2013

The Court's Denial of Racial Societal Debt

Kimberlé W. Crenshaw
Columbia Law School, crenshaw@law.columbia.edu

The Court's Denial of Racial Societal Debt

By Kimberlé Crenshaw

Associated Press, AP

Linda Brown Smith stands in front of the Sumner School in Topeka, Kansas, on May 8, 1964. The refusal of the public school to admit Brown in 1951, then nine years old, because she is black, led to *Brown v. Board of Education of Topeka, Kansas*.

In this year of civil rights anniversaries, the narrative of racial progress has been tempered by the Supreme Court's game-changing decisions this past summer. The notion that "we've come a long way and we have much more work to do" sounds ever more like wishful thinking in the face of a Supreme Court that is no longer an active contributor to the cause. Having abandoned its unprecedented insistence that white supremacy be upended root and branch, the current Court's boldness is measured by its audacious efforts to reverse engineer the transformative mechanisms these anniversaries celebrate.

Many have criticized the Court's "turning back the clock," but this frame doesn't do justice to its skill in transforming the victories we celebrate into its Trojan horse. Landmark cases that denounced segregation are used to undermine integration, voting rights measures that outmaneuvered discriminatory scheming are repudiated because they have been effective, and institutions that are attentive to race inequality are framed as the moral heirs of white supremacy. The language of race, discrimination, and equality that the Court now speaks stands in stark contrast to the aspirations of those who fifty years ago put their lives on the line in the belief that the United States could be different. Perhaps nothing encapsulates the Roberts Court's repudiation of the visions of racial justice that emboldened the nation than its response to Dr. Martin Luther King Jr.'s premise. In his "I Have a Dream" speech, King set out a substantive baseline of racial justice against which the material reality of American life in 1963 fell far short when he remarked:

> It is obvious today that America has defaulted on this promissory note insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check, a check that has come back marked "insufficient funds."
>
> But we refuse to believe that the bank of justice is bankrupt. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation. So we have come to cash this check—a check that will give us upon demand the riches of freedom and the security of justice.

King's soaring oratory embraced a concrete foundation upon which the constitutional demands and expectations of the movement could be articulated. In framing racial justice as a corrective to a historically produced social deficit, King denaturalized the reigning status quo and with it the normative baselines from which the corrective interventions he supported could be misframed as "preferences" or reverse discrimination.

Fifty years later, the repudiation of King's frame is perhaps best articulated by Justice Antonin Scalia, who has stated unequivocally: "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."

By denying societal debt—a racial disrepair structured and facilitated by law—Justice Scalia and the Roberts Court undercut the foundation upon which legal efforts to address racial inequality are grounded. If there is nothing owed and nothing due—if the current distribution of access, power, privilege, and disadvantage is just the way things are—then efforts to reform our institutions so as not to reinforce historical exclusions are

morally bankrupt. Indeed, from this perspective, such "unjustified reforms" tend to promote reverse discrimination against whites.

Of course, efforts to frame the pursuit of racial justice as unfair to whites and a corruption of the traditional legal order are as old as the Republic itself. By law, runaway slaves were guilty of stealing themselves from the whites who owned them. Later, civil rights granted to the freed slaves were framed by President Lincoln's successor as unjustified preferences that discriminated against whites. Even civil rights activist Homer Plessy's claim against segregation was repudiated in part because the Court interpreted Plessy to be demanding social equality, something that whites had and that blacks had not earned. The *Plessy* Court framed racial asymmetries throughout society as wholly natural and apart from law. The Court's cure for second-class citizenship was for African Americans to think better of themselves.

In all these efforts, and many subsequent thereto, yawning asymmetries in race, deeply structured into society and its institutions, have been framed as natural, nondistributable, and defensible. *Brown* and its progeny presumably rejected this naturalized view of racial equality and the self-help admonishment from the *Plessy* Court: Segregation's injuries were substantively embedded in a system that symbolized the inferiority of blacks. This was an asymmetry to which the Equal Protection Clause should be directed.

