never overruled *Green* and reinstated freedom of choice plans. They did, however, reduce the power of federal courts over the decisions of local school boards. They also limited the reach of *Brown* so as to leave *de facto*

25. *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973) at 256–58.

26. *San Antonio Independent School District v. Rodriguez* 411 U.S. 1 (1974).

school segregation undisturbed. . . . By linking the color-blindness theory of the elder Justice Harlan's dissent in *Plessy v. Ferguson* with their modern interpretation of *Brown*, the conservatives transformed the laws governing race relations in this country" (Snyder 2000, 465).

THE COLORBLIND REFORMULATION OF AFFIRMATIVE ACTION

This influence was perhaps most sharply seen in the realm of affirmative action. Although a full accounting of the development of related law and the conservative reaction to it is beyond the scope of this article, a brief examination of how legal conservative rhetoric shaped Supreme Court doctrine on affirmative action during the era of Nixon, Reagan, and Bush appointments highlights how the Supreme Court's enduring struggles over affirmative action stemmed from an inability to reconcile two commitments. First, the Court has persistently recognized that racial diversity within higher education is a positive good that leads to better educational outcomes and, second, has repeatedly insisted that applications to competitive institutions of higher education must be evaluated individualistically. Colorblindness as a trope within affirmative action has been used to alleviate that tension, but it can do so only by ignoring the ways that the existing pre-K-12 pipeline is wholly inadequate to meeting the demands of both commitments simultaneously.

Affirmative action in higher education is relevant only for the roughly fifty colleges and universities that employ highly competitive criteria for undergraduate admission, given that they compete for approximately twenty-five thousand students each year. Of course, those highly competitive universities are elite and set up their students for both lucrative and high-status careers. If these institutions were to employ only colorblind metrics, such as standardized test scores, the result would be gross racial disparities in elite university enrollment. According to an examination of SAT test results from 2005, the disparities in standardized college admission test scores were staggering, in both percentages of African Americans scoring in the top tier and in the absolute number of students. Looking at the absolute number of

African American students who scored 750 on either the math or verbal SAT in 2005 (the average score of students entering the most competitive institutions), one study found "that in the entire country 244 blacks scored 750 or above on the math SAT and 363 black students scored 750 or above on the verbal portion of the test" (*Journal of Blacks in Higher Education* 2005). To put those numbers in perspective, Harvard's entering class in the fall of 2005 was 1,655 students (Harvard University 2006, 6). If Harvard enrolled all of the African American students in the nation who scored at or above the mean math SAT score of their entering class in 2005, the percentage of African American students in that class would be 14.7 percent—roughly representative of the percentage of African Americans in the nation. Of course, none of the other approximately forty-six institutions that the Pew Research Center identified as "extremely competitive" would have any African Americans enrolled, assuming their mean scores were the same as Harvard's (Desilver 2019). Little to no evidence indicates that these test score disparities have changed in the intervening fifteen years. In short, the pre-K-12 pipeline for African American students is simply inadequate for the task that a presumption of colorblindness requires.

Colorblindness articulates an expectation of individualized fairness, but it drastically reduces the collective access of students of color to higher education, particularly black students. In 1995, the Regents of the University of California banned the use of race-based affirmative action across all of the system's campuses. A year later, a statewide ballot measure (Proposition 209) banned all race-based affirmative action and financial aid at all public universities in the state. Both bans took effect at the undergraduate level in 1998. The following year, "At UC Berkeley and UCLA there were dramatic declines of 55% in admission offers to African Americans" (Kidder and Gándara 2015, 15). Although African American California high school graduates were nearly 8 percent of all statewide graduates in 1998, they constituted only roughly 3 percent of all UC admitted students that year (16).

In *Regents of the University of California v. Bakke*, the Supreme Court first articulated the

notion that diversity in higher education was a sufficiently compelling justification for public officials to consider race within the admissions process.²⁷ Despite numerous and repeated efforts to reverse race-based affirmative action, that compelling rationale has held firm since *Bakke*. Racial conservatives have been more successful, however, at striking down race-based affirmative action plans in which the method of considering race was not individualized. That is, any use of a race-based criteria in college admissions must employ a holistic, individualized review of an applicant's qualifications. This individualized assessment of the qualities that a student may bring to campus has been a hallmark of constitutionally acceptable affirmative action programs since *Bakke*, with the narrowly tailored requirements becoming increasingly stringent over time.

Indeed, both the efforts to narrow the technical ways universities use race in their admissions decisions and the elimination of race-based considerations in governmental hiring and contracting reflect the sentiment expressed by Justice Antonin Scalia in *Adarand Constructors v. Peña* that "under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual."²⁸ The effort by Scalia, and judicial conservatives more broadly, to discredit the notion that race-based policymaking can be used to compensate for diffuse and widespread societal discrimination rests fundamentally on obscuring the ways that the "individual" talents of those who are rewarded are, simultaneously, the product of that very societal discrimination Scalia is saying is irrelevant. In a competitive environment, one's social advantages accrue within one's individual skills and talents. An assertion that individual merit is divorced from social context is a variant of the logic of colorblindness, particularly when the social construction of race dis-

tributes opportunities so surgically and unequally to whites and blacks in the United States.

THE TRIUMPH OF COLORBLINDNESS AND THE END OF BROWN

This logic is carried to its conclusion in the 2007 case of *Parents Involved in Community Schools v. Seattle School District No. 1*.²⁹ In conjunction with a companion case out of Louisville (*Meredith v. Jefferson County Board of Education*),³⁰ the Seattle case tackled the question of whether school districts could use race to promote greater school integration, absent a finding of official discriminatory conduct. In effect, can a school district promote integration as a social good rather than as a remedial effort to address past discrimination? The answer from a bare majority of the Supreme Court was, in a word, no.

In Seattle, the issue was the use of race as a tiebreaker to determine admission to the city's array of open-enrollment high schools. If a school had more applicants than capacity, then a student's race (after sibling status and residence within the school neighborhood) would be used to promote greater racial diversity within schools. For example, if two students sought admission to a majority-white high school that was at capacity, to promote diversity under the Seattle plan the nonwhite student would have preference over a white student. The relative criterion is the student's racial identity and whether that identity reinforces the existing racial demographics of the school.

There are multiple, legitimate, policy objections to this scheme. The white-nonwhite racial designation was ham-handed and ignores real and powerful differences among racial groups and experiences. The distribution of white and nonwhite students across the city of Seattle meant that high schools in the north end of the city had the largest percentages of white stu-

27. *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978) at 311–12; *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. of TX at Austin*, 570 U.S. 297 (2013) (*Fisher I*); *Fisher v. University of Texas at Austin*, 579 U.S. ___ (2016) (*Fisher II*).

28. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) at 239.

29. *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 551 U.S. 701 (2007).

30. *Meredith v. Jefferson County Board of Education*, 548 U.S. 938 (2006).

dents and that black and brown students were more likely clustered in the southern part of Seattle. Given Seattle’s hour-glass geography and the horrific traffic bottlenecks that ensue, transportation between north and south Seattle would inevitably limit the capacity of this plan to generate meaningful integration, rendering the policy ineffectual. Despite these deficiencies, the Supreme Court’s majority focused on the use of student racial identity to make decisions about enrollment. After quoting Justice Harlan’s dissent in *Plessy*, Chief Justice John Roberts concluded his opinion in the 5–4 case by contending that “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”³¹ Roberts’s opinion does not acknowledge that to stop discriminating on the basis of race—given the racial geography of Seattle—meant that Seattle’s schools would be more segregated, resulting in more unequal schooling apportioned on the basis of student skin color.

This use of colorblind logic locates the harm of race-based decision making not in the consequences of public acts, but in simply fostering the ability of governments to see race and to use race as a basis for public policy. To do so, the argument goes, is to embed racism into the design of public policies. The use of race, in other words, is fundamentally and inevitably racist and must be avoided by public actors at all costs. As Chief Justice Roberts writes in *Parents Involved in Community Schools*, quoting the *J.A. Croson* case, “Government action dividing us by race is inherently suspect because such classifications promote ‘notions of racial inferiority and lead to a politics of racial hostility.’”³²

As a result of the Seattle case, the Supreme Court’s position in school desegregation cases has moved from one in which school districts must undo the effects of segregation “root and branch” (the language used in *Green* in 1968) to one in which school districts may not acknowledge or use the racial identity of students to combat the massive de facto segregation students confront on a daily basis. The result is a kind of policy paralysis, in which the injury of

racial segregation is imposed on students by anonymous and unknown actors, but school officials are unable to meaningfully address the issue by acknowledging and using the racial identity of students to promote greater racial heterogeneity in schools. In other words, the colorblind logic of public actors effectively perpetuates the very color-aware, de facto segregation that generates educational inequality. The ghost of *Plessy* lives on in the Supreme Court’s adoption of Harlan’s colorblind dissent.