The asymmetries that were naturalized in *Plessy* and rejected in *Brown* have found a new constitutional shepherd: color blindness. To be more specific, color blindness's basic claim is that everyone has a race and everyone is treated equally so long as race is not taken into account. Among the most troubling consequences of the Court's elevation of symmetrical logics to constitutional principle is *Parents Involved v. Seattle*, the case that dealt the most serious blow to date to school desegregation. The Court passed off this rollback of school desegregation by reframing the constitutional wrong wrought by segregation simply as the use of racial classifications. The constitutional injury was not *what* the state was doing with racial classifications—namely racially subordinating black children as second-class citizens—but the fact that they were using racial classifications to do it. By these lights, the Court managed to reduce an entire history designed to produce distinct racial asymmetries into a simplistic notion of symmetrical harm. Thus, Linda Brown, who had to walk over train tracks to the inferior black school, and the white children in the superior school were harmed in the same way as Linda walked by.

Buried deeper still within the Supreme Court's gradual but deliberate effort to gut the very infrastructure designed to address the institutional vestiges of racial power is a shift in the presumed endpoint of the civil rights movement. No longer is the realization of the goal framed as the "elimination of the vestiges of racial discrimination root and branch," as the Court famously declared in *Green v. New Kent County*. The message seems to be that although we might not be there yet, we can coast our way forward. In fact, Roberts ensures that we can only coast toward the Promised Land by taking the engine out of our vehicle.

The Court's ability to attach its deconstructionist agenda to strategies that were actually effective emerged in its effort to gut what many saw as the crown jewel of the civil rights movement, the Voting Rights Act (VRA). Legal efforts to circumvent constitutional protections against discrimination in voting have been formally "race neutral" since the earliest attempts to deploy grandfather clauses and poll taxes. As soon as one approach was struck down, another would emerge.

After years of ineffective interventions, Congress grabbed the matter by the horns and, through a formula known as section 4(b) in the VRA, designated that certain "covered" jurisdictions would no longer exercise a free hand in the electoral process. For covered jurisdictions, changes in voting procedures would have to be approved by the Department of Justice or a special three-judge panel, either of which could determine whether the proposed change discriminated against people of color in the electoral arena. The burden of proof shifted to the states to demonstrate that new policies that they wished to employ would suppress the right to vote. Most recently the Act came into play in the presidential election of 2012 when some states' efforts to impose voter identification laws, restrict polling hours, and eliminate early voting were eventually barred by the VRA.

Shelby County, a covered jurisdiction ineligible for bail-out due to its recent history of voter discrimination, argued that section 4(b) unfairly and anachronistically singled out some states and political subdivisions for onerous burdens. Key to the county's argument was the idea that the level of voting participation on the part of African Americans was no longer disproportionately low, as evidenced by the turnout in the recent elections, and that the areas where the participation of African Americans was the heaviest were precisely those districts where the preclearance process had been required by the Act. Notwithstanding Congress's voluminous records—over 14,000 pages of documented incidents of voter suppression and discrimination across the contemporary United States—the Court held that the VRA denied the integrity and sovereign equality of the states. Moreover, Justice Scalia punctuated this point by actually characterizing the Act as a form of "racial entitlement" that no one in Congress would dare to contest.

On display in *Shelby* is the Roberts Court's signature move in dismantling

the civil rights infrastructure: occupying the moral high ground of racial progress while relegating civil rights laws and advocates to the ugly past. The magic in the *Shelby* opinion is its ability to stigmatize the VRA as a slave to history, locked in the past, when, in actual fact, the VRA's brilliance was its nuanced understanding of the contours of racial discrimination. Indeed, the Act did not portray voting discrimination as forever locked in the scenes of the Edmund Pettus bridge, where the world watched as civil rights workers demanding the right to vote were beaten and tear gassed by Alabama police. Instead Congress recognized that the will to suppress political participation would find expression not simply at the crack of a police baton, but fifty years later with the insistence that an eighty-nine-year-old black woman produce a government-issued ID or stand in a line hours longer than those in white precincts to vote.