CRITICAL RACE THEORY AND COLOR-CONSCIOUSNESS IN THE CLASSROOM

In a law review article assessing twenty years of scholarship in critical race theory (CRT) and its applicability to a seemingly post-racial Barack Obama presidency, Kimberlé Williams Crenshaw relates that the group of minority scholars that gathered for the first formal meeting of Critical Race Studies in the summer of 1989 “were all veterans, in one way or another, of particular institutional conflicts over the nature of colorblind space in American law schools.” As she writes, there had been “by this time many fights, both within the academy and in society at large, over how far and to what ends the aftershocks of white supremacy’s formal collapse would travel. These tensions were evident in struggles ranging from the raw contestations over schools and public resources in the public sphere to the more refined debates about ‘diversity’ in the walled-off worlds of the nation’s editorial rooms and faculty lounges” (Crenshaw et al. 2019, 58–59).

Informed by their direct experiences and struggles over the hiring of black law professors and admitting black students to law schools, these scholars have over the past thirty years developed a collective body of work that critically examines the nature of race and law in the United States, particularly the dynamics of power and white supremacy. The works are numerous but cluster around a number of central themes: critiques of liberalism, including colorblindness and meritocracy; storytelling and counter-storytelling; critical race feminism;

31. *Parents Involved in Community Schools*, 551 U.S. at 748.

32. *Parents Involved in Community Schools*, 551 U.S. at 746; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469.

race, class, sex and their intersections; revisionist histories and interpretations of civil rights law, among others (for an introduction, see Delgado and Stefancic 2017; for two extensive annotated bibliographies of related works, see Delgado and Stefancic 1993, 1995).

A central aim of CRT is to unsettle the strictly bounded legal categories of race in use within U.S. law and challenge the public-private distinction that allows these definitions to exercise such a potent check on redressing racial and ethnic inequality in the United States. Simultaneously, these authors highlight how multiple dimensions of marginality—particularly gender identity, class, sexual orientation, disability, and language—further distance individuals from the loci of power within legal and social structures, thereby compounding and complicating important questions of privilege and the engagement of questions of racial and ethnic equality. Their central analytical claim is that the normalization of a particular perspective within the law as a universal metric—the reasonable man test, for example—encodes a series of assumptions and statuses that, on examination, fundamentally reveal the narrow, biased, and particularistic views of particular constituents within the legal and social communities. What counts as normal or neutral is not only highly contingent, but also deeply tied to racial, economic, gendered, or linguistic assumptions that often are unwarranted.

As its influence expanded, CRT has found a particularly welcoming reception within the field of education. Educational scholars have fused the analytical insights of CRT with ethnic studies, and stirred in their critical and radical traditions, in particular, the pedagogy of Brazilian theorist Paolo Freire (1970). The resulting framework has in many ways moved beyond critique and devised specific pedagogical strategies, within the policy confines of school systems, that draw on race, ethnicity, and culture to help children learn better. In contrast to colorblind policies, these approaches surface and

acknowledge the ongoing power and force of race. This pedagogical view, however, is less of a static characteristic or status and more of a socially organizing and individually constituting set of practices, habits, and acts that both motivate and constrain actors. These culturally responsive pedagogies and curricula explicitly invoke and utilize the racial identities of students to cultivate student learning.

Gloria Ladson-Billings's foundational article "Toward a Theory of Culturally Relevant Pedagogy" (1995) uses an anthropologist's lens to examine how a teacher's pedagogy might help her forge a relationship with her African American students that aligned with their home and community cultures in a way that could foster academic success. Ladson-Billings fused her research on highly effective teachers of African American students with a deep empirical research base on language and literacy. Together, these two research streams led her to develop a pedagogical approach that embraced and used the cultural awareness and identities of students in the course of building academic skills.³³

Ladson-Billings's work has been central to the emergence of what has become known as asset-based pedagogy (ABP). ABP inverts the conventional understanding of the relationship between academic performance and student backgrounds. Most discourse about academic achievement constructs students of color and poor students as operating under an accumulating load of deficits: their parents' educational backgrounds limit them; their poverty limits them; their home language limits them. In contrast, ABP seeks to use the strengths and assets of all households and communities to connect students to learning opportunities. Heeding Ladson-Billings's call to pay close attention to the race, ethnicity, cultural contexts, and dynamics of students' lives, ABP enables teachers and schools to draw on the racial identities, as well as the home and community environments of students to use as resources and strengths within the project of teaching, rather

33. Ladson-Billings regards "culturally relevant pedagogy" (CRP) as pedagogy that, first, disrupts the prevailing cultural deficit approach (which assumes something is "wrong" with some children that prevents their achieving at a high level) and, second, both affirms students' cultural identities and helps them develop a critical understanding of how inequality is generated (1995, 469).

than viewing these aspects of students’ lives as deficits to be overcome. Although asset-based pedagogy is not limited to the racial and ethnic dimensions of students’ lives, in the contexts of racial, ethnic, and economic segregation of U.S. schools, it represents a deep commitment by public actors (teachers) to acknowledge and utilize the racial and ethnic identities of students to improve learning. It is explicitly and intentionally color aware rather than colorblind—precisely because colorblind policies have helped construct the inequality that students confront.