Of course, as Justice Ruth Bader Ginsburg commented, tossing out the VRA is "like throwing away your umbrella in a rainstorm because you are not getting wet." The Court does not suggest that discrimination is fully a thing of the past—some would-be voters may still need umbrellas. Yet, the Court operates as though the greater harm is maintaining measures that may overreach in their prevention of racial discrimination rather than creating a playing field of underprotection against the growth of vote suppression. Worries about the consequences of unleashing covered jurisdictions from the VRA are not conjecture: mere hours after *Shelby* was handed down, Texas renewed a voter ID law that had been blocked by the VRA. The balance of concern has shifted away from the ongoing underrepresentation of people of color throughout American institutions to the intangible psychic harms suffered by a growing category of status quo stakeholders—a group now refreshed with the newly aggrieved: states unfairly singled out for their past sins.

The Court's vigilance in returning the reins of political power to the states is all the more disconcerting given its efforts to constrain their authority to facilitate racial inclusion. When state actors do take racial inclusion seriously—like the University of Texas (UT)—deference to their autonomy and integrity seems difficult for the Court to muster. As *Fisher v. University of Texas* reveals, this rollback is not so much a matter of protecting states rights but, instead, of controlling what states may do to address racial wrongs.

Fisher addressed the constitutionality of the use of race as one consideration among dozens of other non-"merit" factors that admissions officers considered in sustaining a critical mass of diverse students of color in the university. Plaintiff Abigail Fisher's tale struck a chord in the mainstream media, but hers was not a standard *Bakke*-type claim that she was more qualified than the beneficiaries of affirmative action. A student of midrange credentials, her discrimination claim was complicated by the fact that applicants of color with scores higher than hers were denied admission, and whites with scores lower than hers were admitted. Rather, Fisher's claim was that the school's race attentiveness itself "handicapped her race" in derogation of the protections of the Fourteenth Amendment.

The Court sent the case back to the Fifth Circuit under stiffened strict scrutiny review. UT must now demonstrate that there are no race-neutral measures that would have sufficiently satisfied the university's diversity interests before it is permitted to turn to race attentiveness. *Fisher* seems to preserve the shell of *Grutter*—race consciousness is fine so long as UT jumps through fiery hoop after fiery hoop to prove that race is in fact an appropriate factor to be taken into account. In effect, however, the Court has aggressively narrowed the space in which state actors can pursue a policy that addresses racial inclusion. *Fisher*, then, represents yet another moment of reversal. Rather than conceptualizing racialized obstacles as inherently suspect, the Court has instead painted efforts to eliminate such barriers as suspect. This rebranding of the Equal Protection Clause forces the Fourteenth Amendment into the service of insulating entrenched patterns of exclusion rather than facilitating the full and robust integration of all our institutions.

The Roberts Court's jurisprudence contributes to a broader discursive trend that shifts the burden for serious racial disparities to the racially marginalized while silencing racial discourses that draw attention to racial privilege and power. Emergent now is a new asymmetry—a post-racial embargo on lingering discourses that attend to racism, while race explanations that focus on group deficits to explain away racial disparities continue to be valid. With such an imbalanced discourse on race, it is not surprising that liberals as well as conservatives continue to frame crucial race attentive policies as preferential handouts rather than measures enhancing equal opportunity. So long as traditional baselines are not contested and institutional practices that are only formally race neutral are taken as natural, the disagreement between many liberals and conservatives will continue to focus on whether helping inferior runners serves important utilitarian purposes. With a frame such as this, no wonder so many people who have been beneficiaries of these programs decline to come out and say so, or, as in the case of one Supreme Court justice, repudiate the very policies that broke barriers they otherwise would have faced. In *My Grandfather's Son*, Justice Clarence Thomas argues that "I'd graduated from one of America's top law schools—but racial preference had robbed my achievement of its true value."