EMPIRICAL EXAMINATIONS OF THE EFFECTS OF COLOR- CONSCIOUS PEDAGOGIES

Recent research into the efficacy of ABP suggests that these approaches can change student academic outcomes. Although much of the work on the efficacy of asset-based pedagogy has been qualitative and based on case studies, other recent works have sought to use quantitative strategies to examine the effects of ABP on student outcomes.³⁴ Multiple studies provide clear empirical evidence of the efficacy of racially and culturally anchored curricula on student learning, particularly among historically marginalized youth (Cabrera et al. 2014; Dee and Penner 2017; López 2017).

Nolan Cabrera et al.’s 2014 study emerged out of the controversy that arose after the Arizona state legislature banned a Mexican American Studies (MAS) program designed in part to comply with a federal desegregation consent decree that required the Tucson Independent School District to address the educational inequality experienced by Mexican American youth in Tucson. The MAS program—focused on a critical engagement of the literature and history of the greater Southwest—explicitly addressed the historical discrimination of indigenous, Latino, and immigrant communities in Arizona (for an overview of the Mexican American Studies program and its intellectual foundations, see Cammarota and Romero 2014). Ca-

brera summarized the goal of MAS: “Within this framework, the more Latina/o students see themselves and their experiences reflected in the curriculum, the more likely they are to be engaged in school, leading to greater educational success” (Cabrera et al. 2014, 1086–87).

Examining two dependent variables—high school graduation and passing the state-mandated assessment test (AIMS) after an initial failure of the test—Cabrera et al. found that MAS course-taking had significant effects on both dependent variables. Studying the academic outcomes of roughly eight thousand students across four cohorts, the authors found that taking at least one MAS course increased the likelihood of graduation by 9.5 percent, with the likelihood of graduating jumping 16.1 percent for one cohort. The likelihood of passing the state-mandated assessment also increased for those who took at least one MAS class, even for the math assessment (by 8.7 percent), which was not a subject covered in MAS courses. Cabrera et al. found “the MAS students outperformed their non-MAS peers in terms of AIMS passing and graduation despite having 9th- and 10th-grade academic performances that were significantly lower” (2014, 1106).

Thomas Dee and Emily Penner (2017) find similarly encouraging results in their analysis of the San Francisco Ethnic Studies program, using a regression discontinuity analysis. Because the San Francisco Unified School District assigned ninth grade students to an ethnic studies (ES) course if their eighth grade GPA was below 2.0, Dee and Penner could compare their performance with students whose GPA just above 2.0 made them ineligible for the program. The effects of ethnic studies on attendance, ninth grade GPA, and credits earned were striking: “Taking ES increased attendance by 21 percentage points, GPA by 1.4 grade points, and credits earned by 23 credits (or roughly four courses)” (145). Although they were cautious about the interpretation and generalizability of these findings, Dee and Penner conclude that their work aligned with the qual-

34. Many ABP scholars may argue that quantitative approaches are reductive and inapposite to the task of examining how school structures alienate and disenfranchise students. The fact remains, however, that the policy community often gives greater credence—fairly or not—to positivistic accounts that rely on sophisticated modeling techniques.

itative and theoretical work about the power of culturally sustaining pedagogies: “Taken at face value, these findings provide a compelling confirmation of an extensive literature that has emphasized the capacity of CRP to unlock the educational potential of historically marginalized students” (158).

Francesca López (2017) offers another confirmation of effectiveness of asset-based approaches in her study of teacher expectations and practices. She begins with noting that asset-based pedagogies posit that teachers who have a critical awareness of the socioracial history and contexts of their students’ lives can better connect a student’s existing cultural knowledge to the teacher’s instructional practices. In turn, this helps develop students’ academic identities. Using a survey of teacher expectations, beliefs, practices, and critical awareness, as well as student surveys and achievement scores, López examines the connections between these teacher characteristics and student identities and academic performance. Importantly, teacher critical awareness of the historical contexts of marginalized students—in conjunction with high teacher expectations—had a much stronger effect on reading achievement, than high teacher expectations alone: “There is approximately a ½ SD difference in student reading achievement between teachers who have high expectancy but are on the opposite extremes of critical awareness, suggesting that critical awareness abates bias that teachers may unconsciously hold” (2017, 203). In short, the awareness of race and the ability to employ cultural knowledge of one’s students can enable a teacher to grow a child’s reading ability significantly better than not being aware of race and not integrating cultural knowledge of one’s students.