It was not always the case that the aspirations for racial justice were so

continued on page 16

courtroom, where justice should be blind, the presumption of guilt is especially dangerous. Today, too many innocent prisoners like Taylor are trapped by systemic pressure to plead guilty in a system where 96 percent of all convictions are rendered by plea bargains.

The Innocent Defendant's Dilemma, a recent study, describes how the blameless, particularly those who are poor, find it an onerous, nearly impossible burden to prove their innocence. With few resources for defense, they find themselves trapped by a system that presumes their guilt. Because the odds seem hopelessly stacked against them, many innocent individuals reluctantly plead guilty to avoid the longest prison terms or even death. Innocent victims lose years in prison and face rejection because of criminal records, and many never reach their potential.

We have come a great distance in the last fifty years, but we still have not fully escaped the miseducation and distortions created by America's policies of racial injustice. These problems demand remedies, and we must admit this nation may require some form of therapy before we can freely reconcile ourselves to a better future informed by the truth surrounding present human rights abuses and those of the past. Despite progress, in the last fifty years we have retreated from an honest conversation about racial and economic justice and have opted instead for mass criminalization and incarceration, leaving many poor and minority people marginalized and condemned. As Taylor's story reminds us, out of sight is hardly out of mind. It is an abysmal violation of human dignity.

This article was originally published in commemoration of the fiftieth anniversary of the Lawyers' Committee for Civil Rights Under Law, of which Congressman Lewis was grand marshal. The Lawyers' Committee is a nonpartisan, nonprofit organization formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity—work that continues to be vital today.

U.S. Rep. John Lewis has represented the Fifth Congressional District of Georgia since 1987. An iconic civil rights leader and recipient of a 2010 Presidential Medal of Freedom, he is the only living person who was a speaker at the 1963 March on Washington for Jobs and Freedom. Bryan Stevenson is executive director and founder of the Equal Justice Initiative and professor of law at New York University.

continued from page 14

weighted by stigmatizing frames and discursive dead ends. When King set forth the idea of a promissory note, it was not a hat-in-hand plea for social charity but a demand to address the social disrepair that building our institutions around racial exclusion had wrought. Perhaps the key to reversing the reversal of civil rights is to extend King's vision into the post–civil rights era. Rather than acquiesce to the mischaracterization of race-conscious policies as a handout, a leg up, or some kind of benefit to damaged runners, racial-justice advocates should reframe these policies as repairing damaged lanes on the equal opportunity track. This anti-preference rationale suggests a different and more appropriate metaphor: clearing away obstacles that are structured into some people's lives as a result of race, gender, or class.

Race-conscious measures are not a matter of giving anyone a head start. Instead, they simply reflect what it means to pay attention to the continuing effects of a historical experience that impedes efforts to promote equality in the contemporary United States. This isn't a difficult message to frame. The African American Policy Forum, for example, foregrounds this vision in its (Un)equal Opportunity Race, an animation that simply and elegantly regrounds the story of racial justice in images inspired by the March on Washington. As George Eliot put it, it is astonishing what a different result one gets by changing the metaphor.

Embodying the view that social repair that addresses the asymmetries of race is neither stigmatizing nor inconsistent with deep commitments to racial equality, Justice Sotomayor observed in *My Beloved World*: "I had no need to apologize that the look-wider, search-more affirmative action that Princeton and Yale practiced had opened the doors for me. That was its purpose: to create the conditions whereby students from disadvantaged backgrounds could be brought to the starting line of a race many were unaware was even being run."

Justice Sotomayor recognizes that racial inclusion embodies the vision of social repair that brought so many Americans to Washington in 1963. In commemorating those events and all that they made possible, heirs to that legacy would do well to remember that those marchers sought not to ignore the asymmetries that courts had long ignored, but to eradicate them. Of the many losses that racial justice has sustained in the era of post-racialism, the ability to return this aspiration to its rightful place during this fiftieth anniversary should not be one of them.

Kimberlé Crenshaw is a leading authority in the area of civil rights, black feminist legal theory, race, racism, and the law. She also founded the Center for Intersectionality & Social Policy Studies at Columbia Law School.