These findings—and those from numerous other studies—highlight a key dimension of our current understanding of educational practices: taking account of race, ethnicity, and cultural contexts of students transforms the educational task and produces results significantly

better than employing colorblind strategies that ignore or deny the salience of race to a student’s world (for an extensive review, see Sleeter and Zavala 2020). Equally important, these color-conscious instructional strategies strengthen the capacity of students to be full citizens of their communities and of their nation. To not engage that sense of racial identity is to reject Harlan’s commitment to governmental policies that respect and fulfill the rights of all U.S. citizens.

CONCLUSION: COLOR-CONSCIOUS EDUCATION AND THE FULL RIGHTS OF CITIZENSHIP

At the end of April 2020, in the case of *Gary B. v. Whitmer*, a three-judge panel of the Sixth Circuit Court of Appeals ruled in an appeal from the Federal District Court in Detroit that the failure of Detroit public schools to ensure that their students achieved minimal literacy skills violated the U.S. Constitution, declaring that students enjoy a “fundamental right to literacy.” While the court rejected the plaintiffs’ equal protection claim, the court did find that the state’s denial to students of a basic minimum education violated a fundamental due process right. As Judge Eric Clay wrote for the majority, “In short, without the literacy provided by a basic minimum education, it is impossible to participate in our democracy.”³⁵ In the course of reviewing the fundamental nature of a minimal level of education, Judge Clay contended, “education has held paramount importance in American history and tradition, such that the denial of education has long been viewed as a particularly serious injustice.” But Clay saved his most forceful language for the rights of citizenship: “every meaningful interaction between a citizen and the state is predicated on a minimum level of literacy, meaning that access to literacy is necessary to access our political process.”³⁶ He added a few lines later, “Our nation’s history of racial discrimination further reveals the historical and lasting importance of education, and the significance of its

35. *Gary B. v. Whitmer*, U.S. Court of Appeals for the Sixth Circuit, Case nos. 18-1855/1871, at 33. Decided April 23, 2020. For the draft opinion, see <https://www.opn.ca6.uscourts.gov/opinions.pdf/20a0124p-06.pdf> (accessed September 15, 2020).

36. *Gary B.*, Case nos. 18-1855/1871, at 42.

modern ubiquity. Education, and particularly access to literacy, has long been viewed as a key to political power. Withholding that key, slaveholders and segregationists used the deprivation of education as a weapon, preventing African Americans from obtaining the political power needed to achieve liberty and equality."³⁷

Like Justice Harlan's dissent, Clay's language here is focused on the power of governmental practices to create tiers of citizenship. By not merely neglecting the education of Detroit schoolchildren, but by ensuring that it is virtually impossible to receive a basic education within the public schools of Detroit, the state of Michigan is assigning the mostly African American students of Detroit to second-class citizenship. Without fundamental and basic skills of literacy, these students will be unable to fully participate within democratic life—let alone economic life.

The ruling by the three-judge panel opened the door for a trial that would litigate the plaintiffs' claims that their newly found federal rights had been violated. That door closed, however, when the state of Michigan settled the case, agreeing to increase funding for literacy programs in Detroit schools by roughly \$94.4 million. After the settlement, the plaintiffs withdrew their claim, but the Sixth Circuit Court of Appeals nonetheless decided, on its own motion, to review Judge Clay's ruling en banc, thereby vacating the decision. The plaintiffs' claim withdrawn, the Sixth Circuit then dismissed the case as moot. In a legal sense, it is as if Clay's opinion was never written. After Clay's ruling was vacated and the case dismissed by the Sixth Circuit, an attorney for the Detroit schoolchildren stated, "The decision was vacated but the words will never disappear."³⁸

Like Harlan's dissent, Clay's ruling rejects the way we create formal institutions that subordinate and suppress the full rights of citizenship. Rather than viewing Harlan as the Great Dissenter whose colorblind Constitution prevents governments from seeing (and using) race, we should trace his influence in decisions

like Clay's, decisions that reject governmental indifference and overt hostility to students' needs and rights. To continue to view Harlan's dissent as both justifying and defending a colorblind Constitution is to deny Horace Plessy's—and Gary B.'s—demand for fundamental justice.

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